EMERGING LGBTQ ISSUES
City Club of Cleveland
20 March 2019

Presented by:

Joan M. Burda
Attorney at Law
216.832.8825
jmburda@mac.com

INTRODUCTION

Following the U.S. Supreme Court decision in *Obergefell v. Hodges*[1] many in the LGBTQ community believed the fight had been won, everything was fine, and they could move on with their lives. Little did they realize the *Obergefell* was not the definitive statement on LGBTQ rights. Since June 26, 2015, it has become apparent the battle for LGBTQ civil rights continues.

Legal issues involving parental rights, government benefits, employment, immigration, and even marriage continue to crop up. Some litigation involved the right of married same-sex couples to receive the same state marital benefits as heterosexual married couples,[2] and whether married same-sex parents are entitled to the same parental rights as other married couples.[3]

Rather than resolving all issues, *Obergefell* prompted new and improved challenges to the civil rights of LGBTQ individuals and families.

A. LANGUAGE

In 2015, the Ohio Supreme Court issued an administrative action:[4]

> "It is ordered, effective immediately, pursuant to Article IV, Section 5 of the Ohio Constitution and Rule 84 of the Ohio Rules of Civil Procedure, that all references to husband, wife, father, mother, parent, spouse, and other terms that express familial relationships contained in the Rules of Superintendence for the Courts of Ohio and related forms and the Uniform Domestic Relations Forms of the Ohio Rules of Civil Procedure be construed

[1] 576 U.S. ____, 135 S.Ct. 2584, 192 L.Ed. 2d 609, 2015 WL 2473451 (2015)
[2] *Pidgeon v. Turner,* 538 S.W.3d 73 (Tex. 2017); (U.S. Supreme Court denied certiorari December 4, 2017)
[3] *Pavan v. Smith*, 582 U.S. ____, 137 S.Ct. 2075 (2017)
[4] 06/26/2015 *Administrative Actions,* 2015-Ohio-2568

> as gender neutral where appropriate to comply with the decision of the United States Supreme Court in *Obergefell v. Hodges*, case No. 14-556, rendered on June 26, 2015. This order will remain in effect until the rules and forms are amended to reflect the changes contained in this order.

Words matter. Using the correct words and pronouns when working with LGBTQ clients is important. It is also helpful for lawyers and their staffs to familiarize themselves with the terms that are integral to the LGBTQ community. (See Appendix, *Gender Identity Definitions*). Using the correct terms reflects well on lawyers and their staffs.

Using "they," "them," "themselves," and "themselves" as a singular pronoun is becoming acceptable. In 2017, the AP Stylebook and Chicago Manual of Style decided it is acceptable to use "they" as a gender-neutral singular pronoun.[5]
Some LGBTQ people who identify as gender-neutral, gender-queer or non-binary may use alternative pronouns such as "zee," "zhou," and similar words. These are non-traditional pronouns and, as such, are unfamiliar to most people.

It may be necessary to explain to clients that a more traditional approach to pronouns is necessary in legal documents such as court pleadings. However, in transactional documents (wills, trusts, contracts, etc.) adapting or adding a definition clause that clearly explains the words used, their meanings and applications, will offer a way to respect the client wishes and avoid confusion later.

Understanding and respecting a client's preferred pronoun use is an essential aspect of representing LGBTQ clients. And, the language being used is in flux. New words, pronouns and usage continues to evolve.

B. FAMILY LAW

Family presents myriad challenges for same-sex couples who have children whether married or unmarried.

1. RELATIONSHIPS

Marriage is only one type of legally recognized relationship in which same-sex couples may be involved. Some couples entered into civil unions or domestic partnerships before *Obergefell* and continue in those relationships. In several states (California and Washington, for example) same-sex and opposite sex couples may enter into domestic partnerships.

A. Domestic Partnerships: The following states recognize domestic partnerships: California, Oregon, Maine, Washington, Nevada, Wisconsin, and the District of Columbia.

[5] https://www.quickanddirtytips.com/education/grammar/themself-or-themselves

California has the most extensive legislative history involving domestic partnerships. This includes continuing to allow same-sex and opposite sex couples over the age of 62 to register domestic partnerships.

The District of Columbia allows couples in a DP that existed before 2009, when DC recognized same-sex marriages performed in other jurisdictions, to apply for a marriage license without an additional fee.

Nevada: domestic partnerships are available to opposite sex and same-sex couples.

Washington: same-sex marriage was recognized in 2012. State law now restricts domestic partnerships to couples in which at least one is 62 or older. As of June 30, 2014, any state-registered same-sex domestic partnership, in which neither party is 62 or older, was automatically converted to marriage, unless the DP was dissolved or converted before then.

B. Civil Unions: Vermont was the first state to permit civil unions. Following the *Obergefell* decision, Vermont recognizes civil unions that existed before 9/1/2009 but civil unions are no longer available.

At present, Colorado, Hawaii, Illinois and New Jersey allow or recognize civil unions.

Hawaii also allows a similar relationship, **reciprocal beneficiaries**. The Hawaii Reciprocal Beneficiaries law was enacted July 8, 1997. The law provides limited state rights to same-sex couples, relatives and friends. Hawaii's law establishing reciprocal beneficiaries is not limited to same-sex couples and can be used to contractually bind two parties, even those who may be already related, such as a brother and sister.

C. Automatic upgrade to marriage

The following states automatically converted civil unions into marriages: Connecticut (2010), Delaware (2013), New Hampshire (2011 & recognizes civil unions from other states), and Rhode Island (2013).

That creates a dilemma for out-of-state couples that may be unaware of the conversion. Since any type of legally recognized relationship for same-sex couples is a relatively new development, many couples believe their civil union, domestic partnership or marriage "didn't count" because their state of residence (like Ohio) did not recognize the relationship.

That is and always was untrue. Lack of recognition does not invalidate a civil union, marriage or domestic partnership if valid in the jurisdiction in which it was entered.

There are an unknown number of LGBTQ people who are in these legally recognized relationships and not know it. Further, they may have entered into other legally recognized relationships with other people without first dissolving the pre-existing relationship.

D. Reverse Evasion statutes

Reverse evasion statutes are rare but they have created problems for same-sex couples who travelled to jurisdictions that recognized marriage equality. The states that had or still have a reverse evasion statute are: Massachusetts (repealed 2008), New Hampshire (repealed), Wisconsin ( ), Wyoming ( ) and Illinois.

These laws prevent non-residents from marrying in the state if the marriage would not be recognized in the non-residents home state.

The Ohio 12th District Court of Appeals issued an opinion on the matter in *McKettrick v. McKettrick*, [6] in 2015. The court upheld the trial court decision finding that the parties marriage was invalid because of the Massachusetts law. One fact that eluded everyone revolves around the fact that one party to the marriage owned real estate in Northampton, MA and used that address to obtain a marriage license. The parties presented themselves as Massachusetts residents. Following the court's 2015 decision, the case was subsequently remanded for further consideration in light of the *Obergefell* decision. Massachusetts repealed the statute in 2008.

Illinois, on the other hand, continues to have a reverse evasion statute that may create problems for same-sex couples who married in that state after it recognized marriage equality in 2014. The pertinent section of the Illinois law reads:

> (750 ILCS 5/217) (from Ch. 40, par. 217)
> Sec. 217. Marriage by Non-residents - When Void.) No marriage shall be contracted in this state by a party residing and intending to continue to reside in another state or jurisdiction if such marriage would be void if contracted in such other state or jurisdiction and every marriage celebrated in this state in violation of this provision shall be null and void.
> (Source: P.A. 80-923.)

Wisconsin's statute prevents its residents from avoiding the state's marriage requirements by marrying in another state. Section 765.04(1) provides:

> If any person residing and intending to continue to reside in this state who is disabled or prohibited from contracting marriage under the laws of this state goes into another state or country and there contracts marriage prohibited or declared void by the laws of this state, such marriage shall be void for all purposes in this state with the same effect as though it had been entered into in this state."

New Hampshire repealed its law in 2014 and, since the *Obergefell* decision, those that continue to exist are not applicable. However, marriages entered into before that decision may be

[6] 2015-Ohio-366

subject to a challenge. It is something to think about when discussing matters with LGBTQ couples. Finding out where and when they were married is important.

E. Dissolving pre-existing relationships

This means lawyers need to ask questions about prior relationships, the type of relationship and, if necessary, assist the client in dissolving it. If the client has moved on to another relationship, the matter may be one of first impression for the appropriate court.

Ohio does not recognize civil unions or domestic partnerships. Therefore, the Domestic Relations Court may not have subject matter jurisdiction to dissolve them.

Vermont and the District of Columbia allow non-residents to dissolve their pre-existing civil unions or domestic partnerships without establishing residency. But that is only for those who entered into them in those jurisdictions. And, in Vermont, there can be no minor children.

An argument could be made that Ohio would be the child's home state under the Uniform Child Custody Jurisdiction Enforcement Act (UCCJEA) and that Vermont has no jurisdiction over the child. However, Vermont law does include that restriction and it must be addressed.

An alternative is to seek to dissolve the civil union or domestic partnership by pleading the dissolution as a contract action in the General Division of Common Pleas Court.

In 2015, Judge Rosemary Grdina Gold, issued a decision in *Cleary v. Lonzer*,[7] that involved the defendant's motion to dismiss a divorce complaint because there was never a legally-valid marriage. While domiciliaries of Ohio, the parties were married in Canada in 2006. They had two children, one born before the marriage, the other during the marriage. In July 2011, the defendant began living with another woman and in 2012, entered into a marriage in New York. The defendant did not formally terminate her 2006 marriage to Cleary.

Judge Gold's unpublished decision discusses why the Canada marriage was valid and why the New York marriage was not.

Apparently, the defendant researched the matter on her own and determined the Canadian marriage was invalid because Ohio did not recognize it. Unfortunately, New York did recognize the Canadian marriage.

The Motion to Dismiss was denied because the marriage was valid. Another reason why client's should not do their own legal research.

This matter of pre-existing legally recognized relationships will eventually resolve itself. Until then, this presents a conundrum for clients and lawyers alike.

[7] *Katherine Ann Cleary v. Jennifer Lynn Lonzer*, Case No. DR 15 357783, Judge Rosemary Grdina Gold

F. Determining the length of the marriage

The legal date of a same-sex couple's marriage may not accurately reflect the length of the relationship. Couples who were together for decades may have been married only for a few years. That thwarts an accurate representation of the couple's property and usually damages the lower income or lower earning spouse. In many cases, all of the property may be in the name of one spouse.

Long-time same-sex couples usually jerry-rig their assets to account for the fact they were prohibited from marrying. Untangling those arrangements often present unprecedented challenges to the lawyers, parties and the courts.

In some cases, establishing the existence of a common law marriage may help resolve the dilemma. Ohio stopped allowing common law marriages in October 1991. However, the state will recognize common law marriages that existed prior to October 10, 1991. Further, all 50 states recognize common law marriages if established in states that recognized them. While many states no longer recognize common law marriage, others still do under the principles of comity.[8]

The Social Security Administration recognizes same-sex marriages and some nonmarital legal relationships (civil unions & domestic partnerships) when determining eligibility for Social Security and Medicare benefits.[9] The Social Security Act authorizes the agency to consider a claimant, who is in a nonmarital legal relationship (NMLR), to be a "spouse" if the state in which the worker lives would the claimant to inherit an intestate share of the worker's estate.

G. Prenuptial Agreements, Domestic Partnership Agreements, Property Agreements

LGBTQ clients who are contemplating marriage, and have been in a long-term relationship with each other, can address the issues concerning the length of their relationship in a prenuptial agreement.

Prenuptial agreements can provide a level of certainty and protection to all LGBTQ couples. Discussing the various issues before the marriage will help avoid unpleasant discussions afterward.

Unmarried LGBTQ couples will benefit from executing either a Domestic Partnership Agreement or a Property Agreement. The former can spell out the couple's intentions concerning their relationship, property accumulated, division of property if the relationship ends and identifying individual property at the outset.

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[8] Alabama (if contracted before 1/1/2017); Colorado, DC, Georgia (if contracted before 1/1/1997); Idaho (if contracted before 1/1/1996); Iowa, Kansas, Montana, New Hampshire (for inheritance purposes only); Ohio (if contracted before 10/10/1991); Oklahoma; Pennsylvania (if contracted before 1/1/2005); Rhode Island, South Carolina, Texas, Utah

[9] What Same-Sex Couples Need to Know

A Property Agreement is helpful if the couple buys a house. Unmarried couples ending a relationship may find they remain stuck together because of a house, especially if one party remains in the house and refuses to sell or refinance the mortgage. Putting their intentions and method to resolve disputes in writing will assist them if the relationship ends. Such an agreement can also be used as the foundation for a prenuptial agreement if the couple later decides to marry.

