

The ABC and E(thics) of LGBTQ

CHICAGO ESTATE PLANNING COUNCIL

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I. Introduction

Lawyer Betty is referred a new client, Kathy, who needs some estate planning work. While Kathy has a large estate, her primary goal is ensuring that her daughter, Vicki, and Vicki's family are adequately provided for upon Kathy's passing. In conversation with Kathy, Betty learns that Vicki and her partner, Matt, are expecting a child. Betty assures Kathy that the estate plan will provide for Vicki and, ultimately, for the unborn child of Vicki and Matt. Betty prepares her usual estate documents, providing that in the event of Kathy's passing, the assets held in trust will be distributed to Kathy's descendants, *per stirpes*. In the event Kathy has no descendants, the trust provides that the assets would be distributed to Kathy's heirs-at-law. Kathy signs all of the estate documents and is happy knowing that she has arranged her affairs.

A few years later, Betty receives a call that Kathy has passed. The caller, who is the successor trustee of Kathy's trust, informs Betty that tragically, Vicki predeceased Kathy. Betty assures the trustee that Vicki and Matt's child, Audrey, is, of course, a beneficiary of the trust.

Over the course of the administration, Betty discovers that Matt is a transgender male and is actually the parent who carried Audrey in gestation and gave birth to her. Vicki and Matt never married. Vicki is not listed as a parent on Audrey's birth certificate, was not biologically related to Audrey, and never adopted Audrey. Kathy's trust defines "descendants" according to a traditional definition that references biological relationship and adopted children only.

Knowing that it was Kathy's intent to provide for Audrey, Betty nonetheless instructs the trustee to distribute the trust assets to a descendant trust for Audrey pursuant to the trust. Kathy's sister, Judy, however, who was never accepting of Vicki's relationship with Matt, brings an action contesting the trust administration, alleging that she is Kathy's sole heir. The Court agrees.

The end result here was not consistent with Kathy's intent. Does Kathy bear fault for not sharing with Betty the details regarding Vicki and Matt's relationship and Audrey's birth? Absolutely.

Stories of clients not sharing full information are not uncommon. In such situations, it is important to ask ourselves why Kathy did not share that information with Betty. Kathy did not seem shy about discussing Vicki, Matt and their baby. Did Kathy feel comfortable being open with Betty about the modern structure of Vicki's family? Could Betty have asked better questions to elicit the information? Had Betty looked at her boilerplate in the last 10 years to consider whether her definitions have kept up with societal changes?

We are in a period of evolution of the definition of "family". As planners, we need to be thoughtful about understanding our implicit biases and creating an environment of open communication with our clients about their families. Many clients, like Kathy, will have experienced negative reactions from those close to them about nontraditional relationships. Being thoughtful about the psychological impact of what LGBTQ clients and their families experience in the world can make us better able to elicit information and encourage open communication.

A. The Planner's Role

Many estate planners focus on tax and death planning, setting aside the softer family issues. Much like internists and family doctors, we treat individuals and families from birth through death, and everything in between. Given our unique position, we can do more than just solve problems – we can try to foresee issues and prevent them from blossoming into larger problems. Working with families, we can be more effective when we view our job as treating the whole person.

Planners are in the unique position of working with clients on planning at a very personal level. We can become a more complete resource for our clients by learning about and being prepared to advise our clients on issues facing lesbian, gay, bisexual, transgender, and queer persons, as well as issues they face with their families. For simplicity, when talking about a person who identifies as lesbian, gay, bisexual, transgender or queer, we will simply use “LGBTQ”. Although each identifying subgroup faces its own specific legal and societal challenges, the LGBTQ community as a whole shares overlap of particular legal issues.

