Local & National Legal Trends

AFCC ASSOCIATION OF FAMILY AND CONCILIATION COURTS

Presenters

Nesta N. Johnson, Esq.

she/her/hers

Family Law Attorney

The National Center for Lesbian Rights

THE LGBTQ+ BAR NCLR MEMBER FAMILYLAW INSTITUTE

NCLR

NATIONAL CENTER FOR LESBIAN RIGHTS

Eva N. Juncker, Esq.

she/her/hers

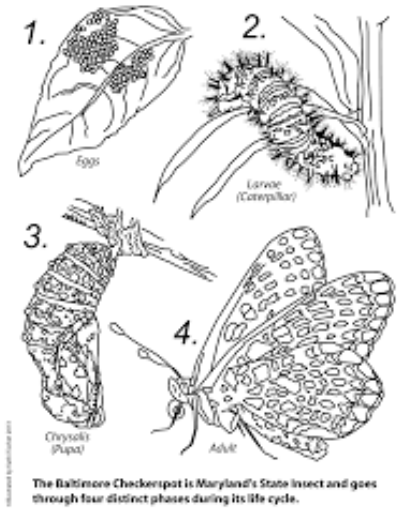
Partner

Cipriani & Werner

CIPRIANI & WERNER

ATTORNEYS AT LAW

Evolution of Maryland Case Law



The Baltimore Checkerspot is Maryland's State insect and goes through four distinct phases during its life cycle.

Evolution of Maryland Case Law
Custody Matters

- **S.F. v. M.D.**, 132 Md. App. 99, 751 A.2d 9 (**2000**), *overruled* by Janice M. v. Margaret K., 404 Md. 661, 948 A.2d 73 (2008)
  - Mother's former domestic partner had standing to seek visitation with child.
  - In determining whether mother's former domestic partner had right to visitation with child, appropriate standard was the best interest of the child.
- **Koshko v. Haining**, 398 Md. 404, 921 A.2d 171 (**2007**)
  - To accord with due process, grandparent visitation statute would be construed to contain a rebuttable presumption favoring parental decision concerning visitation to be in child's best interests
  - Grandparents petitioning for visitation with their grandchildren under grandparent visitation statute are first required to show prima facie evidence of parental unfitness or exceptional circumstances demonstrating the current or future detriment to the child, absent visitation from his or her grandparents, before a trial court applies the best interest of the child standard
- **Janice M. v. Margaret K.**, 404 Md. 661, 948 A.2d 73 (**2008**), *overruled* by Connover v. Connover, 450 Md. 51, 146 A.3d 433 (2016)
  - de facto parenthood is not recognized in Maryland. Accordingly, we conclude, in order to overcome the constitutional rights of a legal parent to govern the care, custody, and control of his or her child, even a person who would qualify as a de facto parent, who seeks visitation or custody, must demonstrate exceptional circumstances as a prerequisite to the court's consideration of the best interests of the child as a factor in that decision.
- **Conover v. Conover**, 450 Md. 51, 146 A.3d 433 (**2016**)
  - de facto parenthood is a viable means for a same sex partner to establish standing to contest custody or visitation, overruling *Janice M. v. Margaret K.*
  - To determine whether an individual qualifies as a de facto parent for the purpose of seeking custody or visitation with a child, the legal parent must consent to and foster the relationship between the third party and the child; the third party must have lived with the child; the third party must perform parental functions for the child to a significant degree; and most important, a parent-child bond must be forged.

Evolution of Maryland Case Law
Custody Matters continued

- **E.N. v. T.R.**, 474 Md. 346, 255 A.3d 1 (2021)
  - Both legal parents must consent to third-party de facto parent relationship unless non-consenting parent is unfit or exceptional circumstances exist.
- **Basciano v. Foster**, 256 Md. App. 107, 284 A.3d 1116 (2022)
  - The appellate court clarifies that the third party can obtain standing to pursue custody of child by either showing that third-party is de facto parent or by showing that parents are either unfit or that exceptional circumstances exist, but the paths are not the same and the distinction matters.
- **Skye v. Patton**, No. 0924, Sept.term,2022, 2023 WL 5199638 (Md. Ct. Spec. App. Aug. 14, 2023)
  - The Court did not err in denying parental rights to the spouse of the biological parent, as she was neither the biological nor adoptive parent and there was no de facto parentage.