2. CHILDREN

A. Birth Certificates

The primary issue is this is an administrative procedure and the document does **not** confer parental rights simply because a person's name is listed as a parent.

Same-sex parents need to take additional affirmative action to establish parental rights for both parties. Even if the couple is married and the child is born during the marriage, reliance on a birth certificate is not enough.

B. Marital Presumption

Usually only one parent is biologically, genetically or legally related to the child. The other parent has no legal recognition.

The marital presumption, while recognized in Ohio[10], can be rebutted by the either party. There are several states that do not recognize a marital presumption. That means reliance on the presumption will not protect same-sex parents in every U.S. jurisdiction. Relying on the marital presumption can give a false sense of security to same-sex couples with children.

For those states with marital presumption statutes, the law must be applied uniformly to heterosexual and same-sex married couples. The U.S. Supreme Court reversed the Arkansas Supreme Court[11] and held, under *Obergefell,* marital presumption statutes must apply to same-sex couples and both spouses have legal parentage rights. The court held that children have a right to both parents. Upon remand, the Arkansas Supreme Court's minority continued its opposition and expressed a desire to invalidate the state's marital presumption law.

This reflects the problems married same-sex couples will continue to have if they rely solely on the marital presumption to establish their parental rights. There remains significant hostility to same-sex couples and their children.

[10] O.R.C. 3111.03

[11] *Pavan v. Smith*, ___ U.S. ____, 137 S.Ct. 2075, 198 L.Ed.2d 636 (2017)

The marital presumption only applies to married couples and to those children born during the marriage. Many same-sex couples have children who were born before the parents were allowed to marry (pre-*Obergefell*) and the presumption does not apply to those children. Another issue involves how the presumption applies to a married same-sex gay male couple when ART is used to create a family. The men need to use a gestational surrogate and one (or in the case of twins, both) may be biologically related to the child(ren).

That question came up in a case[12] concerning twins born to a married same-sex gay male couple, where one spouse was a U.S. citizen (Andrew), the other an Israeli citizen. (Elad) The twins were born during the marriage and one child is Andrew's biological child and the other is Elad's biological child. The U.S. State Department refused to recognize Elad's child as a U.S. citizen. A federal judge in California sided with the fathers and granted them summary judgment. The court engaged in a lengthy discussion of why the State Department's original decision contradicted the law and held the same-sex couple to a different standard than similarly situated opposite sex couples.

C. Adoption

For married couples, a stepparent adoption is the preferred way to proceed because it grants legal parent status to the non-bio/genetic/legal parent.

Be aware that clients **HATE** the idea of adopting "my own children." Explaining the necessity for the procedure is essential. The stepparent adoption procedure was never created to deal with the situation involving same-sex parents who planned the pregnancy and birth together, but it is the primary means to ensure legal recognition of both parents.

It may help to refer to the process as a "confirmatory adoption." That can take the sting out of "stepparent."

Ohio's adoption statute does not specifically list "second parent adoption" as an option. But, second parent adoption is not specifically prohibited in Ohio. It is a gray issue.

In 2002, the Ohio Supreme Court issued its decision in *In re Bonfield*.[13] The court issued its initial decision in this case and included the sentence, "[H]owever, because second parent adoption is not available in Ohio, Shelly cannot adopt the children."[14] The appellants filed a motion for reconsideration and asked the court to delete that language. The court granted the motion and issued a new decision without the language regarding second parent adoption. In effect, the court took a mulligan.

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[12] *Dvash-Banks, et al. V. Michael R. Pompeo*, Case No. 2:18-cv-00523-JFW JC (U.S. Dist. Ct., Central Dist. CA, January 7, 2019).

[13] 97 Ohio St.3d 387, 2002-Ohio-6660

[14] *In re Bonfield*, 96 Ohio St.3d 218, 2002-Ohio-4182 (original decision)

The question of whether second parent adoption is permitted in Ohio remains unanswered. There is a 1998 9th District Court of Appeals decision held that the non-biological parent in a same-sex couple could not adopt their child without terminating the biological parent's parental rights.
An argument is waiting to be made that second parent adoption is permitted in Ohio.

D. Parentage Action

A new parentage action procedure is in place in several Ohio counties (Franklin, Fairfield, Cuyahoga, and Summit).

A *Determination of Parentage* action allows married same-sex couples to establish legal relationships with the children they are raising together. Juvenile court has exclusive original jurisdiction to hear cases involving children, such as parentage actions.

The court in Franklin county is processing parentage actions as a routine procedure. The court views this as a parenting confirmation procedure. The court is only processing these actions for married same-sex couples that have children born during the marriage. Children born before the marriage are subject to the stepparent adoption process in probate court. Franklin County's Domestic Relations Division will confirm parentage if it is pursuant to a divorce.

Same-sex couples that are raising children often experience difficulty establishing a legal parent-child relationship when only one party is legally recognized as a "parent." In most same-sex relationships, only one spouse is biologically or genetically related to the child. The non-biological/genetic parent is considered a legal stranger to the child.

One exception involves a lesbian couple where one woman donates her egg and her spouse/partner serves as the gestational surrogate and birth mother. In these cases, both women have a legal connection to the child.

The parentage action gives same-sex couples an option to establish a legally binding relationship with their children. The adults involved are entering into a unified attempt to create a legally recognized parent-child relationship. This is in the child's best interest because it promotes stability.

Parentage actions may be the only way for unmarried same-sex couples to obtain legal recognition for both parties. Unmarried heterosexual couples have several ways to obtain legally recognized parental rights. Unmarried same-sex couples do not. Requiring same-sex couples to marry in order to establish parental rights raises equal protection issues. However, at this time, no Ohio court is processing parentage actions for unmarried couples. Their only option may be a second parent adoption. Cuyahoga County's probate court, for example, will not entertain a petition for a second parent adoption by an unmarried couple.

Parentage is a separate issue from a custody determination. However, issuing a parentage order for unmarried same-sex couples should be accompanied by a shared parenting order and a CSEA support order. The support order can be held in abeyance because the couple is residing together.

Known donors are made a party to the action and given an opportunity to sign off in an affidavit. That results in the court order including a provision relieving the known donor of any rights, responsibilities and obligations for the child. This also presupposes that the parties complied with Ohio law and involved a doctor in the process.[15]

Pleadings for Parentage Actions filed in Cuyahoga County's Juvenile Court are included in the Appendix.

3. ASSISTED REPRODUCTIVE TECHNOLOGY

There is a significant increase in the use of assisted reproductive technology (ART) for married and unmarried people who want to start families. It is the common method used by gay and lesbian couples.

Ohio law,[16] state the requirements for "non-spousal artificial insemination." Ohio requires that a physician supervise the procedures. This is the only way a third party donor will not have any parental rights or be responsible for any child born. Without a doctor supervising the procedures, the third party donor will be considered the child's legal parent. Any agreement between the intended parents and the third party donor will be unenforceable in court.

ART can result in fragmented parentage. For example, there may be five different "parents": sperm donor; egg donor; surrogate/gestational host and two non-biologically related individuals who are the intended parents and will raise the child.

Fragmented parentage can create legal issues if any of the third parties challenge the intended parents' rights to the child. The surrogate, gestational host, egg donor, embryo donor and sperm donor may all claim parental rights. This is a primary reason why DIY practices are never a good idea. Most states do not recognize multiple parents. California does permit up to three adults to be recognized as a child's legal parents.

The widespread use of ART has resulted in "parentage" being divided into three distinct types: (1) biological or genetic parentage—contributing the genetic materials to the child (*i.e.*, sperm or egg); (2) gestational parentage — carrying and bearing the child; and (3) functional parentage — raising the child following birth. Careful attention must be paid to how parentage is defined and how those definitions impact the children conceived through assisted reproduction.

[15] O.R.C. 3111.88-95
[16] O.R.C. 3111.88-96

A. Prenuptial, ART & Surrogacy Contracts

The intended parents may have a contract with the clinic they are using to accomplish IVF or assisted fertilization. These contracts are usually drafted by the clinic and the prospective parents may not understand the legal ramifications of those contracts.

Many clinic contracts result from a "cut and paste" procedure in which the clinic takes clauses from various contracts found on the internet. Further, the contract may only involve the "donor" and that donor may also be one of the intended parents. Generally, clinic contracts include a clause in which the donor relinquishes all parental rights to children that may be created from the donation. This is not the intention of intended parents but they may not have read or understood the contract terms.

California has addressed most issues involving ART and ART contract and has the most advanced response to assisted reproductive technology. The other jurisdictions are playing catchup. Legislative remedies are ill-equipped to deal with this rapidly changing area of family development.

Prenuptial contracts allow couples to agree on a variety of issues before the marriage. This includes discussing ART. Couples for whom ART is a possibility can address what happens to a woman's frozen eggs or the man's frozen sperm, or the couple's frozen embryos, after they separate, divorce or when one dies. The couple can decide, in advance to destroy or donate the stored genetic materials. They may also decide under what circumstances they will allow conception.

B. Stored Genetic Materials

Cryogenic technology allows human tissue to be frozen long-term. This allows for reproduction at later times, even after the death or incompetency of an "intended parent."

Stored genetic material or fertilized embryos are considered "property" or "quasi property." The owner(s) of this property must consider what happens to stored genetic materials and embryos when creating their estate plan. The parties need to document their intent concerning this property and its use posthumously and address the possibility that the intended parents may divorce.

Some ART clinic contracts include a clause granting the clinic ownership rights to the unused stored genetic materials. Reviewing the contracts is essential.

C. Donated genetic materials

Addressing donated genetic materials is another aspect of estate planning that is overlooked. If a person donates his sperm or her eggs, the donor needs to reference those donations in the will and trust. Otherwise, there remains the possibility of the child born from that donation to

seek a share of the decedent's estate. Generally, the states and courts agree a child's "mother" is the woman who gave birth. But, in this rapidly changing area of law, that can no longer be a presumption. An increasing number of woman are donating their eggs to assist other women. Those donations need to be explicitly addressed in the donor's estate plan. Not doing so creates the possibility of issues and complications that can be avoided with creative, careful and comprehensive estate planning.

D. Rights to Stored Genetic Material

Two California cases address a testator's right to bequeath stored genetic materials in a will. *Hecht v. Superior Court of California*, 16 Cal.App.4th 836 (Cal. 1993), involved the storage of 15 vials of sperm in a California sperm bank. The testator gave the facility a letter instructing it to release the stored material to his girlfriend. He also bequeathed the stored genetic material to the woman in his will. He made it clear he wanted her to use the stored material to produce children. After completing these arrangements, the testator committed suicide.

The decedent's living children objected to the girlfriend's efforts to retrieve the stored genetic materials. The court sided with the girlfriend and held that the decedent had an ownership interest in the sperm and retained decision-making authority over its disposition. The stored sperm was the decedent's "property" under the California Probate Code.

In 2008, a different California appellate court came to the opposite conclusion. In *Matter of Kievernagel*, 166 Cal.App.4th 1024 (Cal. 2008), a married decedent deposited sperm with a California sperm bank. He and his wife intended to use the stored genetic material to start a family. The husband died before accomplishing this purpose.

Retrieval of ova from a woman who is dead or in a persistent vegetative state is more difficult but medically possible. In 2010, the husband of a woman in a persistent vegetative state asked that his wife be kept on life support so that she could be administered ovulation-stimulating hormones and her ova be harvested. The hospital convened an ethics committee, which declined the husband's request because of lack of evidence of the wife's consent to the procedure, and evidence that retrieval might hasten her death. David M. Greer et al., *Case 21-210: A Request for Retrieval of Oocytes from a 36-Year-Old Woman with Anoxic Brain Injury*, 363 New Eng. J. Med. 276 (2010). The only published report of postmortem ova retrieval has occurred in Israel. After a 17-year-old woman died in a car accident, her parents obtained a court order to remove and freeze her eggs.

The consent form signed at the sperm bank instructed the facility to destroy the stored sperm if he died rather than releasing it to his wife. The court ruled the agreement was enforceable and the decedent's surviving spouse had no right to the frozen sperm.

Another consideration for clients to consider is what happens to the stored genetic material if she is no longer interested in using it? Or, who gets the material if the marriage or relationship ends? Who has ownership rights? Have the parties considered what to do if one wants to have

a child post-relationship and the other does not? Can a person be forced to become a parent? The courts are split, but there is a trend in the courts to opt in favor of giving consent to become a parent, even if the other party object.