“Q” is the newer initial added to the LGBTQ community’s self-identifying acronym. The “Q” stands for “queer”, which had become a pejorative phrase applied to the LGBTQ community. In the 1980s, the term was reclaimed by the community. Today, it is often used to reference individuals who choose not to identify as LGB or T, and represents the more radical edge of the community. Merriam Webster online notes:

Over the past two decades, an important change has occurred in the use of queer in the senses that refer to sexuality. The older, strongly pejorative use has certainly not vanished, but a use by some gay people and some academics as a neutral or even positive term has established itself. This development is most noticeable in the adjective but is reflected in the corresponding noun as well. The newer use is sometimes taken to be offensive, especially by older gay men who fostered the acceptance of gay in these uses and still have a strong preference for it.¹

Many lesbian, gay, bisexual, and transgendered persons are not comfortable enough to discuss their sexual orientation or gender identity with their healthcare providers.² Six percent of transgender people report having a negative experience with an attorney because of being transgender.³ While there is no study solely focusing on estate planners, we can infer that there are probably many persons who do not feel comfortable discussing with us their sexual orientation, gender identity, or that of their family members. If we are more inquisitive in a thoughtful manner and become creative about how we “ask” for information, we may receive more details that will help us craft better plans for our clients.

¹ <https://www.merriam-webster.com/dictionary/queer> (last visited February 2, 2019).

² *Coming Out To Your Doctor*, Human Rights Campaign, <https://www.hrc.org/resources/coming-out-to-your-doctor> (last visited February 2, 2019).

³ James, S. E., Herman, J.L., Rankin, S., Keisling, M., Mottet, L. & Anafi, M., *The Report of the 2015 U.S. Transgender Survey*, Washington, DC: National Center for Transgender Equality (2016).

In short, we are on the front lines in helping the law, which often lags society, treat the LGBTQ community in an equal manner as heterosexual persons. To position ourselves to address the shortfalls in the law, we need to become educated about the particular issues LGBTQ persons may face in their daily lives, the terminology to use when advising LGBTQ individuals and families, and ideas for preventing, resolving, and planning in anticipation of problems.

B. A Brief History Of Marriage Equality

Since *United States v. Windsor*⁴ was decided by the Supreme Court in June 2013, it has been legal for two consenting adult persons of sound mind to be married in the United States regardless of their sex assigned at birth or at the time of their marriage, however, a discussion of the complexities of estate planning for LGBTQ persons would not be complete without a short history of marriage equality in the United States. Prior to the landmark cases *Windsor* and *Obergefell v. Hodges*⁵, discussed below, estate planning for couples assigned the same sex at birth was vastly different. Estate planners had to plan for LGBTQ couples the same way as they structured plans for unmarried couples.

The distinction of sex assigned at birth is significant because the right to marry for couples where one party is transgender was murky prior to *Obergefell*. For example, in *M.T. v. J.T.*, a 1976 case out of New Jersey, the New Jersey Superior Court found that if “sex reassignment surgery is successful and the postoperative transsexual is, by virtue of medical treatment, thereby possessed of full capacity to function sexually as a male or female, as the case may be, we perceive no legal barrier, cognizable social taboo, or reason grounded in public policy to prevent that person’s identification at least for purposes of marriage to the sex finally indicated.”⁶ However, in *In re Estate of Gardiner*, the Supreme Court of Kansas held that a couple where one party was transgender was not legally married because they were of the same sex assigned at birth.⁷ Therefore, in terms of marriage, the case law varied by state when one or more of the parties identified as a gender other than the sex assigned at birth.

i. *United States v. Windsor*

United States v. Windsor was an exciting decision for the estate planning community because it was the estate tax exemption that ultimately led the Supreme Court to strike down the Defense of Marriage Act (DOMA).⁸ While *Windsor* did not extend the right to marry to couples of the same sex assigned at birth, it did strike down DOMA, thereby allowing couples where both members were of the same sex assigned at birth who were married under state law to enjoy the benefits conferred upon married couples under federal law.

ii. *Obergefell v. Hodges*

Before *Obergefell*, marriage was an issue left to the states. In some states, the right was won through litigation; in others, state legislatures passed laws. In *Obergefell*, the Supreme Court found the

⁴ *United States v. Windsor*, 111 AFTR 2d 2013-2385, 133 S. Ct. 2675, 570 U.S. 744 (2013).

⁵ *Obergefell v. Hodges*, 576 U.S. ___, 135 S. Ct. 2584, 192 L. Ed. 2d 609 (2015).

⁶ *M.T. v. J.T.*, 1355 A. 2d 204, 210-211, 140 N. J. Super. 77, 89 (NJ 1976).

⁷ *In re Estate of Gardiner*, 273 Kan. 191 (Kan. 2002).