Evolution of Maryland Case Law
Identity Documents

- **In re Heilig**, 372 Md. 692, 816 A.2d 68 (**2003**)
  - Statute provided that courts could change the sexual classification on birth certificates of individuals born within state who had undergone surgery to change their sex, and the Circuit Courts had general equity jurisdiction to declare, alter, or terminate the personal or legal status of an individual in matters such as paternity actions, appointment of a guardian for a disabled person, or adoption
  - Petitioner was required to produce sufficient medical evidence of the criteria for determining gender, and, after applying the criteria, that he had completed a "permanent and irreversible" change from male to female.
- **2015** - The legislature amended laws about birth certificate -- As amended, H-G section 4-211(b) provides that, for an individual born in Maryland, "the Secretary [of Health and Mental Hygiene] shall make a new certificate of birth" upon "satisfactory proof" of "one of the following" relevant criteria:
  - (2)(i) 1. A licensed health care practitioner who has treated or evaluated the individual has determined that the individual's sex designation should be changed because the individual has undergone treatment appropriate for the purpose of sex transition or has been diagnosed with an intersex condition;
    - 2. The individual, or if the individual is a minor or disabled person under guardianship, the individual's parent, guardian, or legal representative, has made a written request for a new certificate of birth with a sex designation that differs from the sex designated on the original certificate of birth; and
    - 3. The licensed health care practitioner has signed a statement, under penalty of perjury, that:
      - A. The individual has undergone surgical, hormonal, or other treatment appropriate for the individual, based on generally accepted medical standards; or
      - B. The individual has an intersex condition and, in the professional opinion of the licensed health care practitioner, based on generally accepted medical standards, the individual's sex designation should be changed accordingly; [or]
  - (ii) A court of competent jurisdiction has issued an order indicating that the sex of an individual born in this State has been changed[.]
- Subsection (f) of H-G section 4-211 goes on to provide that upon satisfactory proof, the sex designation on the new birth certificate shall be the one proven; the name on the new birth certificate shall be in accordance with any name change shown to have been made; and the new birth certificate shall not be "marked 'amended' " or reflect that there has been a change in sex designation or, if applicable, name.

Evolution of Maryland Case Law

Marriage Recognition

- Since **2008**: Same-sex couples as domestic partners with rights such as hospital visitation, health-care decision-making, and exemptions from taxes on certain property transfers between partners. *See, e.g.*, Md. Code Ann., Health—Gen. §§ 6-101, 6-201 and 6-202; Md. Code Ann. Health—Gen. § 5-605; Md. Code Ann., Real Prop. § 14-121; Md. Code Ann., Tax-Prop. §§ 12-101, 12-108.
- **Port v. Cowan**, 426 Md. 435, 44 A.3d 970 (**2012**): valid, out-of-state same-sex marriage was cognizable in the state pursuant to the common law doctrine of comity, for purposes of application of the state's divorce law, as statute prohibiting same-sex marriage did not preclude from recognition same-sex marriages solemnized validly in another jurisdiction, but only those sought to be, or actually, performed in the state, and the parties' same-sex marriage was not repugnant to state public policy, but was actually consistent with it.
- Same-sex couples' right to marry was legislatively recognized: Civil Marriage Protection Act, H.B. 438, 430th Reg. Leg. Sess. (Md. 2011) (signed by Governor O'Malley on **March 1, 2012**); H.B. 438 § 7, 430th Reg. Leg. Sess. (Md. 2011).
- **Sherman v. Rouse**, 244 Md. App. 694, 225 A.3d 490 (**2020**): Out-of-state same-sex civil union was cognizable in the state pursuant to doctrine of comity and could be dissolved through application of state's divorce law, where parties entered into civil union under out-of-state laws granting such parties a spousal relationship that entitled them to same legal benefits as a civil marriage, including divorce, property division, and maintenance, and civil unions were not contrary or repugnant to state public policy.