E. Postmortem extraction of eggs and sperm

It is possible to extract eggs and sperm from a deceased individual or one in a persistent, vegetative state. There is a finite amount of time available, generally, 24-36 hours, to perform this extraction from a decedent. Estate planners must consider these possibilities when drafting estate documents.

The ABA Model Act on Assisted Reproduction states that, except in an emergency[17] gametes or embryos shall not be collected from a deceased or incompetent person without consent given[18] before death or incompetency or expressly authorized by a fiduciary with the authority to give such consent[19]. Including a pertinent clause in the General Durable Power of Attorney or a will or trust, or other estate planning document, can provide evidence of the person's intention concerning this matter. Adding a provision specifying that the decedent/incompetent person intended or become a parent post-mortem or post-incompetency is also important.

Discussing these matters with clients must become a standard estate planning practice.

Section 2-120 of the Uniform Probate Code creates a rebuttable presumption that the decedent consented to be a parent if he or she was married at the time of death and no divorce was pending and the surviving spouse conceived the child within 36 months or gives birth within 45 months after death. There is no requirement that the decedent had deposited the genetic material before death.

Since not all states have adopted the UPC or only adopted parts of it, reviewing the probate code of the state of residence is essential. The UPC could be used as authority if litigation ensues.

Another issue involves the rights of surviving spouses, girlfriends, boyfriends and parents to harvest sperm and eggs from a decedent in order to create a posthumous child. There is no uniform response to this in the nation's courts. An Iowa court decided the matter in *In re Daniel Thomas Christy,*[20] to allow the decedent's parents to harvest their son's sperm. The court based its decision on the fact the decedent was an "organ donor" and that created implied consent to retrieve the sperm post-mortem.

[17] §205(2)
[18] §102(33)
[19] §205(1)
[20] No. EQV 068545 (Sept. 14, 2007)

Many states require the decedent's written consent before allowing harvesting. Discussing this aspect with clients, whether married or unmarried, is another developing area of the estate planning process.

Situations involving postmortem extraction raise additional issues like who pays for the extraction. It is unlikely the decedent's health insurance will approve the bill. Is the sperm, once extracted, an estate asset subject to probate? Is the estate liable for the expenses involved? If it is property, are estate creditors able to submit a claim and argue that the genetic material should be sold to pay the decedent's debts? Can fertilized embryos be sold? Is there a 14th amendment prohibition?

The next question is must the estate must remain open pending the birth of a child and for how long. If there are other heirs must they wait for their inheritance until the posthumous child is born? Who pays the expenses of keeping the estate open? Does the executor have a fiduciary duty to existing heirs or to them and the as yet unborn child?

How does a testator address these financial issues? Do all men need to specify their wishes concerning postmortem extraction? Do women need to do so as well?

California's *Hecht* case addresses the issue of cryopreserved genetic materials and whether they are estate assets. That case also raises the issues of who inherits the material and who is responsible for paying the storage bill. Can the heir disclaim the bequest?

States that have no laws addressing whether a posthumous child should inherit generally consider whether keeping the estate open would pose an unreasonable burden on the orderly administration of the estate or the other heirs.

F. Consent to Be a Parent

The Uniform Parentage Act, Section 707 requires written consent to be a parent of a posthumous child. In states that adopted this section, probate is not delayed if there is no written consent.

Colorado, Alabama, Texas and Utah require written consent if the spouse dies before the eggs, sperm or embryo is implanted. Delaware, Washington and Wyoming adopted the 2002 version of the UPA's Section 707 that applies to any individual rather than being limited to a spouse who gives written consent. New Mexico and North Dakota adopted a hybrid approach and use language from the 2000 and 2002 versions. As a result, it is unclear whether those state laws apply only to married couples or to unmarried persons as well.

Utah's Supreme Court decided that a Semen Storage Agreement did not satisfy the consent requirement. See, *Burns v. Astrue*.[21] And, Florida requires the decedent to specify that posthumous children are included in the will. No other written consent is recognized.

Colorado and North Dakota allows consent to be proven either by a writing or by clear and convincing evidence. And, the child is considered in gestation at the time of death if the pregnancy exists no later than 36 months or born no later than 45 months after the decedent's death. Connecticut and Maryland require written consent.

Connecticut requires that the child must be in utero no later than one year after the decedent's death. Maryland requires the child to be born within 2 years of the death and does not require that the decedent be married.

Suppose that the family of a recently deceased person asks the hospital to retrieve the deceased's sperm or ova. The hospital refuses to proceed without a court order and asks you to represent them in court. Do you need to establish that the decedent has consented to this retrieval? If so, is retrieval of gametes similar to organ donation?

G. Posthumous Heirs & Intestate Succession

There is little guidance either by statute or caselaw for dealing with posthumous heirs in estate planning. Most of the existing cases deal with a posthumous child's entitlement to Social Security surviving dependent benefits.

The U.S. Supreme Court addressed this issue in *Astrue v. Capato*,[22]. The case dealt with the right of a posthumously conceived child to qualify for Social Security survivor benefits. The Social Security Administration's position is that such children qualify for benefits only if they are entitled to inherit from their father under the state's intestacy statute. In a 9-0 decision, the Court agreed with the SSA's interpretation of the Social Security Act.

Children that are conceived and born after a parent dies must demonstrate eligibility to inherit under state law or satisfy a statutory alternative to the requirement. The Act's core purpose is to protect family members that depended on the decedent's income. This decision applies to all children including those born using ART techniques.

Under the Social Security Act, a child is a legal dependent and entitled to benefits if the deceased parent legally recognized the child, the parent was fully insured, the child is under 18 and was dependent on the decedent at the time of death. A posthumous child cannot meet those statutory requirements.

[21] 289 P.3d 551 (Utah 2002)
[22] 566 U.S. _____, 132 S.Ct. 2021, 182 L.Ed2d 887 (2012)

The decision means that a posthumous child's right to receive SSA survivor benefits will depend solely on that child's right to inherit under the state's intestacy law. Intestacy laws vary by state and those variances affect a posthumous child's entitled to these federal benefits.

The only way to overcome the Court's unanimous decision is for Congress to amend the Social Security Act and given the current state of inertia in Washington any such action is remote.

Posthumous children have the potential to affect the distribution of estate assets and the closing of an estate. Further, ART techniques are creating situations that make identifying a decedent's heirs difficult. A posthumous child's status is important because of the possibility that others left property "to the children" of the father in a will or if a child might be entitled to take from the estates of the father's relatives who die intestate. See *In re Estate of Kolacy*.[23]

Twenty states have specifically addressed the issue of posthumously conceived children: Alabama, California, Colorado, Connecticut, Delaware, Florida, Iowa, Louisiana, Maryland, Minnesota, New Mexico, New York, North Carolina, North Dakota, Ohio, Texas, Utah, Virginia, Washington and Wyoming.

Those states realize there are competing interests between the posthumous children and existing beneficiaries. Some of the requirements being imposed by states include: written consent to posthumous reproduction and imposing time limits for conception and birth. The time limits range from one to four years after the decedent's death. The latest laws took effect in 2013 in Connecticut,[24] and Maryland.[25]

Ohio's statute[26] states that an intestate's descendants must be conceived before the person's death in order to inherit. Any child conceived and born after the decedent's death cannot inherit.

Some of those states ban a posthumous child from receiving an intestate share unless specific conditions are met: the deceased consented to have children using his genetic material, there is written evidence, the child must be conceived within a set time after death and the prospective mother must be the surviving spouse.

The intestacy situation must be addressed in light of property issues: (1) Did the decedent store genetic material. (2) Who is entitled to inherit that property? (3) Did the decedent make arrangements for the disposition of the material after he or she died? (4) Did the decedent intend to produce a child from the stored genetic material? These questions will undoubtedly lead to other questions and issues that have not yet been considered.

[23] 754 A.2d 1257 (N.J. Super. Ct. Ch. Div. 2000)
[24] Conn. Gen. Stat. Sections 45a-7850788
[25] Md. Estates and Trusts Code Section 1-205(a)(2)
[26] O.R.C. 2105.14

Surviving spouses have an advantage in the intestacy process because there is a presumption that a deceased spouse would want the surviving spouse to receive a portion of the estate. And, following that assumption, it is likely that a surviving spouse can make a legitimate claim to the stored genetic material. This assumption may also play out in cases where the decedent has no surviving spouse or children and the parents want to make all decisions concerning the disposition of the estate assets. Those assets would include the stored genetic material. The number of cases involving requests to extract sperm from deceased men is increasing--from surviving spouses, partner, girlfriends and parents. Without statutory guidance, the courts are figuring out how to resolve these requests.

The Supreme Courts in New Hampshire, Arkansas and Michigan have decided in the past few years that posthumous children do not qualify to inherit under the state intestacy statute because they were not considered "in being" when the decedent died. See, *Eng Khabbas v. Commissioner of Social Security*;[27] *Finley v. Astrue*;[28] *Mattison v. Social Security Commissioner*.[29] In each case the posthumous children were applying for Social Security survivor benefits.

- California, Colorado, Iowa, Louisiana, North Dakota, Texas and Virginia provide intestate succession rights to posthumous children with certain conditions.

- Iowa requires a genetic relationship between parent and child, written consent signed by the decedent and the child must be born within two years of the parent's death.

- Louisiana law allows the child to be born within three years of the parent's death and allows other heirs to challenge the inclusion of a posthumous child.
- North Dakota treats a posthumous child as a life in being if in utero up to 36 months or born within 45 months after the decedent's death.

- In Virginia, intestate succession is permitted if the embryo is implanted before the physician is notified of the death or the decedent consented, in writing, to becoming a parent before implantation.

H. Tax considerations

Clients may be able to pay for some of their ART expenses without incurring a gift tax or minimizing what they give to their beneficiaries. The "education/medical" exclusion under I.R.C. 2503(e) allows a taxpayer to pay qualified educational or medical expenses for another person without those payments being counted against the lifetime exclusion amount ($11.2 million for individuals; $22.4 million for married couples). There are ART related expenses that qualify for inclusion under the IRS Code.

[27] 930 A.2D 1180 (N.H. 2007)
[28] 270 S.W.3d 849 (Ark. 2008)
[29] 825 N.W.2d 566 (Mich.2012)

4. MULTI-PARENT FAMILIES

Multi-parent families include the following:

- Multiple adults involved in a consensual intimate relationship with each other, and who are raising children;
- Married same-sex lesbian couples with one spouse giving birth, her spouse claiming parentage and the biological father retaining parental rights;
- Platonic partnering where two or more adults, who are not in a romantic relationship come together as a family;
- Friends opting to co-parent with the child's parents

Mention the topic of polyamory families make most people cringe usually because they do not understand the concept.

"Polyamory" involves intimate relationships with more than one adult and with the consent of all the partner. It is synonymous with "non-monogamy." And, it is more prevalent than commonly thought.

Polyamorous families have legal concerns that are similar to multi-parent families, such as a same-sex couple co-parenting with a sperm or egg donor who retains his or her parental rights.

Third parent adoptions are available in California, Oregon, Washington, Massachusetts, and Alaska. Delaware, California, and the District of Columbia have statutory provisions that allow for third parents.

A. Shared Custody Agreement

The Ohio Supreme Court stated in *In re Bonfield*, that an adult involved in an unmarried arrangement cannot claim the term "parent" when describing the relationship with a child. That leaves a Shared Custody Agreement in which the legally recognized parent or parents can agree to accept the non-legally recognized person as a "parent" to the child.

This type of agreement requires all involved parties to be represented by counsel. The agreement should include specifics about the adults hopes, intentions and concerns; address financial contributions, caretaking responsibilities, decision-making processes, including how to resolve disagreements. Sections involving what the adults intend to do if the relationship terminates and how the children will be provided for and by whom.

The agreement must clarify individual and joint responsibilities and obligations of the adults involved. That includes finances, property (real and personal) ownership, estate planning, alimony, support, and advance care directives. Financial issues can be particularly tricky if one or more adult partner intends to remain under or unemployed to care for the children. Further,

the agreement must address the situation if any of the adults are married to each other or marry in the future, and how that will affect future custody, visitation and support provisions.

This is a rapidly evolving area of law. Ohio is not a state that is addressing these issues in any meaningful way. That does not mean, however, that multi-parent and polyamorous families do not exist in Ohio. It only means the legal issues these families face are being dealt with in an ad hoc manner rather than under carefully drafted legislation that reflects the changing face of the family.

