

Chicago Daily Law Bulletin®

Volume 162, No. 107

Serving Chicago's legal community for 161 years

Judges, attorneys face new world regarding gender identity and custody

The news, television programs, magazine covers and social media have recently been inundated with stories about transgender individuals.

Transgender people are individuals whose gender identity or expression differs from the sex they were assigned at birth. The sex of an individual is typically assigned at birth based on the appearance of the external genitalia. Gender identity is a person's basic sense of being a man or a woman.

Gender identity is distinct from sexual orientation, which refers to a person's attractions, sexual behaviors, fantasies and emotional attachments toward others, whereas gender identity is about one's experience of self as a man or a woman.

With LaVerne Cox on the cover of Time magazine and Caitlyn Jenner on Vanity Fair, our society is recognizing the necessity for understanding gender identity issues and the impact that stereotypes, misperceptions and laws have on our family members, neighbors and colleagues.

As has been widely reported, the North Carolina legislature passed HB 2, the Public Facilities Privacy and Security Act, which requires transgender individuals (and everyone else) to use public restrooms according to the biological sex on their birth certificate.

North Carolina's passing of this bill set off a firestorm of emotions from supporters and opponents who sounded off on social media, holding protests and in the court system.

On May 9, Attorney General Loretta E. Lynch announced that the Justice Department had filed a complaint against the state of North Carolina, the University of North Carolina and the North Carolina Department of Public Safety alleging discrimination against transgender individuals in violation of federal law as a result of the state's implementation of HB 2.

The enactment of this law and the public outcry from both supporters and opponents highlight-

ed the polarizing issue of the acceptance of transgender individuals in our society especially for transgender parents. Misperceptions and prejudices about transgender parents, which include transsexuals and cross dressers, often fuel many custody disputes.

Transgender parents are often faced with the reality that their gender identity, not their parenting skills, is the seminal issue in a custody dispute. Specifically, the transgender parent is often placed in a bad light because of his or her gender identity or decision to transition, but such aspersions are often based on misinformation questioning a transgender parent's suitability to parent a child.

Courts generally base custody or parenting allocation rulings on factors that directly affect the "best interests of the child." Moreover, the court has a responsibility to ensure that a child is not placed in a situation where a possibility of harm exists.

For example, the court is to assess the circumstances and situations where a parent has proven to be negligent or incapable of caring for his or her child. However, transgender parents often find in a custody dispute that they are faced with the harsh reality that a correlation between their gender identity and parental capabilities will be made.

More often than not, judges and attorneys are not familiar with gender identity issues and are often left to decide, based on whether or not they represent the transgender parent.

If, however, a transgender parent's gender identity cannot be shown to harm the child in some way, custody and parental allocation decisions should not then be impacted by one's gender identity. Many courts have upheld this principal and have treated transgender cases like any other custody case by focusing on statutory factors such as the



Kimberly A. Cook is an associate at Schiller DuCanto & Fleck LLP. Kimberly's family law practice is informed by an intimate understanding of the needs, challenges, and family dynamics of her contemporaries. She can be reached at kcook@sdfllaw.com.

wishes of the child, the level of each parent's participation in the child's life and decision-making, the child's needs and the willingness and ability of each parent to facilitate and encourage a close and continuing relationship with the other parent and child.

There is little reported case law on custody issues involving transgender parents and what does exist reflects the divisive feelings our society has regarding transgender parents. In some cases, the courts soundly rejected claims that transgender individuals cannot be good parents and relied on the statutory factors in consideration of the best interests of the child.

In *Mayfield v. Mayfield*, 1996 Ohio App. Lexis 3724, the court upheld a shared parenting plan

that it recognized the seriousness and complexity of the situation, but that respondent being transgender did not automatically disqualify the respondent from having a parent-child relationship.

However, in other cases, parents have been denied custody or parenting time based on the court's conclusion that being in the care of a transgender parent would be harmful to the child. For example, in *Cisek v. Cisek*, 1982 Ohio App. Lexis 13335, the court terminated a transgender parent's parenting time, holding that "there was a risk of both mental and social harm to the children" as a result of the transgender parent's transition.

Moreover, in *J.L.S. v. D.K.S.*, 943 S.W.2d 766 (Mo.Ct.App. 1997), the court imposed an indefinite moratorium on parenting time based on the court's belief that it would be "emotionally confusing for the children to see their father as a woman."

More often than not, judges and attorneys are not familiar with gender identity issues and are often left to decide, based on whether or not they represent the transgender parent, what information about the transgender parent's transition is relevant and tantamount to the determination of custody issues. That is not to say, however, that a presentation of a parent's transition status should not be used to inform the court and court-appointed experts in understanding the overall family dynamic.

Yet, exactly what information should be provided? And, at what point is the parent's gender identity irrelevant? As practitioners, we are left to navigate an increasingly common issue against a backdrop of misperceptions, prejudices and outdated laws.

Irrespective of whether the representation is for the transgender parent or not, it is imperative for practitioners to help the court to base its custody and parenting time decisions on evidence, not on assumptions or societal stigmas, but rather by the application of the law which is applied in custody cases for all parents.