⁸ *Windsor*, 570 U.S. 744.

requirement that persons must be of opposite sex in order to marry was unconstitutional and struck down state bans on marriage between two members of the same sex in Michigan, Kentucky, Tennessee, and Ohio.⁹ The Supreme Court specifically held that the Fourteenth Amendment required states to issue marriage licenses for two individuals regardless of their sex.¹⁰

Obergefell only made it unlawful for states to deny marriage licenses to two individuals on the basis of sex. It did not, however, address disparate treatment of LGBTQ couples and their families with respect to healthcare, family planning, and other social services. Acknowledging that the struggle was not over for LGBTQ couples, in celebrating the *Obergefell* decision, Vice President Joe Biden lamented, “There are still 32 states where marriage is recognized in the morning and you can be fired in the afternoon.”¹¹

iii. Illinois’ Voluntary Conversion Of The Civil Union To Marriage

Beginning June 1, 2011, Illinois began allowing two persons, regardless of gender, to enter into a civil union, which conferred most of the rights of marriage.¹² Then, in 2013, Illinois passed the Illinois Religious Freedom and Marriage Fairness Act, which took effect on June 1, 2014 (earlier in certain counties).¹³ For up to a year after the effective date, Illinois couples who were parties to a civil union could convert their civil union to a marriage, with the effective date of the marriage being the date of their civil union. This means that the official marriage date for some couples in Illinois may predate the effective legalization date of same sex marriages in Illinois.¹⁴

C. Who Are LGBTQ Clients?

As of May 2018, almost 4.5% of the U.S. population identifies as lesbian, gay, bisexual, or transgendered.¹⁵ About 5.1% of women and 3.9% of men identify as LGBTQ.¹⁶ There are wide differences among generations.¹⁷ 8.2% of millennials (defined as birth years 1980-1999) identify as LGBTQ, while

⁹ *Obergefell*, 576 U.S. ____.

¹⁰ *Id.*

¹¹ *Biden Celebrates Same-Sex Marriage Says More to Be Done*, CBS News, July 10, 2015, available at: <https://www.cbsnews.com/news/biden-celebrates-same-sex-marriage-says-more-to-be-done/>.

¹² Illinois Religious Freedom Protection and Civil Union Act, 750 ILCS 75/1, et. al.

¹³ Illinois Religious Freedom and Marriage Fairness Act, 750 ILCS 80/1, et al. See also *Illinois: Terminally Ill Allowed to Marry*, Associated Press, The New York Times, December 16, 2013; BJ Lutz and Mary Ann Ahern, *Judge: Gay Marriages Don’t have to Wait Until June*, February 21, 2014, available at: <https://www.nbcchicago.com/blogs/ward-room/cook-county-gary-marriage-246553691.html>; Jessica Bourque, *Grundy County Issues First Same-Sex Marriage License*, Morris Herald-News, March 4, 2014, available at: <https://www.morrisherald-news.com/2014/03/04/grundy-county-issues-first-same-sex-marriage-license/angkadj/>.

¹⁴ See 750 ILCS 80/915.

¹⁵ Tim Fitzsimons, *A record 4.5 percent of U.S. adults identify as LGBT*, Gallup estimates, NBC News, May 25, 2018, available at: <https://www.nbcnews.com/feature/nbc-out/record-4-5-percent-u-s-adults-identify-lgbt-gallup-n877486>

¹⁶ Frank Newport, *In U.S., Estimate of LGBT Population Rises to 4.5%*, Gallup, May 22, 2018, available at: <https://news.gallup.com/poll/234863/estimate-lgbt-population-rises.aspx>

¹⁷ *Id.*

3.5% of generation X (birth years 1965-1979), 2.4% of baby boomers (birthday 1946-1964), and 1.4% of traditionalists (birth years 1913-1945) identify as LGBTQ.¹⁸ Among the LGBTQ population, approximately 0.6% of the US population identifies as transgender, but “twenty states (in order from highest to lowest percentage: Hawaii, California, New Mexico, Georgia, Texas, Florida, Oregon, Oklahoma, Delaware, Tennessee, Washington, Arizona, Nevada, Mississippi, Alabama, North Carolina, Louisiana, Arkansas, Vermont, and Minnesota) and the District of Columbia have a higher percentage of transgender-identified adults than the national average.”¹⁹

The number of openly LGBTQ millionaires and billionaires is growing rapidly.²⁰ As of 2014, about 0.4% of the 1,645 billionaires (about 65) globally identify as LGBTQ.²¹

II. Strategies For Creating The Right Environment For LGBTQ Clients

Understanding a client’s community in order to use the right language can help to establish rapport and build a trusting relationship with them. It is difficult to do our job and identify past, current, or future issues if our clients do not feel comfortable enough to engage in an open and frank discussion with us.