Evolution of Maryland Case Law
Assisted Reproduction

- **In re Roberto d.B.**, 399 Md. 267, 923 A.2d 115 (**2007**)
  - Holding: a gestational carrier did not have to be listed on the twin children's birth certificates, even though there was no other "mother."
- **Jocelyn P. v. Joshua P.**, 250 Md. App. 435, 250 A.3d 373 (**2021**)
  - courts should first look to the preference of the parties in any prior agreement expressing their intent regarding pre-embryos
  - frozen pre-embryo cannot be classified simply as an interest in property because it concerns interests of far broader dimension. Therefore, in absence of express agreement as to what to do with parties' remaining pre-embryos upon dissolution of parties' marriage or partnership, courts should seek to balance the competing interests.

  Jocelyn P. v. Joshua P., 259 Md.App. 129, 302 A.3d 1111 (**2023**)
  - oral agreement between husband and wife during marriage that each of three viable pre-embryos would be given chance at life was enforceable;
  - evidence did not support trial court's finding that parties' agreement that each of three pre-embryos would have chance at life, "no matter what," did not contemplate disposition of third remaining pre-embryo in event of divorce;
  - parol evidence rule did not preclude consideration of discussions between husband and wife and clinic that performed in vitro fertilization (IVF) procedure, and husband's and wife's subsequent written agreement with clinic, to determine whether parties' orally agreed that three viable pre-embryos would be given chance at life "no matter what"; and
  - trial court would be required to schedule supplemental hearing to determine husband's rights and responsibilities with respect to any child born to wife post-dissolution, in event child was born to wife.
- See also: **Skye v. Patton**, No. 0924, Sept.term,2022, 2023 WL 5199638 (Md. Ct. Spec. App. Aug. 14, **2023**)

Evolution of Maryland Case Law
Trans Youth

- **In re K.L.,** 252 Md. App. 148, 258 A.3d 932 (**2021**)
  - Clarifying the standard dictating in a court proceeding to declare the gender of a non-intersex person
    - the petitioner's evidence should show that the petitioner has undergone or is undergoing appropriate treatment, whether surgical, hormonal, or other generally accepted medical treatment, to physically transition to the sex that does not correlate to the person's sex-assigned-at-birth but does correlate to the person's gender identity
    - no requirement, however, for proof of surgery or of the "permanent and irreversible" physical change (even though it used to be required by Md. Courts)
    - best interests of the child standard applies in this case (CINA case, child seeking to change gender designation and first name to match the gender designation)
    - court disagreed with mother's argument that "K.L. had not experienced violence due to her transgender status, so publications advocating that it is protective for transgender people to change their given names do not apply to her," observing that "Fortunately, K.L. has not yet experienced violence, but that is no reason to discount the very real danger transgender children face when their status is "outed" by disclosure of given names that align with their sex-assigned-at-birth but not with their gender identity." (252 Md. App. at 194).
- **C.M. v. J.M**., 258 Md. App. 40, 295 A.3d 193 (**2023**)
  - As to S., Father "opposed" his decision and refused to call him by his preferred name. S. subsequently engaged in the self-harming behavior of "cutting." On March 4, 2022, Father sent the following text messages to S.: "What is your email address? I'm sending you an email and I'm copying your mother and my lawyer. I'm t[ir]ed the BS manipulations. Your grandmother doesn't call you S[.] and neither does either one of your aunts and uncle up here and for some reason my Christian beliefs are being attacked, so the intent is for a trial, so that everyone can understand what your mother that has manipulated a wedge after you and I had already came to an agreement [to call you a shortened version of your given name]. Thanks[.]" S. is "scared" to be around Father because "he doesn't feel support; doesn't feel that S[.] can be himself, ... his true self[.]"
  - Holding: the appellate court upheld the circuit court's grant of the protective order petition, holding that the circuit court "did not err in finding that it was more likely than not that Father's actions caused substantial risk of harm to N. within the meaning of FL § 5-701(b)(1)(i), and Father's actions were intentional or with reckless disregard as to the consequences of his actions." (*Id.* at 60.)
  - A similar case where the child, S., had overheard Stepfather call her a "fag with multiple personalities" and the appellate court upheld the lower court's factual finding of "mental injury" (**J.W. v. J.P**., No. 0037, Sept.term,2021, 2021 WL 5071604 (Md. Ct. Spec. App. Nov. 1, **2021**))