5. EMPLOYMENT

Twenty-one states[30] and Guam, Puerto Rico, and the District of Columbia include sexual orientation and gender identity in state non-discrimination statutes. Twenty-nine states, including Ohio,[31] provide no protection from discrimination based on sexual orientation or gender identity.

Michigan and Pennsylvania are subject to executive orders, court rulings or binding decisions from state civil rights commissions prohibiting discrimination based on sexual orientation and gender identity. Indiana and Wisconsin prohibit discrimination based on sexual orientation only and do not address gender identity.

The current status of federal protection from discrimination based on gender identity is in flux. In 2012, the Equal Employment Opportunity Commission (EEOC) extended Title VII's prohibition on sex discrimination to include transgender and gender non-conforming persons.

In three separate decisions, the 6th Circuit Court of Appeals decided that transgender persons are protected from discrimination.[32] The first two cases involved public employees; the latest case, *Harris Funeral Home v. EEOC*, deals with a private employer. The *Harris* case also raises the question of whether an employer's religious beliefs allows them to discriminate in employment. The court based their decision, in part, on the U.S. Supreme Court decision in *Price-Waterhouse v. Hopkins*[33] that bans discrimination based on sex-stereotyping.

While various other federal circuits[34] have weighed in on the question of whether Title VII extends protection based on sexual orientation and gender identity, the definitive statement

[30] California, Colorado, Connecticut, Delaware, Hawaii, Illinois, Iowa, Maine, Maryland, Massachusetts, Minnesota, Nevada, New Hampshire, New Mexico, New Jersey, New York, Oregon, Rhode Island, Utah, Vermont, and Washington

[31] By Executive Order, Governor Mike DeWine extended protection on the basis of sexual orientation and gender identity. State Senator Nikki Antonio again introduced her bill, The Ohio Fairness Act.

[32] *Smith v. City of* Salem, 378 F.3d 566 (6th Cir. 2004); Barnes *v. City of Cincinnati*, 401 F.3d 729 (6th Cir. 2005); *R.G. & G.R. Harris Funeral Homes Inc. v. Equal Employment Opportunity Commission, 884 F.3d 560* (6th Cir. 2018), petition for certiorari filed July 20, 2018, pending with SCOTUS

[33] 490 U.S. 228 (1989)

[34] *Christiansen v. Omnicom Group, Inc.*, 167 F.Supp.3d 598 (S.D.N.Y. 2016); *Hively v. Ivy Tech Community College of Indiana*, 853 F.3d 339 (2017);

has yet to be given. *Harris* is pending in the U.S. Supreme Court but it's can has been repeatedly kicked down the SCOTUS conference road, the most recent being March 1, 2019.

Over the past several years, the EEOC has interpreted Title Vii to cover discrimination based on sexual orientation and gender identity. EEOC rulings, however, are not binding on the courts.

Regardless of the advances in the courts, a number of state legislatures continue to consider legislation that would repeal local anti-discrimination laws that include sexual orientation and gender identity and exclude those categories from statewide anti-discrimination laws.

Until the U.S. Supreme Court weighs in on the matter, or Congress acts to prohibit discrimination based on sexual orientation and gender identity, nationwide protection will remain elusive.

6. ESTATE PLANNING

LGBTQ clients are best served by having a lawyer assist in preparing a comprehensive estate plan because of the unique issues that arise with same-sex couples and LGBT individuals.

Estate planning for LGBT clients involves more than the traditional documents. These clients need life-planning documents as well. They may be considering starting a family and need to know the legal issues that will arise in that respect.

The drafting process requires a creative approach to addressing changing legal issues. An attorney who is familiar with LGBT legal issues can explain the benefits of a complete estate plan to the client.

A New York Surrogate Court case[35] presents a grim reminder of why having a professional prepare an estate plan is often in a client's best interest. Ronald Myers signed a homemade will in 1981. He did not consult a lawyer. He left the bulk of his estate to his longtime partner, Dr. Robert Ephraim. Myers left "all monies" to his mother. Myers died in 2006 and Ephraim paid over $40,000 to the mother. He transferred the stock portfolio to himself, even though the will only mentioned "all Stocks of I.B.M." because that was the only stock Myers owned when he made the will. The mother then died intestate and her heirs claimed that Ephraim was only entitled to the I.B.M. stock. When Ephraim died--with the matter still pending--his brother took over as the fiduciary. It is now almost nine years after Myers died and the matter continues to be contested.

The Surrogate issued a decision that preferred the mother to the surviving partner in distributing the disputed assets. She relied on old family priority rules and old caselaw. The

[35] *In the Matter of the Accounting of Martin Ephraim, as Fiduciary of the Deceased Executor for the Estate of Ronald D. Myers*, No. 2006/4109 (N.Y. Surrogate's Court, N.Y. County)

Surrogate refused to consider Ephraim as “family” and employed the presumption that there is a presumption in favor of the testator’s relatives as opposed to “unrelated persons.”

Had Myers consulted with a lawyer a more detailed and comprehensive estate plan would have been developed. An experienced lawyer would have clearly designated Ephraim as “family” and the primary beneficiary. Doing so would have prevented this protracted litigation.

A. GENERAL CONSIDERATIONS

A. Intestate Succession

The inheritance laws in marriage equality states treat married lesbian and gay couples the same as heterosexual married couples. Some states that continue to recognize civil unions and domestic partnerships also cover same-sex couples under state statutes.

Lesbian and gay couples, regardless of how they designate their relationships (married, civil union, domestic partnership) are considered legal strangers under intestate succession laws. There is no statutory right to inherit and the intestate succession statutes will prevent the surviving spouse/partner from receiving any probate assets.

An unfortunate example of dying without a will occurred in Florida. A gay couple was in a committed relationship for years. The couple made the decision to hold the house, property, bank accounts and other assets in the name of only one partner. That man became ill and died. He had no will.

On the day of the funeral, the decedent’s family encouraged the surviving partner to take a walk on the beach. While he was gone, the family changed the locks, emptied the contents of the house and took the dog to an animal shelter in another county.

When the surviving partner returned he was told the house was not his, he could no longer live there and everything in it belonged to the decedent’s family--including his own clothing. The family also refused to tell him where they had taken his dog. He could not prove ownership of the dog.

With the help of a lawyer, the man obtained a court order to return to the house. It took six months. He never found his dog.

This situation was avoidable if the couple had executed wills or other documents providing for the disposition of the estate. The cost of the estate plan would have been far less than the attorney fees paid to regain the property.

B. Joint Representation

Joint representation in estate planning is common because most couples, straight and gay, ask

the attorney to provide services to both. Rarely does a couple want to hire separate counsel to prepare their estate documents.

But, joint representation remains an ongoing matter of concern for lawyers representing lesbian and gay couples. In most cases, the clients will not seek separate counsel.

The key is to have an explicit Joint Representation letter. Include language about confidentiality, conflict of interest, waiver of those conflicts and review it with the clients. Make it clear that you will withdraw from representing them if a conflict arises.

The letter can also address future representation if the couple ends their relationship. Decide whether written consent is required before either can retain your services in the future or that neither can retain you in the future. Couples end their relationship and often return for future services.

Finding lawyers experienced in LGBT issues can be difficult. Clients want to stay with lawyers they like. Discussing this with clients early on can make things easier later.

Make it clear that no secrets will be kept from the other partner. Have both partners and the lawyer sign the letter and give copies of the letter to each one. Include a provision that specifies both clients are waiving any conflicts that may exist by having one lawyer represent both in the process.

C. Relationship Clauses

Clients that identify "domestic partnerships" or "civil unions," but are not married, should include that language in their estate documents. The purpose is to establish that the couple is in a committed relationship and not "just friends."

a. Optional Relationship Clause:

I entered into a Civil Union in August 2002 in Middlebury, Vermont with John F. Randolph. We have been in a committed relationship for ____ years.

*I am aware that **[name of state]** may not recognize our civil union. However, we are in a long-term committed relationship and it is the basis for my decisions in this document. I will refer to John as my "partner" and when I do so, I mean only him. He is the primary beneficiary of my will. I intend that he be treated as my family under state and federal law.*

b. Optional Relationship Clause:

This suggested language is intended to provide ideas on how to address the clients' committed relationship.

DOMESTIC PARTNER: Susanne E. Cutler is my closest friend and Domestic Partner and the primary beneficiary in my will. I share my life with her. [We jointly own our home]. We may elect to marry and if we take that step I wish this estate plan to remain in full force and effect. I enter into this will [and estate plan] in contemplation of that later marriage. I make this will [and trust and estate plan] in contemplation of such a future circumstance and my will shall remain effective under ***[name of state]*** *law.*

D. Relationship Termination Clause

Consider including language that addresses the situation where the unmarried couple is no longer together. Some people ignore their estate plans for years and updating a will is often not high on a client's list of priorities. When working with LGBTQ clients, it will be helpful to address what happens should the couple end their relationship but take no formal action to terminate any legal connection.

Termination of Relationship: If my partner, _____, and I terminate our relationship, I intend that any bequest to him/her in this will be declared void. Any bequest to him/her shall fail and such bequest shall go to my alternate beneficiary.

E. Statement of intent

Biological family members left out of a will may feel a need to contest such exclusion. Clients can include written statements explaining their reasoning for naming her partner and not naming her biological family may alleviate a potential contest. Including a specific clause is evidence of the testator's intent and can be useful when refuting a will contest.

Another reason for including an express provision involves the possibility of a future action against the testator's attorney. Some states permit unhappy heirs to sue the testator's attorney. Preempting this possibility by including specific language identifying the heirs, or class of heirs, who are not provided for in the will is helpful to the client.

This clause can include language such as:

1.01 Debra is my life partner. We have been together since September 26, 1990 and are in a committed and loving relationship. In 2002, we entered into a civil union in Middlebury, Vermont. We accumulated our assets during our relationship. We may not have receipts for everything, but we own everything together. No one else contributed to our assets.

1.02 I leave my estate to my life partner, Debra. I do not do this out of any disrespect for or lack of love or affection for my family. Rather I do so because she is the person I love and with whom I have spent my life. We shared our lives together. I expressly intend to benefit her. She has been a source of great love, comfort and companionship to me. I believe my family is adequately cared for and does not need any support from me. I ask my family recognize the commitment that Debra and I share and to accept wishes expressed in this will.

F. Spouse - Past and Present

Lesbian and gay couples are still learning the nuances of what marriage means. This includes understanding that marriages entered into as a "political statement" are, in fact, valid.

Ask clients about earlier marriages. Find out if they dissolved those marriages either through divorce or dissolution. If no action was taken you will be faced with the task of explaining how that earlier marriage affects the couple's current plans.

There are many lesbian and gay clients with spouses or partners in the shadows. Too many lesbians and gay men got married as a "political statement" and do not realize that the marriage is legally valid even though it is not recognized by their state of domicile.

There are also clients who may have entered into marriages, civil unions and domestic partnerships throughout the country to the same or different people. There is no consensus on whether a divorce in one state dissolves these other legally binding relationships. Some marriage equality states that had civil unions or domestic partnerships provided for an automatic upgrade to marriage. Washington State is one of them. The state notified everyone who had a domestic partnership but there is no guarantee the people involved received the notice. Couples that ended their relationship without obtaining a formal termination may continue to be legally bound together and not know it.

This issue is not a factor in most hetereosexual estate planning scenarios. The same is not true for lawyers working with same-sex couples. Getting a divorce may not be a simple process because most marriage equality states have residency requirements that must be met before a court can grant a divorce.

G. Children

When lesbian or gay couples have children, it is important to define the relationship the non-biological parent has with the children in the will or trust. In states that do not allow second parent or joint adoptions or where the couple decides not to proceed with an adoption, only one of the adults may be considered the child's legal parent.

Most states do not allow second parent adoption or joint adoptions. Until recently, Florida law explicitly banned adoptions by lesbians and gay men. Now, second parent adoptions by same-sex couples are the norm.

Including language in the estate planning documents that both testators are raising the children together will reflect the testator's intent concerning the children.

Have the biological or legal parent's will state that he acknowledges his partner's parental status and consents to the child's adoption by his partner if that is possible can be used to establish intent.

The will needs to reference any joint custody agreement the parties signed. While leaving this out should not be fatal to establishing the surviving partner's status with the child, it would help to include a reference to the Agreement.

This may seem like overkill, but the law is changing in this area. Some judges are reluctant to acknowledge the rights of a non-recognized parent. When there is the possibility of a challenge, it is best to make the effort to protect the child and the parent-child relationship.

If one party is pregnant when the wills are drafted, reference the prospective child in the will. Remind the clients they will need to update the will after the child's birth. It is in everyone's interest to have these documents as current and complete as possible.