A. Terminology To Know

Becoming comfortable with the terminology used by and preferred by the LGBTQ community is helpful in having an open dialogue. Discussing sexual orientation and gender expression identity is something that will be less intimidating if we take the time to become familiar with common terms.

At Appendix A are some terms defined by the Human Rights Campaign “to help give people the words and meanings to help make conversations easier and more comfortable.”²² If the advisor is not comfortable using the vocabulary to accurately and openly discuss sexual orientation and gender identity issues that may impact the planning, the client is more likely to sense that hesitation and have difficulty engaging in an open and honest conversation.

¹⁸ *Id.*

¹⁹ Andrew R. Flores, Jody L. Herman, Gary J. Gates, and Taylor N.T. Brown, *How Many Adults Identify As Transgender in the United States?*, The Williams Institute, June 2016, available at: <https://williamsinstitute.law.ucla.edu/wp-content/uploads/How-Many-Adults-Identify-as-Transgender-in-the-United-States.pdf>.

²⁰ Robert Frank, *The LGBT Rich Are a Fast-Growing Market*, CNBC, October 30, 2014, available at: <https://www.cnbc.com/2014/10/30/the-lgbt-rich-are-a-fast-growing-market-.html>. See also, Leslie Dobbins, *14 Insanely Wealthy LGBT People*, The Advocate, February 12, 2015, available at: <https://www.advocate.com/arts-entertainment/people/2015/02/12/14-insanely-wealthy-lgbt-people>.

²¹ Natalie Robehmed, *Meet The World’s LGBT Billionaires*, Forbes, March 3, 2014, available at: <https://www.forbes.com/sites/natalierobehmed/2014/03/03/meet-the-worlds-lgbt-billionaires/#615921d77e6c>.

²² *Glossary of Terms*, Human Rights Campaign, available at: <https://www.hrc.org/resources/glossary-of-terms> (last visited February 2, 2019).

B. Words And Phrases To Avoid

The LGBTQ community historically has been an example of how to unite to create political and social momentum for change. There are countless reliable resources available on the internet that provide excellent educational material. The Gay & Lesbian Alliance Against Defamation (GLAAD), was formed by a small group of journalists in the 1980s in response to defamatory reporting about the LGBTQ community with respect to the HIV and AIDS crisis.

There are certain words and phrases that may be perceived as offensive, even if they are not intended by the user to be anything other than descriptive. To create an open and trusting environment, it is important to understand how members of the LGBTQ community may feel about certain “charged” words or phrases. The GLAD Media Reference Guide – 10th Edition, is attached as Exhibit A, with express permission from GLADD.²³

First and foremost, jettison the phrase “sexual preference” from your vocabulary. Suggesting that a person’s sexual orientation is a choice is offensive to most of the LGBTQ community. “Sexual orientation” is the appropriate phrase, or simply “orientation”.

Another word to avoid is “homosexual”. Instead, use “gay”, “gay man”, “lesbian” or “gay person/people.”²⁴ The Associated Press, The New York Times, and The Washington Post restrict use of the term “homosexual”, which is a pretty good indicator that you should leave that word out of your vocabulary as well. Similarly, it is not necessary to identify a lifestyle as a “gay lifestyle” or “transgender lifestyle”. No two married or unmarried couples have an identical lifestyle, whether they are LGBTQ persons or not.

Marriage between consenting adults is legal in the United States, regardless of gender or sexual orientation of the two individuals choosing marriage. It is no longer necessary to use modifiers such as “same sex” when referencing marriage or “gay” when referencing a couple.

And most importantly, it is ok to admit that you care about your client’s feelings if you are just not sure what words to use and need to ask. Showing that you are aware of the issues your clients face and want to be sensitive to those issues may actually increase the trust and openness of the relationship with the client.

