

1. An Overview of the Current Legal Situation of trans Parenthood in Germany

The TSG (*Transsexuellengesetz*) from 1980¹ is currently the primary way that enables trans people to legally change their gender and first name. The TSG is divided into two parts: the first deals with the change of the first name (the so-called *Kleine Lösung* “small solution”), while the second deals with the change of legal gender (*Große Lösung* “big solution”). According to the TSG, in order for a person to change their name and legal gender, they must open a legal proceeding, during which they are to provide two psychiatric evaluations that affirm that they are indeed transsexual². If the proceedings are successful, the court orders the change of name and of legal gender. All documents (including birth certificate) are to be changed in accordance with this ruling. In addition, after the ruling it is forbidden to reveal a trans person’s former name and gender (*Offenbarungsverbot*³).

The law makes an exception to both these articles in the case of family relations: birth certificates of children born to the trans person before the ruling or adopted before the ruling are not changed. Parents, grandparents, former spouses and children the person had before the transition are only obliged to use the new name when in connection to public record. The ruling does not change the legal relationship between the trans person and their parents, nor that between them and their children before the ruling⁴. Children adopted by trans people after the ruling are legally adopted according to the person’s new legal gender.

Article 8 section 1 subsection 3 used to require the trans person to be sterile (*fortpflanzungsunfähig*) before having their gender legally changed. Therefore, the law did not foresee the existence of biological children of legally transitioned people. In 2011 the Federal Constitutional Court declared this section to be unconstitutional, therefore making it possible for trans people to legally have biological children after their legal transition. This made the legal situation of children born to trans parents unclear. In September 2017⁵ the Federal Court of Justice decided that a “Female-to-Male Transsexual⁶ who has birthed a child is legally the child’s mother”. In addition, the birth register and the birth certificate of the child will have the parent’s pre-transition name and not their current legal name and gender. Similarly and on the basis of that decision, the Federal Court of Justice ruled in November of that year that a trans Woman “can be seen in terms of parental right only as father and not as mother”⁷. Registrars are bound by these court decisions and have to act accordingly.⁸

German law has different rights and obligations according to gender (Maternity protection, paternity, law of descent). On that ground, the Federal Constitutional Court has ruled that the State has an invested interest in clear and long term personal status and in minimizing the cases of different biological and legal genders⁹.

1Transsexuellengesetz vom 10. September 1980 (BGBl. I S. 1654)

2§ 4 TSG

3§ 5 TSG as well as § 10 Abs. 2

4§ 11 TSG

5BGH XII ZB 660/14

6the plaintiff of the current ECtHR case

7BGH XII ZB 459/16

8see e.g. attached letter from registry office Reinbek, Germany, 22.5.2019

9Bundesministerium für Familien, Senioren, Frauen und Jugend - Gutachten: Geschlechtervielfalt im Recht. Status quo und Entwicklung von Regelungsmodellen zur Anerkennung und zum Schutz von

In December 2018, a new subsection, §45b, was added to the Personal Status Law (PStG, *Personenstandsgesetz*). This law, intended for intersex people, allows them to change their name and legal gender with a simple medical certificate confirming a variant of sex development. They may choose between “female”, “male”, “diverse” and no gender marker at all. Although being directed at intersex people, some trans people have successfully used this law to legally change their names and genders without costly and personal psychiatric evaluations and court proceedings. The legal status of children of people who have changed their gender through §45b, is at the time of writing unclear.

A recent bill to reform the law of descent (*Abstammungsrecht*)¹⁰, as well as a recent bill to reform the TSG¹¹, leave the situation in regard to trans parenting as is: legal “males” and legal “diverse” who have birthed children are declared to be “mothers”, while legal “females” and legal “diverse” who provided the sperm are to be “fathers”. The decision of the bill makers to not go with gender neutral terms in order to describe descent is explained by a presumed better political viability (acceptance of the reform by the majority, cis people) and by the fear that gender neutral terms would make it harder for lawmakers to draft error-free laws. The reform of the law of descent states that the birth certificate and the names on it are to be managed in accordance to personal status law¹². The TSG reform proposal refers the question of parenthood recognition back to the reform of the law of descent¹³. Thus, it is very unlikely that those reforms will change that the legal gender and name of trans parents are being erased on the German birth certificates of their own children.