Identifying current and future children requires creativity in the drafting stage. If there was an adoption, be sure to note that fact in the will and provide the case number. Attaching a copy of the adoption order or referencing it in the will is a good practice.

The will's definition clause should also refer to after born and adopted children. Some people do not want to include adopted children. This applies to clients who are the grandparents or other extended family members as well as the parents.

Same-sex couples use assisted reproductive technology to create families and they will store genetic materials with clinics and sign agreements with those clinics. These genetic materials must be addressed in the estate plan documents.

Specifically, talk about who owns the materials. Check the contract the clients sign because some of them allow the clinic to decide what happens if the client dies. Courts around the country are enforcing those agreements. Determine if either or both parties intend to become parents after they die. If they do, have them sign a consent form indicating that fact.

H. Guardians for Minor Children

Generally, when a parent dies, the surviving biological parent has superior rights to all others. In cases involving lesbian or gay parents, there is often only one parent legally recognized by the state. For this reason, appointing a guardian for a child is important. The other partner may also have a strong parent-child relationship but state law does not recognize it. Without some type of court order, the non-biological surviving partner has no legal rights. A **guardian clause** in a will is particularly important for lesbian and gay couples raising minor children.

The guardian clause needs to include:

- Primary guardian nominee
- Alternate nominee
- Bridge guardian nominee

Second parent and joint adoptions are not permitted in all states. States cannot refuse to recognize out-of-state adoptions. The Full Faith and Credit clause of the U.S. Constitution applies in those situations. State laws that sought to prevent recognition have been successfully challenged in federal court.[36]

The court will consider the child's best interests in making its placement decision. Without guidance or in spite of guidance, the child may be placed with a member of the decedent's biological family. This may include someone the child does not know.

Nominating a guardian for the child in a will presents a rebuttable presumption of the deceased parent's preference. This may enhance the surviving partner's claim to be named the child's guardian.

Include the parent's reasons for selecting the nominee. Incorporate language explaining why the parent decided to not name family members.

The guardian clause can include language that reflects the testator's consent for the surviving partner/spouse to adopt the children. This rebuts an argument that the deceased parent would oppose such an adoption.

SAMPLE LANGUAGE:

"I name my partner, Elizabeth R. Anderson, as guardian of our children, Robert and Emily. I appoint her guardian of their person and estate.

We have raised these children together from their birth. I consider her their parent. When I executed this will a second parent adoption was unavailable to us or we would have pursued that avenue. I waived my constitutional rights to the full care, custody and control of our children in favor of Elizabeth during my lifetime. I want her to continue to raise our children. I consent to Elizabeth adopting Robert and Emily. I ask that any probate court recognize this declaration as my consent to the adoption. It is in our children's best interest that they continue to be raised by their other parent, Elizabeth R. Anderson.

We executed a Shared Custody Agreement on December 10, 2003 after Robert was born. We amended the Agreement after Emily's birth. That Agreement was adopted by the Cuyahoga County Juvenile Court on August 7, 2009."

A trust is an excellent alternative in situations where there is a fear the non-biological/adoptive parent will not be appointed as guardian. Placing the children's inheritance into a trust will allow the surviving parent to continue having contact with the children. Think of this as the "Auntie Mame" clause--Mame got her nephew but the bank controlled the money and maintained access to the kid.

[36] *Finstuen v. Edmondson*, 496 F.3d 1139 (10th Cir. 2007)

Ensuring that the surviving partner remains a part of the child's life is in the child's best interests. Children need continuity and that gives them security.

An additional clause to consider names a "bridge guardian." This person takes the children until the court names a guardian. For lesbian and gay couples, this clause could prevent the children being removed from their home when their "legal" parent dies and placed in foster care or with relatives they do not know.

Naming a bridge guardian reflects the testator's intent about who will have custody of the child before a permanent guardian is named. It protects the child and provides additional evidence of the surviving partner's relationship with the child. Losing a parent is traumatic enough for a child. A child's best interests are not served by placing her in an unsettled home situation. A bridge guardian is one tool to accomplish that purpose.

I. Prevalidation of Will/Trust

Ohio[37], Alaska[38], Arkansas, Nevada and North Dakota allow you to prevalidate a will. Delaware[39] allows prevalidation of trusts. Alaska permits non-residents to take advantage of the law. However, that may create problems in the testator's home state because a probate court may not recognize the actions taken in another state as controlling.

This proceeding, allows the testator, during his lifetime, to ask the court to determine the validity of his will. All parties entitled to notice under the intestate succession statute are notified of the hearing and permitted an opportunity to appear and contest the will. A finding by the court that the will is valid precludes any contest after the testator dies. If the testator changes his will, another validation hearing is required.

This process gives the testator peace of mind if she fears a will contest because the family must contest the will with the testator present. A validated will cannot be contested after the testator dies. When the client fears a will challenge, this process provides excellent protection.

If the court finds that there is evidence of duress, fraud, incompetence or undue influence, the will presented for validation is declared invalid. The testator can then take the necessary steps to draft a new will. The testator can then return to court to seek validation of the new will. Challenging a will under these circumstances is difficult because it is an affirmative action by the testator. Generally, that will preclude a finding of fraud, duress, incompetence or undue influence.

It may be possible to seek prevalidation even if your state does not have a specific statute. A petition to prevalidate a will is a pre-emptive move on the part of the testator. Will contests

[37] Ohio Rev. Code § 2107.081-085
[38] A.S. 13.16
[39] Del. Code tit. 12

take place after death and prevalidation is a request to move up the contest to a time when the testator can provide evidence of his state of mind. This is a creative move to assist clients and alleviate their concerns.

J. Designation of Heir

Ohio is the only state that has a Designation of Heir statute[40]. This statute allows a person to designate someone not named in the intestate succession statute as an heir-at-law. The named person falls into the "children" category. After one year, the testator may remove the designated heir if she chooses. It is a valuable planning tool for lesbian and gay clients who want greater protection for their spouse/partner.

B. Not-So-General Estate Planning Issues

A somewhat sensitive issue arises when asking clients who do not identify as LGBTQ how they want to address whether they want any LGBTQ heirs to inherit. For the most part, many lawyers and clients neglect to address these issues.

The increased use of assisted reproduction and the evolution of family relationships now make it possible for more than two individuals to be deemed a child's legal parents with neither one being biologically or genetically related to the child. These situations sometimes also arise in the context of opposite couples.

Ask if a client has any of designated heirs using ART procedures to start a family. The plan should address stored genetic material, including sperm, eggs and embryos. Discussing whether the client intends to include those descendants and their spouses or partners and any future children is essential. This addresses children that exist now as well as posthumous children. The estate documents must explicitly state if the client intends to exclude anyone.

Clients often focus on their own circumstances rather than considering that the provisions they choose will impact subsequent generations. Drafters today must adapt documents for clients' unique circumstances and anticipate a wide variety of contingencies. The documents are often being drafted not only for the family relationships currently known and contemplated by the settlor, but also for many future generations of the settlor's family. Therefore, it is essential to anticipate further shifts, plan ahead, and provide flexibility in order to ensure that the donor's wishes are effectively carried out.

Definitions used in the will and trust are helpful in deciding whether posthumous or non-genetically related descendants are included in a beneficiary clause. The standard language used in a definition clause may be inadequate to address the science now and in the future. It is better for the testator to decide how she wants to deal with posthumous and non-genetically

[40] Ohio Rev. Code § 2105.15

related children or descendants rather than deferring to the state's intestacy statute and a judge's opinion.

The estate plan document needs to address when the class of children and heirs closes. Without such guidance, a decision may be made to keep an estate open indefinitely and that has an adverse effect on the existing heirs.

A lawyer's detailed notes about a client's intentions are an important component of the file. Those notes, along with the provisions in a document will help in resolving any confusion. It is impossible to prepare for all contingencies, but it is incumbent on the client and the lawyer to discuss the matter as completely as possible.

Some states are considering "personhood" statutes that could make a stored fertilized embryo a "person" who has legal rights and is subject to state law. State laws declaring that life and legal rights begin at conception could encumber the disposition of such stored embryos.

Adding questions to the initial Client Questionnaire about ART will trigger what can be an uncomfortable discussion. Part of the discussion involves what the clients, especially the donor; want to do with the stored materials after death. Posthumous children, those born after the donor's death, are a reality and are often not considered when drafting an estate plan.

1. **ART & Estate Planning**

The ongoing developments in Assisted Reproductive Technology procedures present challenges to courts when interpreting trusts, wills and other estate plan documents decades after they were drafted.

There are issues of standing, intestate inheritances, definitions of "child," "descendant," "beneficiary," and "heir." Pre-existing trust provisions must be examined to determine whether the trustor intended to include posthumous children born in the beneficiary class when the trust has already been paying out proceeds. Are those children entitled to receive retroactive as well as future payments? What about children that are not genetically related to the trustor?

This is another aspect of estate planning - dealing with a client who already has an extensive estate plan in place. Review those documents to ensure they reflect recent and ongoing developments in estate and family planning.

Clients who participate in ART need to remember that the stored genetic material and the embryos are part of their estate and is considered property. The testators may bequeath it to whomever they please, unless there is an existing contract that addresses the issues.

It is important to properly document the client's wishes concerning the disposition of that stored material. Without such documentation, a court will impose its opinion and that may impact the estate in ways the testator did not intend or envision.

Since clinic forms may include provisions that addresses the disposition question at death or divorce, there may be conflicts between the signed agreement and the testator's intent. In those situations, any conflict may be resolved in favor of the contract language. Also consider that family members may be subject to the post-death disposition provisions of the clinic agreement. Reading the clinic donor contract or storage contract is important.

2. Who is a descendant, an heir or issue?

Some trusts were created long before ART was anything more than a plot point in a science fiction movie. This raises new questions: Do posthumous children, or their parent, have standing to bring legal action for a share in the trust? Do the other beneficiaries have a cause of action to object to including those children? To whom does the fiduciary owe a duty?

In 2007, the New York County Surrogacy Court considered this matter in *Matter of Martin B.*, NYLG 8/6/2007 (NY Co. Surr. Ct. 2007). The grantor created several trusts in 1969 to benefit his children and grandchildren. The grantor's son died in 2001 but left cryopreserved sperm. His widow used the sperm and delivered two children in 2004 and 2006. She sought to have her sons included as trust beneficiaries. The trustees filed an action in Surrogacy Court requesting a determination of the sons' qualifications as descendants or issue. The court decided the children were descendants of the grantor and should be included because the Grantor would have included them had he considered that ART would be possible.

A second New York case involved a trust created in 1959. The beneficiaries were the grantor's "issue" or "descendants" and their spouses. The trust provisions specifically excluded anyone who was adopted. The grantor's daughter and her husband engaged a gestational surrogate using a donated egg and the husband's sperm. The pregnancy resulted in the birth of twins in California. A California court declared the daughter and her husband the twins' legal parents. The trustees petitioned the court for an opinion concerning whether the twins were included since they were not genetically related to the grantor. The New York court decided the children were included because they were not adopted. Even though New York law declares surrogacy agreements to violate public policy, there is no prohibition against recognizing the California parentage decision. See, *In re Doe*, 793 N.Y.S.2d 878 (Sur. Ct. 2005).

Virginia, for example, does not recognize any child born more than 10 months after the parent's death. Georgia requires the child to be born within 10 months of death and survive at least 120 hours after birth. New York prohibits any posthumous child from claim a share of the estate through its omitted child statute (N.Y. Estate Powers & Trusts L. Sec. 5-3.2(b)).

3. Family members providing for heirs

There are testators who may disapprove or reject a LGBTQ family member and exclude such members from inheriting. If a client wishes to do so, generic language will be insufficient. Specific language addressing a specific scenario will be necessary. The definition clause in the

estate planning documents will also be essential to establish the testator or grantor's intentions concerning the LGBTQ family member.

Restricting an heir's right to marry may be problematic. Stating that only those who marry a person of the opposite gender may violate public policy. But, this particular scenario has not yet resulted in a published court decision.

Still, it behooves lawyers to carefully draft any documents to accurately reflect the client's wishes. This includes the intention to include an heir even if that person identifies as transgender and transitions after the document is drafted.

4. Transgender Clients, Estate Planning, and Inheritance

Questions continue to arise regarding the inheritance rights of transgender heirs. Unfortunately, there have been few cases addressing the issues and, therefore, few answers.

a. Estate Planning

Transgender clients need to be encouraged to develop a complete and comprehensive estate plan. Testators have the right to express their intent concerning the disposition of their estate through estate plan documents. These documents include wills and trusts as well as advance directives (living will & healthcare power of attorney). Having a well-written General Durable Power of Attorney is also critical.