C. Grammar Usage And Gender

Remember sitting in grammar lessons in school? Your teacher may have drilled that “they” is plural and referring to a singular person as “they” was incorrect; however, using “they” to refer to a single individual has been part of our language for hundreds of years.²⁵ According to the Merriam-Webster

²³ GLAAD Media Reference Guide – 10th edition, available at <https://www.glaad.org/reference> (last visited February 3, 2019).

²⁴ *See id.*

²⁵ Merriam-Webster, *Words We’re Watching: Singular ‘They’*, available at: <https://www.merriam-webster.com/words-at-play/singular-nonbinary-they> (last visited February 8, 2019).

Dictionary, the “development of singular “they” mirrors the development of the singular “you” from the plural “you.”²⁶

As of 2017, the Associate Press Style Book now allows for the use of they/them/their if the person to whom the pronoun is referring prefers a gender-neutral pronoun (but, there is a caveat: it calls for explaining in text that the person prefers a gender-neutral pronoun and to be sure that the phrasing does not imply more than one person).²⁷

All of us have preferred pronouns.²⁸ If you are *cisgendered* male (as a reminder, a *cisgendered* person is someone who’s gender identity matches the sex assigned to them at birth), you probably prefer “he/him/his.” If someone referred to you as “she,” you would probably be upset. When speaking with a client, listen for clues as to how the person self-identifies. If you are not sure, just ask.

For trans individuals, some people prefer pronouns that match their gender identity; others prefer more neutral pronouns. Below are just a few examples of gender-neutral pronouns:

They/them/theirs

Ne/nem/nirs/nemself

Ve/ver/vis/vis/verself

Xe/xem/xyr/xyrs/xemself (pronounced like “ze”)

Ze/hir/hir/hirs/hirself; zie/hir/hir/hirs/hirself; ze/zir/zir/zirs/zirself; zie/zir/zir/zirs/zirself (pronounced like “zee” and “here”)

Most people use the terms she/her/hers, he/him/his, and they/them/theirs.²⁹ Many people who prefer a certain pronoun will tell you, but it does not hurt to simply ask. If you have an initial estate planning client questionnaire, this question may be best placed there.

III. Planning And Drafting Considerations

When working with any client, it is important to draft documents that are clear, accurate, and precise. With marriage laws being gender blind, drafting documents for LGBTQ persons is now largely the same as drafting for cisgender straight clients. But the law has not caught up to social reality in all aspects of planning, and revisiting old boilerplate to avoid the impact of stale law can be helpful. With the rule against perpetuities being virtually non-applicable in most jurisdictions and the high federal tax

²⁶ *Id.*

²⁷ Lauren Easton, *Making a case for a singular ‘they’*, Associated Press, March 24, 2017, available at <https://blog.ap.org/products-and-services/making-a-case-for-a-singular-they> (last visited February 18, 2019).

²⁸ David Galowich, *How to Respectfully Use Gender Pronouns in the Workplace*, Forbes, August 2, 2018, available at: <https://www.forbes.com/sites/forbescoachescouncil/2018/08/02/how-to-respectfully-use-gender-pronouns-in-the-workplace/#188991486c40> (last visited February 18, 2019).

²⁹ Flores, *How Many Adults Identify As Transgender in the United States?*

exemptions relating to estate and generation-skipping transfers, it is simply a reality that even if your clients are not part of the LGBTQ community, there is likely to be a LGBTQ beneficiary of most long-lived trusts at some point in time. Thoughtful tweaks to boilerplate can avoid ambiguities and litigation by recognizing and plugging gaps in the law or its application.

A. Definitions

i. Health Care

The cost of adoption, surrogacy, and gender confirmation surgery are all very expensive. Many trustees have faced the dilemma of having to try to fit the square peg into the round hole on this topic.

As an example, Sandy's grandfather made a gift to him years ago in an irrevocable trust for Sandy's benefit. The trust agreement provides for the classic standard of distributions to Sandy for health, education, maintenance, and support. None of those terms contains further definition in the document. Mark and Sandy are hoping to adopt. Given that the adoption fees are \$40,000, Sandy asks the trustee if the trustee can make distributions to Sandy to cover the cost of adoption. The trustee asks you for your opinion.

Many trustees have stretched the definition of "health" to be able to authorize such a distribution. While "health" may be interpreted fairly broadly, adoption probably is not clearly within its borders. To allow for flexibility, consider clarifying the definition of the health standard to include the cost of family planning, such as adoption, infertility treatment, and surrogacy.