Evolution of Maryland Case Law Executive Order

- Executive Order, 01.01.2023.08, **Protecting the Right to Seek Gender-Affirming Care in Maryland** (Effective 1/1/24)

- Maryland Department of Human Services has issued a policy titled **Working with Lesbian, Gay, Bisexual, Transgender, Queer/Questioning, Intersex, Asexual/Allied, and Two-Spirit (LGBTQIA2S+) Youth and Families** (SSA/CW #23-05), acknowledging the challenges LGBTQIA2S+ youth face in foster care, providing guidance for how they should be respected throughout their experience, and providing resources for affirming language.

Evolution of Maryland Case Law
Miscellaneous

- Identity Documents:
  - Birth Certificates
  - Driver's Licenses
  - Social Security Card: Form SS-5 https://www.ssa.gov/forms/ss-5.pdf
  - Passport: https://travel.state.gov/content/travel/en/passports/have-passport/change-correct.html
  - Selective Service Registration: http://www.sss.gov/PDFs/SilForm_Instructions.pdf
  - School Records
  - Medical Records

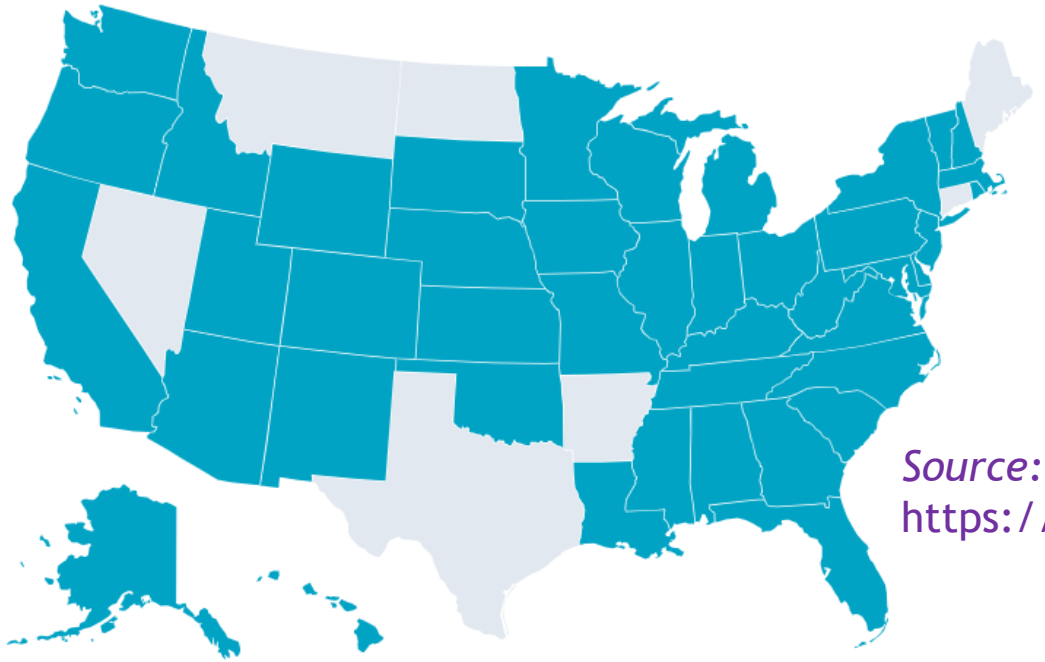
National Trends

2024 anti-trans bills tracker

In 2024, anti-trans bills continue to be introduced across the country. We track legislation that seeks to block trans people from receiving basic healthcare, education, legal recognition, and the right to publicly exist.

