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Child Access and the Transgendered Person

For Those Who Are, or Have Been, Legally Married or in a Legally Recognised De Facto Relationship

by Rachael Wallbank

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This is obviously too large a topic to deal with adequately in any one article; let alone an introductory article.

However, it was considered that this topic would be a useful one to cover at any depth for many members of our community.

The threat to the parent/child relationship is a threat to a person's most basic needs ...

The term 'family law' in this article is loosely used to delimit this discussion to the legal issues affecting those persons who are, or have been, legally married or are, or have been, in a legally recognised de facto relationship. The way the law presently stands, those having financial issues arising out of other non-legally recognised relationships, however real, have their rights determined by way of equitable considerations involving the law of trusts - which is a

significantly different system of legal considerations and is not discussed here. There are two primary family law issues which arise at the ending of a legally recognised marriage or de facto relationship (to simplify I'll refer to them both as a 'marriage') namely property division and access to children. In this article I will address access to children. The other issue of obtaining a divorce is relevant to legal marriages but is really an incidental right arising out of twelve months separation and is generally of no great complexity except where one party seeks to annul the very existence of the marriage. As this last matter is of greater concern and deserves a separate discussion in its own right it will also not be covered in this article. The only prerequisite for a legal de facto marriage is that the parties have lived together as biological 'man and wife' for a continuous period of not less than eighteen months; but legal issues of child access arise no matter what the length of the relationship.

For a great many people with gender issues, the gender issue itself is the initiating factor in the dissolution of that marriage.

Access

As numerically the transgender person is likely to be a biological male, and therefore the non-custodial parent following upon a marriage break-up, and again because of space restrictions, I will limit the discussion of access in this paper to such generality. Following upon a marriage break up the continuing relationship between the non-custodial parent and that parent's children will generally be the crucial issue for the non-custodial parent. The threat to the parent/child relationship is a threat to a person's most basic needs and instincts and in the context of the break up of a marriage involving a transgender person as non-custodial parent, this factor can create the most fear and generate the greatest source of dispute and manipulation.

The legal case in relation to legal marriages is that cited at paragraph 91-267 in the 1982 Australian Family Law Cases Reports as the marriage of N. and H. and was a judgement of the full Court of the Family Court of Australia delivered on 19th October, 1982; confirming the decision of the Trial Judge in that case that access to a transsexual parent be refused. At the time of the original hearing in November, 1981, the father was scheduled to undergo gender realignment surgery in March, 1982. It should be understood that an appeal from an original decision of a single Judge to the Full Court of the Family Court does not represent a re-hearing but merely a review of the original decision of the single Judge. Although this case is comparatively old, in my view it still represents a valid application of the current Family Law Act to the individual circumstances of that case; even though the observations of the Judges in relation to transsexuality or transgender would no doubt be different now; reflecting the positive evolution of the community's attitude to these matters over time. In summary this decision held that even though the father and the mother had agreed to the father having reasonable fortnightly access to the very young child who was approximately three years of age at the time of the original hearing and that such access had been exercised on a regular basis so that a close relationship had been developed between the child and the father, it was considered to be against the interests of the child to continue that relationship by way of access to the father basically because of the continual strife that such access caused to the new family unit created by the mother and her new husband and their new young child. This strife was violent and basically arose from both the father, who was then living as a woman on a full-time basis and the mother's new husband who had a primitive hatred of 'poofers', and other such people including transsexuals. The issue of the father's pre- or non- or post-operative transsexual state was irrelevant. By the time of the original hearing, the transsexual father could not uplift the child for the purpose of access or return the child at the end of access without violent confrontation arising between the transsexual father and the mother's new husband and the mother. It would seem that the mother's attitude to the transsexual father's access to the child changed drastically from reluctant acceptance to active antipathy once she had the security and had adopted the

ways and patterns of her new husband and marital relationship.