In trusts using standard HESM language, the term "health" has also been used as the basis for allowing a distribution to cover the costs of gender confirmation surgery and related procedures, counseling and medications. The costs of the gender confirmation process can be high, and so it is easy to imagine another beneficiary of the trust objecting to the expenditure. If "health" is specifically designed in estate planning documents to include gender confirmation procedures, an objecting beneficiary can be shut down quickly.

A definition that would allow the trustee to make distributions for adoption and gender confirmation procedures might look something like this:

The terms 'health' and 'medical care' of a beneficiary shall be construed liberally by the trustee to provide any mental or physical care that the trustee shall determine to be in the interests of the beneficiary's well-being. Such terms specifically shall include distributions for all expenses (including legal fees and travel costs) related to (a) gender confirmation surgery and related procedures, including cosmetic or reconstructive surgery, counseling, and medications; and (b) family planning, such as fertility treatments, adoption, and surrogacy.

The Tax Court has included gender confirmation surgery as an allowable deduction under Internal Revenue Code §213(d), so clients could make an unlimited gift to a loved one for gender confirmation surgery under Internal Revenue Code §2503(e).³⁰ Note, however, that breast augmentation surgery for the

³⁰ *O'Donnabhain v. Commissioner*, 134 T.C. 34 (US Tax Court 2010).

same Taxpayer was not allowed as a deductible medical expense.³¹ For clients thinking about making a gift to couples of the same sex for adoption and surrogacy, such gifts are not included in the definition of healthcare under Internal Revenue Code §213.

ii. Gender

There are several ways in which we can address issues that arise when we have clients or loved ones of clients who are transgender or non-binary individuals.

1. Definition Of Gender In Documents

Consider including a definitional provision that any gender references are intended as being inclusive of all possible genders (masculine, feminine, neutral). Having an acknowledgment that gender references in the document are not intended to be binding on the meaning of the document can be particularly helpful if there is a name change or gender confirmation that results in a client or beneficiary being other than the gender referenced in the documents.

2. Name Changes

If a client (or their loved one) has not legally made a name change yet, but is in the process of pursuing a name change or uses another name, the preferred name or pending new legal name should be referenced. For example, Sarah's legal name is "Sean", but she only ever introduces herself as Sarah. Two possible ways to reference the difference between common name and legal name are: (1) Sarah Smith (legal name: Sean Smith); or (2) Sarah Smith a/k/a Sean Smith.

The name change issue arises even with cisgender clients, and so modifying planning document forms to include a provision that identifies key people such as family members provides a place for such name alternatives to be noted. With transgender clients, referencing legal name may be preferable to using the "a/k/a" identifier because the individual has intentionally ceased using the prior name. Therefore, it is more accurate to say they have a different legal name than to say they are "also known as" the gendered name they have shed in order to embrace who they truly are.

3. Addressing Change Of Gender

Providing in the boilerplate that gender change or legal name change are not designed to write a person out of the document may be important to avoid estate and trust disputes. For example, if a document provides for a gift of "\$100,000 to my son, Brian, if he survives me", is Brian considered to not survive because Brian is now "Judy" and the settlor's daughter? As drafters, we provide for successor corporations when we make charitable gifts or name corporate fiduciaries in order to avoid confusion. Why not do the same for individuals.

An example of a provision to address gender and name changes follows:

Any reference to an individual named in this document shall continue to be a reference to that person even if such person has a reassignment of gender or a change of

³¹ *Id.*

name. Gender references and legal names are used in this instrument for ease of identification, and a person shall not be deemed deceased or to be a different person due to a change of name or gender.

4. Timing Issues With Gender-Specific Gifts

Clients sometimes want to leave specific gifts to a person or class that, at the time of drafting, may not be born yet. For example, a young client comes to you wanting to leave her engagement ring to her first-born daughter. The client does not have a daughter yet, but plans to have children soon. Client has two children, both assigned female at birth. The first child transitions to male later in life, before the death of the grantor. The client dies not having updated the provision. The second child claims the ring belongs to her. Of course, that may have been the client's wish, but perhaps not.

Another example of a conflict that could arise by a gender-specific gift is a bequest of "\$1000 to each of my then living grandsons." If a grandson changes legal gender before the death of the grantor, is that individual, now female, included or excluded?