An inter vivos trust (aka living trust) is another tool that allows the settlor to create a plan for the distribution of her estate without court supervision. There are some limits involved with a trust but it is a topic that needs to be addressed. People with a limited amount of assets may find that a trust is not financially feasible. The costs of administering the trust may outweigh its benefits.

However, using beneficiary designations, joint-titling of assets (real estate, bank accounts, etc.) allows the client to pass along an estate without the need for probate administration.

Unfortunately, clients are at the mercy of state law as wills, trusts and estates law is state-specific. What may be allowed in California may be unavailable in South Carolina. Working with an experienced estate planning attorney is essential.

Name changes, gender marker changes, identification documents, birth certificates, are all potential roadblocks for transgender individuals when preparing an estate plan.

Postmortem instructions provide the client an opportunity to provide written guidance to specified people on a number of topics: organ donation, burial v cremation, information for the grave/crypt marker and the type of services to be held. Some states, like Ohio, allow a person to name someone to plan and carry out the funeral. Many states limit that right to the

decedent's immediate family. For transgender clients, who may be estranged from their family, having the ability to name the person or persons to make and carry out the funeral can be an enormous relief. Likewise, telling a transgender client that their family will make all the decisions can be distressful.

Washington state allows a person to write postmortem instructions[41] and that document is sufficient to establish the decedent's wishes. The document must be signed and witnessed. Even without a specific state law, having such a document may help avoid a problem later.

This is also true when discussing end-of-life issues with clients. While many people make their wishes known, most do not. Failure to consider various end-of-life scenarios leaves a client in a vulnerable position.

Avoiding or withstanding challenges to the testator's testamentary capacity or the overall validity of the estate plan are important factors to consider. And, while drafting considerations in general are important, proper drafting for transgender clients is even more imperative because failure to properly draft a document or reflect the testator's intent may result in expensive challenges and the possibility the estate plan will be declared invalid.

Including "no-contest" clauses in wills and trusts can cause recalcitrant relatives to reconsider a contest. Likewise, checking to see if the state allows the pre-validation of a will or trust allows the client to guarantee the will/trust will not be challenged post-mortem.

b. Prenuptial or Preregistration Acknowledgement of Transgender Status

Transgender clients should consider signing a prenuptial agreement before getting married. Some states permit post-nuptial agreements as well. Another possibility is to have the client execute an Acknowledgement of Transgender Status that can be signed by the client and his/her spouse or partner. This allows the non-transgender party to acknowledge that he/she is aware of the partner/spouse's status as transgender.

Jointly titling assets (real estate, bank accounts, etc.) is another way to protect assets and avoid a contest. Such assets pass to the surviving owner by operation of law. Likewise, naming beneficiaries on all accounts that allow them means those assets will be paid out directly to the beneficiary and the probate court has no jurisdiction over the assets.

c. Dealing with gender-specific language regarding beneficiaries

Estate planning for individual transgender clients is not the only worry. A transgender client may be an heir or beneficiary under a will or trust. State law may affect a person's right to inherit following transition. This is state-specific and each state will have a different take on the matter. Gender may or may not matter but it is important to know in advance if it does.

[41] Wash. Rev. Code Ann. §68.50.160(1)

Consider this provision: “I leave 75% of my estate to my daughters and 25% to my son.” Gender may affect the disposition if one of the testator’s daughters transitions. The will provides for multiple daughters but only one son. Unfortunately, the transgender heir has no power to force the testator-parent to clarify or provide more direction. The outcome may be determined by a judge and there is little guidance available to assist in that decision.

Lawyers can assist testators in providing for the possibility of one heir/beneficiary transitioning and include language in the documents addressing that situation. Discussing the issue with clients may be difficult, especially if the client has not indication such a possibility exists. However, expanding the definition section of the will or trust by including assisted reproductive technology, LGBTQ+ heirs, post-mortem/afterborn children, adopted children, children not biologically or genetically related to the testator definitions will allow a more comprehensive clause.

Using gender-neutral language, such as “my child” or “my children” will also help establish the testator’s intent and clarify the matter.

On the other hand, testators using gender specific terms or references may be construed to be an expression of intent or establishing a pre-condition to an inheritance or benefit. When there is ambiguity in a will or trust, the remedies are interpretation and construction and that is within the purview of a judge.

d. Transition/Name Change After the Will is Signed

One unique proposition is to treat an heir/beneficiary who transitioned after the will is signed as an “afterborn child.” It is a radical way to approach the matter and there are no court decisions or indications of success in using this approach. But, it is another way to look at the issue.

Generally, misspellings, incomplete or incorrect names in a will or trust are not fatal. The testator’s/settlor’s intent, and whether the heir/beneficiary be properly identified, are the determinative factors. However, other heirs/beneficiaries may object and contend that “Jane” no longer exists because “Jane” transitioned to “John” and that means the gift fails.

e. Conditions on Inheritances

Testators can include any condition they want. Some conditions may be void as being against public policy, illegal, repugnant to interest, impossible to perform or uncertain. But, that does not mean the testator cannot include them in the document, thereby expressing intent. Judges determine whether the condition is against public policy or is void for other reasons. The parties can make their arguments but the judge makes the decision.

Testators may condition inheritance or benefits on religious provisions. The testator may be an observant Jew whose estate plan gives priority to male heirs over female heirs. A transgender

woman may be denied an inheritance she would have received pre-transition, and that denial may stand up against a contest. Likewise, an observant Muslim may invoke Sharia law principles giving greater shares to males than females. There are cases involving will contests where the testator conditioned inheritances on religious principles and those conditions were enforced by the courts.[42]

Inheritance premised on religious conditions may present particular issues for LGBTQ+ clients. There may be no way around them.

Testators may also include clauses restricting inheritance to children/descendants to those who marry a "member of the opposite sex," or "who are heterosexual," or "who are in a traditional marriage," or "who identify as the gender of their birth for all purposes." All of those clauses may be contested but whether they are void as against public policy is unclear. Wills and trusts containing those clauses may be lurking in the shadows and it may be years before they surface.

Challenges mounted by other heirs/beneficiaries will remain an ongoing concern.

5. Drafting Considerations

Careful drafting of estate plan documents can help avoid future problems. The testator or grantor's intent, and the expression of that intent, can be included in any will or trust. Generic provisions serve no purpose other than to create confusion. Religious and moral objections to a LGBTQ heir are more likely to be upheld than not. Specificity is the best way to establish intent.

The modern family structure does not fit neatly into most intestate and inheritance rules and statutes. The imprecise nature of language can create ambiguity and that lack of clarity will allow a court to determine the meaning.

Questions: How do today's definitions address changes in tomorrow's statutory changes? What is the best way to reflect the testator or trustor's intent concerning descendants and heirs? What do the words used mean?

Drafting specific provisions to deal with potential posthumously conceived children can be helpful even if there is an applicable state law. The client can modify any statutory default language that does not conform to his wishes. Creative drafting that allows clients to realize their goals concerning stored genetic material will help avoid expensive litigation.

Consider the long-term effect of any language used in the estate plan documents. Identifiable heirs and descendants may not be using ART but that does not mean future generations will do the same. Consider further advances in reproductive technology that cannot be ascertained

[42] *In re Estate of Feinberg*, 2014 IL App (1st) 112219, 6 N.E.3d 310, appeal denied, 8 N.E.3d 1048 (Ill. 2014)

now. Drafting language that addresses those future developments allows the client to about how to provide for those future, unborn descendants.

The Restatement (Third) of the Law of Property concerning wills and trusts provides:

> "Unless the language or circumstances indicate the transferor had a different intention, a child of assisted reproduction is treated for class gift purposes as a child of a person who consented to function as a parent to the child and who functioned in that capacity or was prevented from doing so by an event such as death or incapacity.
>
> Unless the language or circumstances indicate that a transferor had a different intention, a class gift that has not yet closed physiologically closes to future entrants in the distribution dates if a beneficiary of the class gift is then entitled to distribution."

The Restatement disregards marital status and does not require written consent or a specification of post-mortem conception. Consent is dispensed with altogether in cases of death or disability. It also postpones closing the class to future entrants until the distribution date.

But, the Restatement does not resolve the issue of whether a beneficiary is sufficiently "in being" to be entitled to receive a share. The Restatement only provides that a child is "in being" if it is born within a "reasonable time" after the decedent's death. Should the dispositive document define "reasonable time?"

Wills can be easier to change than trusts but trusts are written to provide for future generations and it may be prudent to take greater care when drafting the pertinent documents because ART issues have the potential to disrupt even the most carefully drawn estate plan's dispositive sections.

Public policy is often cited to preserve or prevent certain outcomes but public policy changes over time. What is generally accepted public policy now may be much different at the time a clause is reviewed and analyzed.

Posthumous children, postmortem extraction of genetic material and cryopreserved genetic material create opportunities for subsequent heirs present issues just as illegitimacy and adopted children did in the 20th century.

State legislatures appear to be ignoring the legal issues raised by these scientific developments, most likely because legislators do not understand the science or medicine or because of the potential for religious objections. The courts are trying to resolve these difficult matters through creative interpretations of existing statutes.

As a practical matter, lawyers draft for various contingency scenarios in estate plans including unforeseen and possible bizarre outcomes. Drafting documents that include provisions for

future born and possible genetically unrelated heirs and descendants, defining terms with this in mind and discussing possible outcomes with clients is becoming an essential part of the process.

The language used in drafting these provisions must be as clear and unambiguous as possible. And failure to fully consider these matters leaves any decision to the law of intestacy. It also leaves open the possibility of a conflict with future laws and ambiguity about whether a future statute would control.

The provisions in wills and trusts that address posthumous children, postmortem extraction and ART in general can range from simple to complex. Some clients will not want to include these potential heirs. In those cases, the client's documents must specifically exclude them from the beneficiary class.

A client may want to provide for grandchildren or more remote descendants but not include those born via ART techniques. Silence in a definition provision may be deemed intent to include such descendants. Remember, however, that a testator's words and actions during life may also be used to assist a court in defining intent.

The testator and grantor have broad authority to define descendants and the general rules of construction defer to consideration of a testator's intention when interpreting any given clause.

Discussing the matter with clients affords them the opportunity to clarify their intent. Documenting the file concerning such a discussion and the client's response will be helpful should the lawyer be faced with a need to defend her actions in the matter. Estate planning lawyers may also consider adopting a default provision and inserting it in every estate plan as a matter of course. The terms of such a clause may include a time limit either in terms of the number of birth attempts or an actual live birth.

On a basic level, the documents need to address parentage issues including when a parent-child relationship exists between a person and child. Clients can limit descendants to those created within the context of a traditional marriage or provide an expanded class that includes children born to an unmarried individual, a couple in an unmarried relationship, a nontraditional marriages including those between lesbian and gay couples or a legally recognized relationship such as a civil union or registered domestic partnership.

The estate plan documents allow clients to override existing law to suit their personal or family beliefs. Customizing the documents to address unique situations such as same-sex married couples living in a non-recognition state that does not permit second parent adoption provides an opportunity for creative and robust estate planning.

A testator may decide not to include children born to a same-sex couple or limit inclusion to only children who are genetically related to a direct descendant. That would preclude children born via ART techniques that include donor genetic material and a gestational surrogate. Such

an exclusion is not limited to same-sex couples since heterosexual couples may find themselves in a similar situation.

The estate documents can also place time restrictions on the birth of a posthumous child in order to provide for the orderly termination of the estate. This is not as important in trusts that distribute income to beneficiaries and can accommodate descendants as they are born. Provisions that are more complicated are necessary to define the parameters of the class when distribution is to occur at a specific time and on the happening of a clearly defined event. Posthumous children may be born after the event occurs that triggers distribution and that eventuality needs to be included in the definitions.

Excluding ART children also means deleting references to anyone "conceived" after the triggering event. Language will be very important and using other terms such as "in utero," "placed in gestation" or "implanted embryos" may serve to define the medical event that occurred. In any event, careful drafting is required to meet the client's expectations and avoid a protracted court battle down the line.