2. Problems with the current situation and suggested solutions

About 25%-50% of trans people are parents, numbers vary wildly between studies¹⁴. 36% of trans nonparents and 19.4% of trans parents want to have a child in the future¹⁵. In Germany, 17.4% of trans and non-binary people have children¹⁶. The main areas trans parents experience discrimination are from government officials, schools, kindergartens and medical personnel¹⁷. The legal situation hinders some trans people in fulfilling their wish¹⁸, because the legal system doesn't recognize them and discriminates against them¹⁹. In an online survey on experiences with the TSG, 16,4% of respondents who had not yet used the TSG-procedure stated as an area in need of reform of how trans parenthood is regulated²⁰.

Geschlechtervielfalt Band 8, S. 32

10Diskussionsteilentwurf des Bundesministeriums der Justiz und für Verbraucherschutz - Entwurf eines Gesetzes zur Reform des Abstammungsrechts 13. März 2019, S. 59, S. 60

11Referentenentwurf des Bundesministeriums der Justiz und für Verbraucherschutz und des Bundesministeriums des Innern, für Bau und Heimat - Entwurf eines Gesetzes zur Neuregelung der Änderung des Geschlechtseintrags, Bearbeitungsstand 08.05.2019 §20 Absatz 2

12§ 1600h

13S. 24, Begründung zu § 20

14Stotzer, Rebecca L.; Herman, Jody L.; Hasenbush, Amira (2014): Transgender Parenting. A Review of Existing Research. Los Angeles. Online verfügbar unter <https://williamsinstitute.law.ucla.edu/research/parenting/transgender-parenting-oct-2014/>,

15Pyne, Jake; Bauer, Greta; Bradley, Kaitlin (2014): Transphobia and Other Stressors Impacting Trans Parents. In: Journal of GLBT Family Studies 11 (2), S. 107–126.

16Hoenes, Sauer, Fütty. Dritte Option beim Geschlechtseintrag für Alle?, Berlin (2019), S.33

17Hoenes, Sauer, Fütty. Dritte Option beim Geschlechtseintrag für Alle?, Berlin (2019), S.33

18Sascha Rewald - Was brauchen trans Eltern? (2018) S. 56-58, S. 72

19Sascha Rewald - Was brauchen trans Eltern? (2018) S. 69, S. 71

20Adamietz/ Bager, Regelungs- und Reformbedarf für transgeschlechtliche Menschen, Gutachten im

Dealing with the authorities requires more time, money and emotional strain than for cis people²¹. The fact that the parents suffer from discrimination has a direct effect on the well-being of their children. In addition, the current situation exposes and outs children of trans parents as such, exposing them to potential discrimination and bullying²².

One pregnant trans man decided to go to Sweden to give birth so as to avoid the German legal situation regarding trans parenthood recognition. In January 2019 Sweden introduced a law recognising trans parents according to their gender identity. Unfortunately, going abroad to give birth involves considerable additional emotional and financial burden for the family in question.²³

Another trans father described that the impact the birth certificate designating him as “mother” (with his previous names) on his mental health included depression and suicidal thoughts.

The current situation, in which none of the identity documents (name and gender on passport, national ID, and birth certificate) of trans parents match their children’s birth certificate, makes it hard to prove their identity as the parents of their children, and impossible to do so without coming out as transgender and presenting further documentation, not required of other parents, which may not be recognised by other countries²⁴. This may cause problems while travelling with a minor, which requires consent of the parent. This therefore limits freedom of travel. Trans parents reported to the BVT* and TGEU²⁵ that they chose not to travel abroad with their children, fearing an inability to prove their parenthood to security staff or border patrols while at a foreign airport. They also said that their children feel inferior due to the fact that they have never been abroad.