Rather than referring to gender without more, consider options that are more specific and that address the time at which gender is determined for purposes of qualifying for the gift. For example, if the gift should be tied to gender identified at birth, the provision might read: "To my oldest living child assigned a female at birth." In the alternative, if it is legally assigned gender at birth remaining unchanged that is the qualifier, then the provision might instead say: "To my oldest living cisgender daughter."

Just as advances in reproductive medical technology have necessitated careful consideration of who exactly is a descendant and when that status is determined, the progress in the medical community in gender confirmation procedures requires learning to think about gender as fluid. If a gift relates to gender identity, then specifying the timing for determination of gender can help to avoid unnecessary ambiguities and trust controversies.

5. Defining Descendants

When children or grandchildren become a part of a family through adoption or surrogacy, standard boilerplate may not adequately address how those descendants are to be treated. Particularly where one or both parents are not the biological parents of the child, or where a formal legal proceeding has not taken place, a classic definition of descendants (or a lack of definition in the documents that leaves the determination to statute and common law) may exclude adopteds that the settlor would want to include. Even though the Illinois Probate Act provides that an adopted child is a descendant of an adopting parent for purposes of inheritance³², it is good practice to be sure that your documentation is clear that legally adopted descendants are descendants for purposes of the instrument.

Where a couple does not actually go through a re-adoption process for the non-biological parent, most boilerplate will not include that child in the non-biological parent's document as a descendant. Consider modifying old boilerplate to provide the trustee discretion to determine that a non-biological, non-adoptive child is treated as a person's "child" for purposes of the document where there was an

³² 755 ILCS 5/2-4.

acknowledgment of parent-child relationship and/or where the non-biological, non-adopting parent held the child out as his or hers to the public.

B. Powers Of Attorney

Under Section 25 of the Illinois Healthcare Surrogate Act, a spouse may make healthcare decisions for a person in the absence of an advanced healthcare directive without a court order; therefore, it could appear to some that a power of attorney for healthcare may be unnecessary among spouses. Even today, LGBTQ persons may have parents or other immediate family members that may not be support them.

To avoid conflicts in carrying out the client's wishes, relying on state statutes to fill in a decision maker regarding health care decisions and access to the client when he or she is ill, it is a good idea to have a health care agency document. This advice really applies whether or not the client is a member of the LGBTQ community or not. Medical providers generally will respect a valid health care agency document and will honor the wishes expressed by the client.

C. LGBTQ College Students

Sometimes, estate planning attorneys are asked to prepare powers of attorneys for healthcare and property for the college-aged children of clients. While having a legal adult designate decision makers in the event of incapacity generally is a good idea for several reasons, it is important to consider and be upfront about the ethical rules applicable to assisting the client's child.

Hypothetical: You have represented Ellie and Frank for several years. Ellie has called you asking for your help because their son, Teddy, is headed to study at the University of Illinois soon. Ellie is anxious and would like you to prepare powers of attorney for healthcare and property for Teddy, naming her as his agent. Teddy signs the document and goes off to school. A year later, you receive a frantic call from Teddy. His mother found out on Facebook that he was dating another male student, and emptied Teddy's bank account and deposited into her own.

Consider whether to require direct communication with the child to advise them of what is being signed and that they have the right to change the people named if desired. If the child does not want the parents to know, consider how you will handle that predicament and related billing.

IV. Advising Beyond The Four Corners

Estate planning extends beyond the four corners of the documents that we draft and our clients sign. There are issues unique to advising LGBTQ clients, and, being a client's trusted advisor means you may be called to advise, direct, or otherwise assist in life events such as growing a family, health care issues, employment related concerns, and legally transitioning. Laws change frequently, however, so the discussion below should only be considered a broad introduction to some issues faced by LGBTQ persons.