6. Proposed Definition Language

Some basic criteria in defining posthumous issue may involve the donor's consent, the parents' marital or relationship status, whether there were time limits and notices to the fiduciary of a pregnancy or pending birth.

i. **Parental status of a deceased individual**

An individual will be considered the parent of a child conceived and born after the individual's death if she or he (1) dies before placement of his or her sperm, ova or a resulting embryo and (2) designates another individual who is living at the time of placement as the other intended parent of any resulting child.

ii. **Child born by posthumous conception or implantation**

For purposes of any distribution, an individual will be considered the child of his or her biological parents, even if placement of that parent's sperm, ova or a resulting embryo occurs after that parent's death, so long as the other parent is the deceased parent's surviving spouse or an individual designated by the deceased parent and the child is born alive not more tha 300 days after the date of the distribution.

iii. **Suggested provision for defining "child"**

"Child" includes those conceived by a genetic parent through assisted reproductive technology techniques. The parents of that child must be in a marriage, civil union, domestic partnership, registered domestic partnership or a similar legal relationship. The U.S. government or the state in which the

parents live must recognize the relationship. The other parent includes one who is not a genetic parent to the child. The other parent must have executed a written document acknowledging his or her intent to become a parent. That document shall not have been revoked before the pregnancy began and implantation of the embryo occurred.

"Child" shall also include those conceived by my child, grandchild or similar heir or descendant where there is no genetic connection between the child and the parents. This includes children conceived using assisted reproductive technology techniques that use donated genetic material and a gestational surrogate.

iv. "It is my intention to include the children, grandchildren and subsequent descendants of those named in this document, including those who are adopted or born via assisted reproductive technology and surrogacy."

v. **Suggested provision defining "intended parent"** [this clause can be used when the surrogate is not an intended parent and is not married to or in an intimate relationship with the intended parent.]

A child born to gestational surrogate is not considered the surrogate's child. The child born to such surrogate shall be considered the child of the intended parents. The intended parents are those who caused the surrogacy to occur.

vi. The term **"descendants"** includes those children whose parent/child status arose by virtue of one or more of the following events:

(a) natural child birth, regardless of whether woman giving birth contributed genetic material, unless woman giving birth was a gestational surrogate under a written contract;
(b) legal adoption, including second parent, joint and post-mortem adoption;
(c) court declaratory judgment of parentage including pre-birth order;
(d) parent/child status granted by state law to children born during a same-sex domestic partnership, a civil union or marriage; and
(e) birth of a child from decedent's gamete where either:
(i) the embryo is in utero not later than 36 months after the individual's death or
(ii) the child is born not later than 45 months after the individual's death.

All children or descendants deemed children or descendants of the person indicated by any of the above methods are children or descendants for the purpose of this instrument.

vii. **Child by surrogacy**

An individual will be considered to be the parent of a child if the individual or his or her spouse or domestic partner contributed a gamete or embryo and such contribution resulted in the birth of the child to an adult woman who, under the terms of a surrogacy or similar agreement agreed to bear but not parent the child, whether or not implantation of the gamete or embryo occurred before the individual's death.

viii. **Suggested provision defining "posthumous child"**

A child that was in utero at the time of my death and born alive after my death shall be included within the class of beneficiaries designated in this document. This provision refers only to a child of a person included in the definition of "child" in this document or to a person who is specifically named in this document.

- **Alternate provision #1:** A child that was not in utero at the time of my death shall not be considered my heir or descendant for any purpose.

- **Alternate provision #2:** I acknowledge any child born to any child, grandchild or descendant of mine who came into being by means of assisted reproductive technology, including surrogacy, or who is adopted and include such child as my heir and entitled to be included in any class of beneficiaries named in my [will or trust].

A more complex provision of the foregoing can include the following:

- Include specific requirements for when the child must be born. This would be similar to the requirements established by Virginia--in utero within 36 months or born within 45 months after the decedent's death.

- Include children born after the 45-month period if in utero during that time. This permits inclusion of a younger sibling born if at least one child is born during the 45-month period. The period can be extended to 90 months.

- Require compliance with specific and detailed notice requirements to extend a trust for posthumous children. This requires the eligible beneficiary to notify the trustee of an intention to become a parent using ART techniques. If notice is not given or a child is not born during the 45-month period, the trust can terminate.

7. PUBLIC BENEFITS

A. Social Security benefits

Since the *Obergefell* decision, Social Security benefits and eligibility for them has been an issue for married same-sex couples.

The Social Security Administration recognizes same-sex marriages and some nonmarital legal relationships (civil unions & domestic partnerships) when determining eligibility for Social Security and Medicare benefits.[43] The Social Security Act authorizes the agency to consider a claimant, who is in a nonmarital legal relationship (NMLR), to be a "spouse" if the state in which the worker lives would the claimant to inherit an intestate share of the worker's estate.
The SSA has not always granted benefits to married same-sex couples. Rejected claims usually occur because the claimant did not meet the 9-month marriage requirement.

In February 2019, the SSA did notify one married gay male couple that their 1971 marriage was recognized and they are eligible for spousal benefits. The couple was involved in the *Baker v. Nelson* case out of Minnesota. They obtained a marriage license and married in Minnesota in 1971 but the state refused to register the marriage. The Minnesota Supreme Court[44] ruled the state constitution did not allow same-sex marriage. The U.S. Supreme Court reviewed the decision on a mandatory appellate review (as opposed to granting certiorari) and dismissed the matter, without a hearing on the merits, "for want of a substantial federal question." That established the *Baker* decision as the precedent on which all court denials of marriage equality were based until *Obergefell*.

B. Dependent benefits

One area in which SSA benefits are not readily available involves posthumously conceived children. This situation arises when a couple has stored genetic material, one intended parent dies, and the surviving intended parent proceeds with a pregnancy. This can happen years after the death.

The applicable case is *Astrue v. Capato*[45] decided by the U.S. Supreme Court in 2012. The decedent's surviving spouse gave birth to two children a few years after the death and applied for SSA surviving dependent benefits. The SSA denied the claim and the SCOTUS upheld the denial. The court decided if the after-born children would not be eligible to inherit under a state's intestate succession statute, they would be ineligible for SSA benefits.

In Ohio, children born after a parent's death would only be eligible for intestacy inheritance rights if the mother is pregnant at the time of death. State intestacy law controls the eligibility for SSA benefits for after-born children.

8. LGBTQ SENIORS

By 2050 the number of people over the age of 65 will be approximately 83.7 million. It is estimated that 2.7 million of those people will identify as LGBTQ. Approximately one-third of

[43] What Same-Sex Couples Need to Know
[44] 291 Minn. 310, 191 N.W.2d 185 (1971)
[45] 566 U.S. 541, 132 S.Ct. 2021 (2012)

those seniors live at or below the federal poverty level. There is a misconception that all LGBTQ people are wealthy. The reality is quite different.

Transgender elders face specific medical needs that include transition-related medical care. Too often, transgender elders are forced back into the closet when they enter long-term care (LTC) facilities because of discrimination or abuse by family, staff, or other residents.
Finding affordable senior housing is very difficult. In Cleveland, Ohio, the only housing specifically designed for LGBTQ seniors is A Place for Us on the city's west side. There are 54 units available and, while the facility does not discriminate, it is intended as a safe housing space for LGBTQ seniors.

There is insufficient data regarding elder abuse of LGBTQ seniors primarily because they are not designated an "underserved population" by the U.S. Department of Health and Human Services. Such a designation results in more federal funding for research.

Many LGBTQ seniors are estranged from their birth families and their "family of choice" is often in the same age group. That means these seniors are less likely to have a robust support system to assist them as they age. If the LGBTQ senior is unable to remain in her home, she will be forced into a LTC facility and be faced with the decision to either go back into the closed and hide her identity or be subjected to discrimination and abuse by residents and staff.

A senior lesbian couple in Missouri faced discrimination when the retirement village they found refused to let them buy a unit because of their sexual orientation. The Friendship Village Sunset Hills, located near St. Louis, told them they could not move in because it had a policy that "defined marriage as between a man and a woman" and "as marriage is understood in the Bible."

The women sued claiming discrimination and violation of the Fair Housing Act (FHA). The FHA prohibits discrimination due to "race, color, religion, sex, familial status, or national origin." The federal judge dismissed the case, "[T]he Court finds the claims boil down to those of discrimination based on sexual orientation rather than sex alone." Missouri does not prohibit discrimination based on sexual orientation or gender identity.

Federal law does not prohibit discrimination based on sexual orientation and gender identity in senior housing.

However, in 2018, the 7th Circuit Court of Appeals held that a landlord may be liable under the FHA for failing to protect a tenant from known discriminatory harassment by other tenants. The court reinstated a lawsuit[46] filed by Marsha Wetzel. She claims the facility failed to protect her from abuse, including harassment, discrimination, and violent attacks, by the other residents because of her sex and sexual orientation. In addition to the FHA, the suit also includes claims

[46] *Wetzel v. Glen St. Andrew Living Community, LLC, et al.,* 2019 WL 4057365 (7th Cir. Aug. 27, 2018)

under the Illinois Human Rights Act that prohibits discrimination based on sex or sexual orientation.

A. End-of-Life Issues

Many LGBTQ seniors do not trust health-care providers and that makes it difficult to discuss end-of-life plans. Most senior LGBTQ elders have no one to call in a crisis. They also may have no one to name as an executor, trustee, agent under a general durable power of attorney or an advance directive.

Failure to plan for the end of life places the LGBTQ senior in a position of having someone else make the decisions. Palliative care may not be arranged. Hospice care may be avoided.

There are few community resources available for LGBTQ seniors who have no one to assist them. Unfortunately, the LGBTQ community at large seems to concentrate on the needs of young people at the expense of the community's elders. For several years, the community has promised young LGBTQ people that "it gets better." For LGBTQ seniors "it gets better" until it doesn't.

Lawyers representing LGBTQ seniors need to be creative when addressing these client needs. It may also be necessary to follow-up with the seniors, especially if they are in LTC facilities, to ensure they are being properly treated. This population with the LGBTQ community cannot be viewed as a "one and done" situation.

9. TRANSGENDER ISSUES

Twenty years ago most people had never heard of or were aware of transgender persons. Since then there has been an increased presence of transgender issues and people in the news.

There have been advances in protecting transgender people from discrimination in employment.[47] However, they continue to experience mistreatment, discrimination, violence, and challenges to their existence at every level of society.

Ohio is one of three states[48] that does not permit a person to change the gender marker on a birth certificate. The Ohio restriction is based on a 1987 municipal court case, *In re Declaratory Relief for Ladrach*.[49] The court held that a birth registrant's right to make general amendments to their birth certificate information did not include amendments to sex information for individuals that have undergone gender reassignment/reconstruction surgery.

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[47] *Lampley v. The Missouri Commission on Human Rights, et al.* Case No. SC 966828 (MO. Sup. Ct. Feb. 26, 2019)
[48] Ohio, Tennessee, and Kansas. Idaho prohibited changes until a 2018 federal court decision declaring the practice unconstitutional. Kansas quickly took its place. Puerto Rico also prohibits gender marker changes on birth certificates.
[49] 513 N.E.2d 828 (Ohio Misc. 1987)

A. Identification documents

Having government issued identification documents is an important first step for transgender persons. One significant factor involves changing the individuals gender marker on the documents.

i. Ohio Driver License

While a person cannot change the gender marker on an Ohio birth certificate, it is possible to change the marker on an Ohio driver's license or state identification card. The Ohio Bureau of Motor Vehicles has a form, *Declaration of Gender Change*,[50] that needs to be filed. The form is NOT on the BMV website. A person must contact the BMV's main office to request the form. The BMV has not yet assigned the form an identification number. Until that happens, the form will not be available online. The BMV phone number is: 614.752.7500.

The BMV will mail the form to the person requesting it. The form must be signed by the person's doctor, therapist or psychologist because they are the only people authorized to sign it. They must state the transition is being conducted according to the World Professional Association for Transgender Health's (WPATH) Standards of Care guidelines. Ohio no longer requires a letter from a surgeon stating the person has had gender reassignment surgery.

Completed forms can be mailed or faxed to:

Ohio Bureau of Motor Vehicles
ATTN: License Control
P. O. Box 16784
Columbus, OH 43216-6784
F: 614.752.7987

The BMV will send written notification when the information has been changed. Normal processing time is 7-10 days. The person takes the written notice to the local BMV to obtain a new license.

A person may change their gender marker on a license even if there has not been a formal name change. However, a formal name change is in the transgender client's best interest.

As of July 2018, Ohio initiated the new driver license that complies with the federal Real ID law. These new enhanced driver licenses will be required for air travel, entrance to U.S. federal buildings and military installations on October 1, 2020. The regular driver license is valid but you cannot fly with it.

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ii. Social Security Administration

Transgender persons may change the gender marker on their Social Security record.[51] There is no requirement for the person to have had surgery. The SSA no longer notifies a person's employer when the change is made.