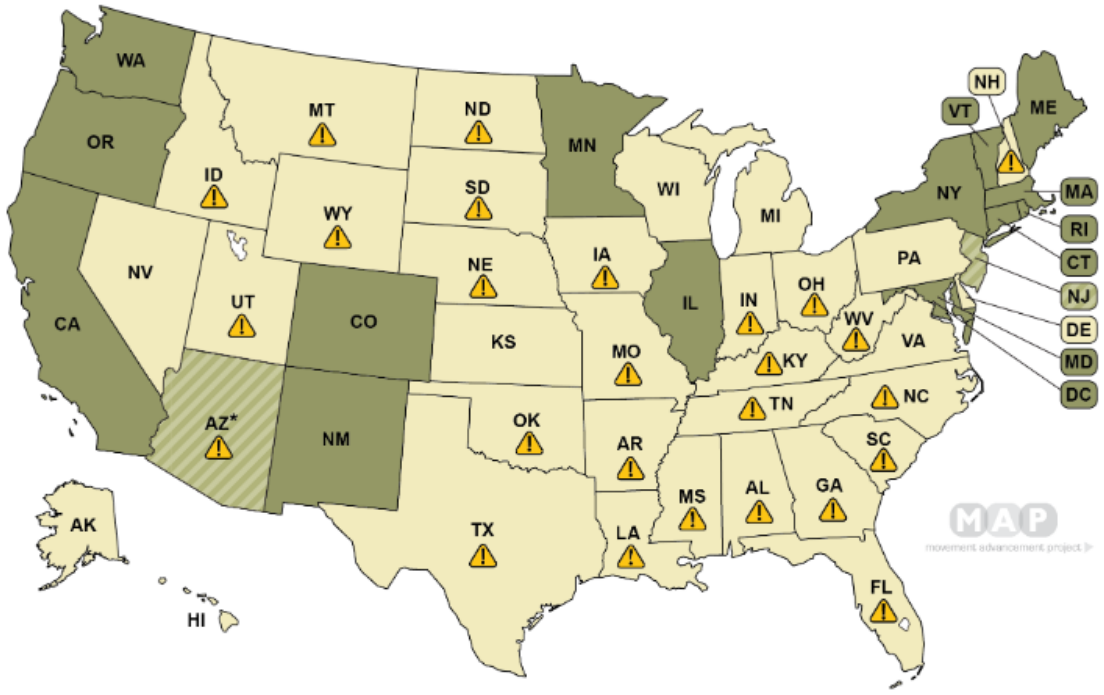
661 bills **43 states**

45 passed 124 active 492 failed



Source: Trans Legislation Tracker
https://translegislation.com

National Trends: Access to Health Care



State has "shield" law protecting access to transgender health care *(14 states + D.C.)*

State has "shield" executive order protecting access to transgender health care *(2 states)*

No "shield" law or policy protecting access to transgender health care *(34 states, 5 territories)*

⚠ State bans or restricts best practice medical care for transgender youth (see this map for more information) *(26 states)*

MAP
movement advancement project

National Trends: Access to Health Care

- In 2021, Arkansas was the first state to ban transgender health care for minors*
- 25+ other states have subsequently restricted gender-affirming services
  - Bans typically include civil or criminal penalties for health care providers
  - Some also include penalties for parents facilitating care
- In 2024, 237,500 transgender youths ages 13-17 lived in states where a health care ban has been *enacted or proposed*
  - About 114,000 of these young people live in states that have enacted bans.
    - Source: Williams Institute at UCLA School of Law, 2024
- In multiple states, these bans have forced transgender youth to stop safe, successful treatment. Bans are especially harmful to transgender minors in low-income families
- Federal policymakers also have proposed care bans and restrictions, including for members of the military and their families
- July 2024: Federal judge enjoins implementation of ACA §1557 SOGIE discrimination ban