One family reported in January 2019 that their child, born in Germany, has the right to Israeli and Brazilian citizenship. These countries hold the German birth certificate to be legally binding, and would register the child as they appear in the birth certificate, regardless of the legal situation in those countries. The family fears having to go through three separate, lengthy and expensive legal proceedings to have their situation recognized. This forces trans parents to out themselves as trans and introduce complicated documentation (court ruling) in order to gain access to any service that the child requires (kindergarten, social services etc.)²⁶, violating the prohibition of disclosure²⁷.

Even everyday situations with services not directly concerning the child, such as the change of residence or any contact with tax authorities have been reported to become lengthy as well as degrading procedures for trans parents. In practice, the current situation forces many trans parents to maintain two separate legal identities: that of the “Mother” and that of the

Auftrag des Bundesministeriums für Familie, Frauen, Senioren und Jugend, Nov 2016, S. 221

21Sascha Rewald - Was brauchen trans Eltern? (2018) S. 59-60

22Stellungnahme der Bundesvereinigung Trans* (BVT*) e.V. zum Referentenentwurf eines Gesetzes zur Neuregelung der Änderung des Geschlechtseintrages von BMJV und BMI vom 8. Mai 2019, S.18

23Personal Communication between the BVT* and the trans man, spring 2019

24 Stellungnahme der Bundesvereinigung Trans* (BVT*) e.V. zum Referentenentwurf eines Gesetzes zur Neuregelung der Änderung des Geschlechtseintrages von BMJV und BMI vom 8. Mai 2019, S.18

25<https://tgeu.org/council-of-europe-recognises-trans-parents/> latest visit: 20th of June, 2019

26Sascha Rewald - Was brauchen trans Eltern? (2018) S. 52-54

27Bundesministerium für Familien, Senioren, Frauen und Jugend - Gutachten: Regelungs- und Reformbedarf für transgeschlechtliche Menschen Band 7 S. 17

“Father”²⁸. Furthermore, children of trans parents are put in an insecure position. They, likewise, cannot easily prove their legal status regarding their parent. Indeed, it is even harder for them, as they do not own prove of their parents court ruling concerning the legal change of gender. It is completely unexplained how these children can prove their legal relationship as adults, i.e. in case of an inheritance.

This also constitutes discrimination against biological parents and in favor of parents who are not genetically related. A trans man married to a cis woman who gave birth is automatically recognized under german law as the father under his/their legal name, while a trans man who gives birth will not be recognized either as a father or by his/their name²⁹. The German state de facto dictates a single possible parenting structure, enforces gender norms (a pregnant person is always a mother) and erases the lived reality of other possibilities³⁰. Trans people already suffer the stigma of questions around their ability as parents in schools, kindergartens, social services etc.³¹ Legal recognition of their parenthood might aid in combating that stigma.

The BVT* reports that in one case the local youth office refused to issue a custody notarization that documented the father’s legal name, but instead issued a notarization on his former female name. He was told they would only issue documents matching the child’s birth certificate. Another trans father who had birthed a child reported to the BVT* that after he had started a new job he was forced to reveal his trans identity to his superior because he had to hand in his child’s birth certificate in order to prove that he has a child. He fears discrimination at work, job loss and thus financial instability for his family. Another trans father reported that he actually lost two job offers due to the fact that the birth certificate outed him as trans: he is married to a woman, thus the certificate would have looked like a usual certificate if he would have been listed with his legal name and gender. But since he had to out himself as transgender in order to prove that he is the person that is listed in the birth certificates of his children, he got rejected as a high school teacher by two schools.³²

The Council of Europe³³, the report written by the Humboldt-University Berlin and

28For example, one trans father reported that he wanted to lengthen his health insurance as a student due to taking parental leave from his studies. The insurance company gives this postponement automatically to mothers, but requires fathers to produce a document written by the mother, stating that the father taking care of the child. In that situation, the father was forced by the insurance company to write a letter as the mother claiming that he as the father is responsible for the child.