The client needs to submit Form SS-5, *Application for a Social Security Card* as well as any of the following forms:

Social Security will accept any of the following forms of evidence for a gender marker change:

- A full-validity 10-year U.S. passport showing the correct gender,
- A state-issued birth certificate showing the correct gender,
- A court order recognizing the correct gender, or
- A signed letter from a provider confirming you have had appropriate clinical treatment for gender transition

If the client uses a physician letter, it must come from a licensed physician with whom the client has a patient relationship and who is familiar with the person's transition-related treatment. (This may be any physician who is familiar with the treatment, including a primary care physician or a specialist.) All certifications must be on the physician's office letterhead and include all information seen in the sample letter below, including the physician's license or certificate number.

The following is an example of a letter[52] that meets all the Social Security requirements:

PHYSICIAN LETTERHEAD

I, Physician's Full Name, Physician's medical license or certificate number, Issuing U.S. State/Foreign Country of medical license/certificate, am the physician of Name of Patient, Date of Birth of Patient, with whom I have a doctor/patient relationship and whom I have treated (or with whom I have a doctor/patient relationship and whose medical history I have reviewed and evaluated).

Name of Patient has had appropriate clinical treatment for gender transition to the new gender (specify new gender male or female).

I declare under penalty of perjury under the laws of the United States that the foregoing is true and correct.

Signature of Physician
Typed Name

[51] SSA Gender Change Policy ; SSA FAQ: How to Change Gender on Social Security Record
[52] SSA Physician Letter

Address
Telephone Number
Date

Surgery is not a prerequisite, however, "appropriate clinical treatment for gender transition" must be referenced. This may mean a range of treatment that are appropriate for each individual's situation and that facilitates gender transition. There is no specific required treatment and the details are not required to be provided.

iii. Passports

In 2010 the U.S. State Department changed its policy[53] about changing one's gender assignment on passports. Transgender persons can obtain a new passport that reflects the current gender by submitting a physician's statement confirming the applicant has had appropriate clinical treatment for gender transition. This policy applied when the applicant had a passport that reflected a different gender. The old policy required documentation concerning gender reassignment/reconstruction surgery (GRS).

Transgender applicants can get a 10-year passport with the updated gender if you have had clinical treatment that facilitates gender transition. Your doctor will need to determine whether the treatment is appropriate. A limited, 2-year passport will be issued, with the updated gender, if the physician's letter states the applicant is in the process of gender transition. This should NOT be necessary. The option is not available if your physician will not state you have had appropriate treatment.

This new policy applies to minors and adults. But, passports for minors are subject to special parental consent requirements--they apply to all minors, not just those who are transgender.

A doctor's certification is required if the documents accompanying the application (prior passport, driver's license, birth certificate, etc.) do not all reflect the current gender. Otherwise, the doctor's certification is not required.

A licensed physician with which you have a doctor-patient relationship and who is familiar with the transition-related treatment must provide the certification.

a. Requirements for physician certifications

- must be on the physician's letterhead;
- include physician's license or certificate number & DEA registration number;

2. Sample Letter:[54]

[53] U.S. State Dept Sex Designation Changes ; U.S. State Dept Gender Change policy
[54] U.S. State Dept. Sample Physician Letter

"I, (physician's name), (medical license/certificate number), (issuing U.S. State/Foreign Country of medical license/certificate), (DEA Registration number or comparable foreign designation), am the physician of (patient's name), with whom I have a doctor-patient relationship and whom I have treated (or with whom I have a doctor-patient relationship and whose medical history I have reviewed and evaluated).
(Name of patient) has had appropriate clinical treatment for gender transition to the new gender (specify new gender: male/female).

I declare under penalty of perjury under the laws of the United States that the forgoing is true and accurate.

Signature
Typed Name
Date

The physician can use this letter and is not required to provide any additional personal health information that is not included in the letter.

3. Appropriate clinical treatment

The healthcare provider determines what constitutes appropriate clinical treatment. This varies by individual. No specific treatment is required; just what is appropriate for the individual's gender transition. There is no requirement to provide details of the treatment. That includes details about surgery, hormone or other treatments. This information is neither helpful nor necessary.

The full policy can be accessed in the U.S. State Department Foreign Affairs Manual, 7 FAM 300, Appendix M: Gender Change; http://1.usa.gov/byv1YP

Information on passports is available at: http://travel.state.gov/passport/passport_1738.html First time applicants must do so at U.S. Post Offices that accept the applications. First time passport applications cannot be mailed.

B. Gender Reassignment/Reconstruction Surgery

Surgery requires a considerable financial commitment. While some employers and insurance companies are beginning to recognize the need to cover these medical expenses, most transgender persons will be paying for it themselves.

In 2010, the U.S. Tax Court issued a decision in *O'Donnabhain v. Commissioner of Internal Revenue*.[55] The IRS had rejected O'Donnabhain's claim for a medical expense deduction under

[55] 134 T.C. No. 4 (2010)

Sec. 213 of the Internal Revenue Code (IRC).

The Tax Court held that O'Donnabhain's gender identity disorder is a "disease" within the meaning of sec. 213(d)(1)(A) and (9)(B) of the IRC. The court also held that her hormone therapy and sex reassignment surgery were for the treatment of and treated the disease as stated in the I.R.C. This means the court found the surgery was not cosmetic in nature and not excluded from the definition of "medical care" under the IRC.

The court's discussion of gender dysphoria is extensive. This is a 139-page decision and reflects considerable research into the subject. The court takes considerable effort in explaining its reasoning. The decision does not leave questions about how the court arrived at its decision. It is an excellent recitation of facts and how the law applies. The court was persuaded that "acceptance of the GID diagnosis is the prevailing view….[t]he evidence amply demonstrates that GID is a widely recognized and accepted diagnosis in the field of psychiatry" (at 43).

This decision allows transgender persons to claim GRS expenses as deductions on their tax returns. Out-of-pocket expenses can be included when calculating the total amount. For the tax year ending 2012, medical expenses that exceed 7.5% of adjustable gross income can be deducted. Starting in 2013, the percentage rises to10%.

The court also considered whether the expenses O'Donnabhain incurred for the breast augmentation surgery could be deducted. These expenses were denied because the procedure was directed at improving her appearance. In this regard, it seems the doctor's description of the procedure and why it was pursued was not helpful.

The doctor stated, "Examination of her breasts reveal approximately B cup breasts with a very nice shape." This language defeated the attempt to have the breast augmentation expenses covered as "medical care".

The court held that O'Donnabhain failed to show that the breast augmentation treated her GID. Since the burden is on the taxpayer to establish that the treatment was for "medical care" this case reinforces the need to have one's ducks in order when presenting the case.

B. Name changes

A court-ordered name change gives transgender persons a formal document reflecting the new name. The application must be filed in the Probate Court in the county where the person has lived for a least one continuous year before filing.

Checking the county probate court's website will include information on the required forms and supporting documentation needed to file a name change application.

Notice of the name change application must be posted in a newspaper of general circulation in the county of residence at least 30 days before the hearing. The court clerk can provide the form for the newspaper ad.

NOTE: if the client believes publication of the notice will jeopardize their personal safety, you may ask the court to waive the publication requirement and seal the file by filing an Application to Waive Publication Requirement and Seal File (Cuyahoga County Form 21.6). An explanation as to why the notice would jeopardize the client's safety is required. The client can attach exhibits in support of the application. Tangible evidence to give the court is required to obtain the waiver.

A person can change his/her name on a Social Security card and record by applying through the mail or in person at a local Social Security office. This can be done separately from, or together with, applying for a gender change. The person needs to submit an *Application for a Social Security Card*, proof of identity and citizenship or immigration status, as well as acceptable proof of the name change.

SPECIAL NOTE FOR MINORS

There usually are separate forms and additional requirements that minors and their parents/legal guardians must complete. For example, minors typically must have the consent of both parents/legal guardians, though there are special procedures if one parent/guardian is unknown or not present. Call the county probate court clerk to confirm all requirements.

Minors and their parents/legal guardians should speak to an attorney before pursuing the name change of a transgender minor because special legal issues surround this decision (such as when legal or physical custody is shared between two or more parents/legal guardians).

i. Changing a name with the Social Security Administration

In general, SSA will accept any of the following as proof of a name change:

- Name change court order (original or certified copy);
- Marriage, civil union, or domestic partnership certificate (original or certified copy);
- Divorce decree (original or certified copy); or,
- Certificate of citizenship or naturalization (original only).

The new card will be sent to in the mail, as will any original documents submitted with the application.

Note: Marriage, civil union, or domestic partnership certificates showing a name change can be used so long as they are recognized by the issuing state. Locally-issued domestic partnership certificates not recognized by a state cannot be used for this purpose.

ii. Name Changes with the Selective Service

Female to Male (FTM) Individuals

If the client was designated female at birth, he does not have to register with the Selective Service, even if he has had sexual reassignment surgery.[56] However, if the client intends to apply for federal financial aid, grants, loans or other benefits as a male, he may be asked to provide proof that he is exempt from the Selective Service. To obtain such proof, he needs to request a Status Information Letter (SIL) from the Selective Service.

To request a SIL that shows an exemption, either download a SIL request form (http://www.sss.gov/PDFs/SilForm_Instructions.pdf) or call 1-888-655-1825. The SIL request form requires female to male individuals to identify as such and attach a copy of a birth certificate showing the birth-assigned sex. If the client has already amended the sex on the birth certificate, attach any proof to that affect. This service is free and the exemption letter does not specify the reason for the exemption so it will not force "out" the client moving forward. The client needs to keep the SIL in his files.[57]

Male to Female (MTF) Individuals

If the client was designated male at birth, she must register for the Selective Service if she is between the ages of 18 and 26, even if she has had sexual reassignment surgery. She may register online at http://www.sss.gov/default.htm or complete and mail a "mail-back" registration form available at any post office.

The present uncertainty concerning whether transgender persons will continue to be allowed to serve in the military will come into play if the draft is resumed. If there is no ban, the client would report as specified in the call-up letter. If transgender persons are prohibited from serving in the military, and the client receives an order to report for examination or induction, she may file a claim for exemption from service.[58]

While there is no need to notify the Selective Service of a change in gender, the client is obligated to inform them of a change in name. To notify the Selective Service of a name change the client must fill out SSS Form 2 (technically a change of address form), available at the local post office. Attach a certified copy of the name change court order.

D. Healthcare

[56] http://www.sss.gov.
[57] Information taken from National Center for Transgender Equality article on Transgendered People and the Selective Service, http://transequality.org/Resources/Selective_Service_only.pdf
[58] http://www.sss.gov/.

Many transgender people are under or unemployed because of discrimination and the failure of federal and state law to protect them. Few have access to quality healthcare and many find healthcare providers discriminating against them because of their gender identity.

Gender dysphoria is a recognized medical condition that is treated with medication and, sometimes, surgery.
The Cleveland VA hospital at Wade Park has a clinic that is specifically intended for transgender veterans. The Pride Clinic at Metro General Hospital provides quality healthcare for transgender adults and children. However, those facilities are the exception and both are at capacity.

E. Schools

LGBTQ youths continue to experience flagrant discrimination and bullying in schools at all levels. Transgender youth are particularly vulnerable and the advances realized during the Obama Administration have been reversed by the U.S. Department of Education since the current administration took control.

The rules and policies that provided protection to transgender young people have been rescinded and the Department has reduced the size of the agency's office charged with investigating civil rights complaints. In addition, the agency has limited the scope of any investigation resulting in a virtual halt to discrimination investigations.

Many transgender students face discrimination when trying to use a bathroom or locker that corresponds to their gender identity. The bathroom issue has been trending in U.S. schools for years. The courts[59] generally side with the student.

F. Military

The current administration has decided that transgender service members must not be allowed to serve. This is a complete reversal of the policy that has been in existence for the past few years. The administration is seeking to discharge all transgender military service members. Decisions by federal courts are the only reason the new policy has not gone into effect.

Discharging transgender service members will adversely affect their entitlement to military retired pay, health care, GI Bill education benefits and the right to continue their military careers.

Conclusion

[59] *M.A.B. v. Board of Education of Talbot County, et al.* Case 1:16-cv-02622-GLR (Dist. Ct. Md. March 12, 2018); R.M.A. v. Blue Springs R-IV School District, et al. No. SC 96683 (MO Sup Ct, Feb. 26, 2019);

Issues facing LGBTQ can be challenging. *Obergefell* did not resolve everything. In some respects it opened different cans of worms. But, there is an inexorable march toward equal treatment under the law for LGBTQ clients. It is an exciting time to be practicing law.

emergingLGBTQIssues;3.6.2019