*Multiple states have proposed bans through age 26 or for patients of all ages

National Trends: Schools & Sports

- "DEI bans" – teacher training, hiring, curricula
- Use of chosen names/pronouns/titles
  - Religious carveouts & prohibitions
  - Written parental permission
- Parental notification
  - Students' "health and well-being"
  - Sex education
  - "Controversial subjects"
- Participation in women's sports restricted to students AFAB
- OH: courts **may not deny or limit parental rights, responsibilities, or time based on a parent's refusal to affirm a child's identity or withholding of consent to care**
- TN: removed discrimination protection for students based on social or cultural background or sexual orientation
- UT: joint resolution deeming Title IX protections "overreach"

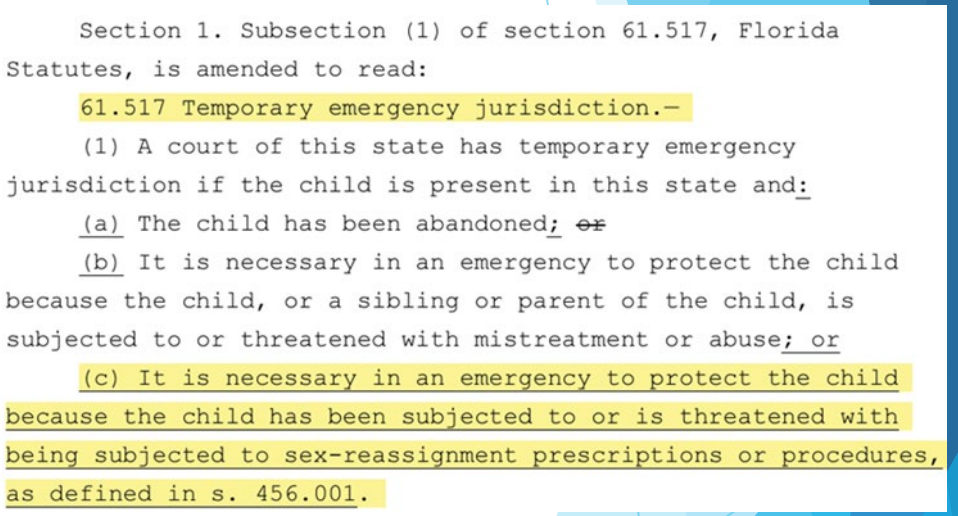
National Trends: Jurisdiction & “Child Welfare”

- When divorcing or separated parents live in different U.S. states, the Uniform Child Custody Jurisdiction and Enforcement Act (UCCJEA) determines which state’s court system will hear cases involving child custody, preventing conflicting orders.
- Seventeen states enacted health care “shield” or “refuge” laws after FL amended its UCCJEA to allow FL courts to take emergency jurisdiction to “protect” children from being “subjected to” receiving health care
- Exact provisions vary, but the primary goal is to protect transgender people, their families, and their medical providers. If a person travels from a state where transgender healthcare is banned and receives that care in another state, a "shield" law can protect the recipient and/or provider against civil or criminal charges from the state where healthcare is banned.

Texas sues Biden administration over requirement to provide LGBTQ+ youth foster placements

Placing LGBTQ+ foster children in more accepting homes would cost Texas too much money and resources, the lawsuit says.

BY XIOMARA MOORE SEPT. 25, 2024



Section 1. Subsection (1) of section 61.517, Florida Statutes, is amended to read:

61.517 Temporary emergency jurisdiction.—

(1) A court of this state has temporary emergency jurisdiction if the child is present in this state and:

(a) The child has been abandoned; ~~or~~

(b) It is necessary in an emergency to protect the child because the child, or a sibling or parent of the child, is subjected to or threatened with mistreatment or abuse; or

(c) It is necessary in an emergency to protect the child because the child has been subjected to or is threatened with being subjected to sex-reassignment prescriptions or procedures, as defined in s. 456.001.