The Full Court upon Appeal confirmed, applying the Family Law Act, that a parent does not have a right to access to a child but such access takes place for the benefit of a child, but that before a parent and child were to be deprived of access to each other there had to be real and compelling circumstances in the case to justify such an order. On the face of it, this judgement would seem harsh and threatening to transgender parents as it can be said that the access to the child, which was progressing well of itself, was terminated primarily as a result of the 'unreasoning feelings of acute hostility' on behalf of the mother's second husband. The Judges of the Full Court stressed however" that this does not mean that in all cases that a transsexual will be deprived of access or custody. The fact that a person is a transsexual may be a necessary factor to be taken into account. But in the ultimate test, the welfare of the child is always the paramount consideration; a decision which cannot be arrived at in a vacuum, but by asking the specific question what is best for the welfare of this child in these circumstances".

What were the factors in this particular case that created such " ... a sad and indeed tragic result for D ... " (the father) as the Judges had no doubt? Firstly, the child was only months old at the time of separation and at the time the father transitioned. As a result of this circumstance, and as a result of the father and the mother's own practice of always referring to D. as a favoured Aunt, the child only grew to know the father as a favoured Aunt; and not as the child's father. The mother was thus able to argue, and the Trial Judge to a large extent accepted, that in this case to deprive the child of access to its father would really only amount to depriving the child of access to a favoured Aunt; from the child's then subjective perception. Secondly, the father had a history of mental instability, and although this had improved significantly with the father's acceptance of the father's transsexuality, there was no doubt that the father was prepared to enter into violence with the second husband and, prior to the advent of the second husband, the father had committed several acts of violence upon the mother after separation had occurred. The evidence does not make clear whether these acts of violence were of a minor or major nature, although it is implied in the case that these acts of violence were of a comparatively minor nature. Nevertheless they existed. Finally, the father's case was badly conducted in that although there was an abundance of expert evidence presented by the father almost all of such expert evidence was concerning the father and the father's transsexuality while failing to deal with the far more relevant and crucial issue of how a continuing relationship between this transsexual father and the child would benefit or otherwise affect the child. The Judges in the Court of Appeal in my view quite rightly criticised the father's case with comments such as "What the Trial Judge should have been offered was evidence of the psychological affect on the child of having a father who was a woman, or of discharging the access order. These are certainly matters which exercised his Honour's mind. This emphasis on the appellant and his problems, and not on the problems of the child, no doubt was the cause for the Trial Judge's strong criticism of the appellant's (the father's) witnesses."

What lessons can then be drawn from this decision by those transgendered parents going through, or contemplating going through, the ending of the marriage in relation to child access? In my view they are these:

1. There should be no agreement on property division 'without' a final Court Approved agreement on orders in relation to child access. There should be no 'trusting' of the 'custodial' parent in relation to future access. Once access has been agreed to and established it is considerably more difficult for the custodial parent to thereafter deny or restrict access; especially if such access rights and terms are incorporated in consent-orders agreed to by the custodial parent after receiving legal advice. It is simply human nature that the custodial parent is more likely to agree to such a consent-order in relation to access while the incentive is there for such person to achieve a prompt and reasonable property settlement;
2. The court will always consider the individual circumstances of each case and of far more relevance than a persons transgendered nature or state of transition will be the history of that person's relationship with the child or children involved. If there has been a close and loving parent/child relationship prior to separation then the most extreme circumstances and present threat to the child would have to exist before a Court would disturb that relationship no matter what the appearance, gender status or sexuality of that parent;
3. Every effort, including immediate legal action, should be taken to ensure that there is no interruption to that parent/child relationship following upon separation and/or transition. In the event that immediately following separation the custodial parent seeks to unreasonably restrict or deny access by the non-custodial parent to the child then immediate action should be taken to enforce access in the Court as any delay will not only reflect badly upon the urgency of the non-custodial parent in terms of Judge's perception of that person's attitude to access but, given delays in reaching the final Hearing, any failure to act will provide the custodial parent with more grounds to argue that there has been a significant change after separation in the relationship between the child and the non-custodial parent; even though that change was in effect caused by the actions of the custodial parent. The need for immediate action to enforce access rights cannot be over-emphasised in this situation and the continuity of the relationship between non-custodial parent and child is crucial;
4. Role play or deception, no matter for whose benefit or for what practical reasons, or in answer to the demands of the custodial parent, should be avoided especially where very young children are concerned. It should be made clear to the child that the parent concerned remains the father or mother (as the case may be) of the child no matter what apparent gender change takes place and no matter what casual social role playing may be a practical necessity during social outings at access time. The older the child the easier this is to achieve;
5. The transgendered non-custodial parent should not be drawn into personal dispute with either the other parent, that parent's new partner or any relatives in relation to access but, if met with serious opposition of any such kind, should immediately seek a legal remedy through the Courts rather than risk creating a


history of upset or dispute;