29Sascha Rewald - Was brauchen trans Eltern? (2018) S. 61

30Rix Weber - trans und Elternschaft (2018)S. 20-21, 25

31Rix Weber - trans und Elternschaft (2018)S. 48

32Reported to the BVT* in June, 2019

33Committee on Equality and Non-Discrimination of the Council of Europe - Report: Private and family life: achieving equality regardless of sexual orientation, September 2018

commissioned by the Federal Family Ministry^{34 35}, TGEU³⁶, and the BVT*³⁷, as well as academia³⁸, recommend trans parents be registered in accordance with their officially recognized gender identity.

4. Appendix: Additional concerns of trans parents³⁹

- The situation may lead to my child being insecure in their family structure, asking "Who is right? My parents who say that they are both men, or the state who says my father was a woman when he gave birth to me?"
- It is especially important for children who have a high potential of being discriminated against to have the documents supporting them. When other children call my child a liar for saying he has two fathers, it is important for him to know that he is in the right, and that it is also true in the eyes of the state.
- The fact that the state doesn't recognize my existence as a father who gave birth messes with my mind. I am not a depressive person, but in my darker moments I found myself thinking: maybe the state is right, maybe it is healthier for a child to grow up with a story about a fictitious mother than with a trans father, maybe I should just erase my existence.
- Dealing with discrimination, especially discrimination from the state, takes away energy that I as a young parent should be investing in my child.
- The state recognizes me as a man, but not fully, not when it comes to being a parent. The birth certificate makes it clear that the state sees my gender as determined by my gonads and genitals and not by the reality of my existence as a man. Instead I feel I am seen as a man, a woman, or some kind of something in between arbitrarily, whatever is more comfortable for the bureaucrats at the time.
- The fact that I have no documents attesting to our relationship as father and son hurts my relationship with him. My child feels as though his own family is unwanted and unaccepted by the state. He learns that the state is allowed to discriminate against certain families. First I transitioned and changed my first name. Then, with marriage, I changed my last name. The birth certificate of my child states their mother is someone with my birth name and new last name, a person who has never existed. In order to use it, I must bring my certificate of marriage and the court decision [concerning transition and name change]. I have a problem looking at the birth certificate, it is very negatively connotated for me. I and my husband use a "blackened" version, with my old name redacted. My name and gender were legally changed back after I gave birth, and I had to go to court - a second time - to have my

34Adamietz/ Bager, Report on the Reform of the Transsexuals Act, commissioned by the Federal Ministry of Family Affairs, Senior Citizens, Women and Youth - Report on Reform of the Transsexuals Act Band 7a Berlin, 2017

35Bundesministerium für Familien, Senioren, Frauen und Jugend - Gutachten: Regelungs- und Reformbedarf für transgeschlechtliche Menschen Band 7, 2017, S. 22, S. 31, S. 53-54

36TGEU Transgender Europe - Handbuch Rechtliche Anerkennung des Geschlechts in Europa - November 2016 S. 39

37BVT* (2016) Policy Paper Recht des Bundesverbandes trans - Paradigmenwechsel - zum Reformbedarf in Bezug auf trans S. 14

38NJW-Aktuell Standpunkt Heft 3/2014

39collected reports of several trans men who gave birth, reported to the BVT*

name and gender changed again. I had borne our first child, and we plan for my husband - also a trans man - to bear our second. This will probably be a bureaucratic nightmare. I don't understand why I can be recognized as a father for my planned second child, but not for the first? The fact that I experience discrimination is a consideration in having another child. We explained to our child, in age-appropriate language, how he came to be. He knows he was in the belly of one papa and not the other. The sperm donor is a friend of ours and he knows him. In no point are the child's origins a secret. We have met many people who can empathize with the desire to have children, and with my decision to do so, as someone with the appropriate organs.. The idea of trans parents has more social acceptance than legal acceptance.