On Friday, February 18, 2022, Texas Attorney General Ken Paxton released a non-binding opinion that under current Texas state law, gender-affirming procedures for nonbinary and transgender youth are to be classified as child abuse, an opinion that contradicts the advice of leading pediatric and medical experts.

Texas Governor Greg Abbott followed this release with his own letter to the Texas Department of Family and P rotective Services (DFPS) demanding that it “conduct prompt and thorough investigations” of parents or guardians who obtain “abusive gender-transitioning procedures” for their children. The letter also directed mandatory reporters to notify DFPS if they are aware of children receiving this care.

Child Welfare League of America Opposes Redefining Child Abuse to Include Gender-Affirming Care

National Trends:
Definitions & Documents
Restrooms & Changing Rooms

- 16 state bills proposed to create barriers to accessing accurate documents
  - 14 bills failed to advance or were vetoed
  - One bill passed (WV); one bill pending (OK)
  - WV: requires birth certificates to designate sex AAB & prohibit “non-binary”

- 12 state bills proposed to prevent public accommodation access
  - 9 bills failed to advance
  - Two bills passed into law (MS, UT), one bill pending (VA)

- Defining “sex,” “man,” “woman,” “mother,” “father”
- Precluding entities from prohibiting sex-based distinctions

National Trends:
Impact on Youth & Families

- Surveyed nearly 20,000 LGBTQ+ young people 18-24
- **39% of LGBTQ+ young people and 46% of trans and nonbinary young people seriously considered attempting suicide in the past year.**
- 49% of respondents ages 13 to 17 said they experienced bullying in the past year.
  - Young people who were bullied were also significantly more likely to have attempted suicide in the past year.
- **90% of LGBTQ+ young people said recent politics has negatively affected their well-being**
- 45% of trans and nonbinary youth said they or their family have considered moving to a different state due to anti-LGBTQ+ politics and laws.

Messages of support published in the study:

"You aren't alone my friend. Remember, there's a whole wide world with people like you and me"

"Be the role model you always needed"

"Keep on going, you're strong for existing."

"The greatest act of rebellion is to go on living authentically and truthfully; find spaces where you can be yourself unapologetically."

National Trends:
Impact on Youth & Families

"Transgender youth who receive support from their families, peers and communities have similar levels of self-esteem and are not more depressed than youth who are not transgender. **Perhaps the most surprising finding from our research is just how unsurprising the lives of trans youth can be, when they feel safe in their families and communities.** It is when they lack support from their parents, lack access to appropriate facilities—such as bathrooms and medical care—and when they fear for their emotional, material and bodily safety that trans youth suffer…. This is most evident when you consider that that **these mandates and proposed bills contravene the advice of every major medical, psychiatric and pediatric organization in the United States**."

Tey Meadow & Kristina R. Olson, *Scientific American*, March 29, 2022

National Trends:
Family Courts

- Although there are few published opinions, courts are increasingly granting (limited) decision-making authority to the more supportive parent in cases involving LGBTQ+ youth
- Courts are excluding expert witnesses that express fringe opinions about gender dysphoria or transgender people
- Courts are finding in favor of transgender youth on other issues such as name changes and restroom access
- Less supportive parents are increasingly willing to settle disputes around puberty blockers, which opens the potential for increasing family acceptance and can significantly reduce distress while preventing irreversible changes
- **These are still just trends:** there are many cases where courts rule in favor of less supportive parents, particularly where the child is younger (pre-teen) and/or the more supportive parent cannot afford to put on expert testimony

Crafting Thoughtful Orders & Agreements:
Cases Involving Transgender Youth

Travel, Relocation, & Visitation

Access to health care

Access to restrooms & facilities

Athletic participation restrictions

“Child Welfare”

Emergency Jurisdiction

Note on Parentage

Any questions?