6. In the event that legal proceedings are necessary then expert evidence will be crucial but should be carefully considered and presented so as to economically present a fair understanding of the transgender state, the stability of the transgendered parent, but most importantly, the positive affect upon the child or children of access to the transgendered parent.
7. The above is of no consequence if you don't give the same attention to practical matters such as accommodation. The temptation to go on deprivation 'guilt trip' or attempt to 'purchase' forgiveness and acceptance by giving the former partner 'everything' can be strong. Unfortunately I've never seen it work at all. Avoid the bed-sit/communal life, if you can, as restricted daytime or visiting access is no real access at all and is easily lost. If possible, look after yourself and the children by obtaining safe, private and adequately sized post-separation accommodation objectively suitable for overnight weekend and holiday access.

Obviously the above can only represent a 'thumbnail sketch' of child access issues in relation to marriage breakdown generally; and for the transgendered person in particular. Nevertheless I hope the issues touched upon above may provide a useful basic guide to the legal and general attitude which should be consistently sought to be adopted and promoted by a transgendered person faced with these family law issues.

If you have further questions in relation to any of the specific legal issues discussed above or any other legal issues that are of particular interest to you and that you wish me to discuss in future articles please feel free to either write to *Polare* or myself care of the Gender Centre as I will obviously seek to direct future articles as per your interests of yourselves as readers of this magazine. If you are confronted with any of the issues raised above please feel free to utilise the new Legal Counselling and Advice service.

Rachael Wallbank

From Lynn Conway's website:  Born on the 4th March 1956, Rachael Denise Wallbank was admitted to practice as a solicitor and attorney of the Supreme Court of New South Wales on the 4th July 1980; after completing an Arts Law degree at the University of New South Wales. Rachael has practiced law continuously since that time and established her own firm, Wallbanks, on the first of July 1985. Wallbanks specialises in undertaking legal work on behalf of people in the areas of family, de-facto relationship and estate law. Rachael has also obtained post-graduate qualifications in mediation and alternative dispute resolution at the University of Western Sydney. Rachael is an accredited specialist in Family Law as awarded by the Specialist Accreditation Board of the Law Society of New South Wales.



Rachael has three children, Kate, Rebecca and James. Having accepted her transsexualism, Rachael transitioned and has subsequently undergone sex affirmation procedures and had her legal sex reassigned in the State of New South Wales pursuant to that State's, births, deaths and marriages law.

From 1999 to 2003 Rachael appeared on behalf of the Applicants, Kevin and Jennifer, in their successful original and appeal proceedings before the Family Court of Australia against the Attorney General for the Commonwealth of Australia recorded in the judgments of Justice Richard Chisholm delivered 12th September 2001 and the Full Court of the Family Court of Australia delivered 21 February 2003 whereby the marriage between Jennifer and Kevin, a man of transsexual background, was declared a valid marriage according to the marriage law of Australia.

Rachael also represented the applicant parents in the case *Re: Bernadette (Special Medical Procedure) [2010] FamCA 94* which was the first case in Australia where both Phase 1 (puberty suppression) and Phase 2 (affirmed sex development) hormonal treatment was approved for an Australian adolescent and the jurisdiction of the Family Court to determine whether or not young Australians can receive such therapeutic medical treatment was challenged.

For further information about Rachael and Wallbanks Legal, visit her website. 

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The Gender Centre is committed to developing and providing services and activities, which enhance the ability of people with gender issues to make informed choices. We offer a wide range of services to people with gender issues, their partners, family members and friends in New South Wales. We are an accommodation service and also act as an education, support, training and referral resource centre to other organisations and service providers. The Gender Centre is committed to educating the public and service providers about the needs of people with gender issues. We specifically aim to provide a high quality service, which acknowledges human rights and ensures respect and confidentiality.