A. Employment

As of 2017, one in four LGBTQ employees report having experienced discrimination in the workplace.³³ Nearly a third of transgender individuals have reported being fired, denied a promotion, or not being hired for a job because of their gender identity or expression.³⁴ Seventy-seven percent of respondents have taken steps to avoid mistreatment in the workplace.³⁵

There is no Federal statute prohibiting discrimination of lesbian, gay, bisexual, or transgender individuals in the workplace; laws prohibiting such discrimination are left to the states. Currently, twenty-three states prohibit discrimination based on both sexual orientation and gender identity: California, Colorado, Connecticut, Delaware, Hawaii, Illinois, Iowa, Maine, Maryland, Massachusetts, Michigan, Minnesota, Nevada, New Hampshire, New Jersey, New York, New Mexico, Oregon, Pennsylvania, Rhode Island, Utah, Vermont, and Washington. Employment discrimination based on sexual orientation is prohibited in Indiana and Wisconsin. In addition, the Sixth and Eleventh Circuits have ruled that gender identity is protected in Alabama, Florida, Georgia, Kentucky, Ohio, and Tennessee.

Although not a complete list, the Human Rights Campaign maintains a list of companies with policies that are LGBTQ friendly (and unfriendly) (<https://www.hrc.org/apps/buyersguide/>). This list may be a helpful starting place for clients evaluating potential employers.

B. Family Planning

Families come in all shapes, colors, and sizes. Some families may have two parents, some have only one. Some families may have two opposite-sex parents, and some may have two parents of the same sex. As of July 31, 2018, approximately 114,000 same-sex couples in the United States are raising children.³⁶ Of those, 68% are raising children that are biologically related to one partner, 21.4% are raising adopted children, and 2.9% have foster children (for comparison, just 3% of different-sex couples are raising adopted children and 0.4% have foster children).³⁷

i. Adoption

Adoption is “a legal proceeding that creates a parent-child relation between persons not related by blood; the adopted child is entitled to all privileges belonging to a natural child of the adoptive parents (including the right to inherit).”³⁸ There are several ways to adopt a child: domestic adoption of an infant, domestic adoption from foster care, international adoption, second parent adoption, and stepparent

³³ *2017 Workplace Equality Fact Sheet*, Out & Equal Workplace Advocates, available at: <http://outandequal.org/2017-workplace-equality-fact-sheet/> (last visited February 8, 2019).

³⁴ Flores, *How Many Adults Identify As Transgender in the United States?*.

³⁵ *Id.*

³⁶ *Same-sex parenting in the US.*, The Williams Institute UCLA School of Law, July 31, 2018, available at: <https://williamsinstitute.law.ucla.edu/press/press-releases/same-sex-parenting/> (last access February 11, 2019).

³⁷ *Id.*

³⁸ <https://www.vocabulary.com/dictionary/adoption>

adoption. The various kinds of adoption and the current status of the laws governing are discussed in detail below.

Although ultimately defeated on September 26, 2018, an amendment to the House Appropriations Bill that funds the Departments of Labor, Health and Human Services, and Education was proposed (called the Aderhold amendment) that would have:

- (i) Allowed “taxpayer-funded child placing agencies to deny needed services and discriminate against children in their care, as well as prospective foster or adoptive parents, based on the agency or provider’s religious beliefs,” meaning services could have been denied to LGBTQ children in foster care;
- (ii) Allowed “service providers to turn away qualified adoptive and foster parents based on their religion, marital status, sexual orientation, or gender identity”; and
- (iii) Punished “states with non-discrimination protections by withholding federal adoption funding, further harming all children in foster care.”³⁹

Such a bill could have drastically reduced available homes for children. While it was not ultimately passed, the fact that such legislation was introduced highlights the extra hurdles faced by members of the LGBTQ community.

6. Domestic Adoption

Domestic adoption is the placement of U.S. born infants for adoption by their birth parents, who legally consent to the adoption, with an adoptive family residing in the U.S. Prospective adoptive parents typically work with an adoption agency throughout the process, from in-take and completion of the home study through placement. As of March 31, 2016, when Mississippi’s ban on same-sex couples adopting was struck down, same-sex couples can jointly adopt in all 50 states.⁴⁰

Although adoption by same-sex couples is legal in all fifty states, some states permit *state-licensed* child welfare agencies to refuse to place children with LGBTQ people and/or same-sex couples if doing so conflicts with their religious beliefs.⁴¹ Thus, while many adoption agencies are working to implement policies and practices necessary to welcome the LGBTQ community, depending on where the prospective adoptive parent(s) live, finding an LGBTQ-friendly adoption agency may be a challenge.⁴² In Illinois,

³⁹ See *Creating A License to Discriminate: 2018 Federal Child Welfare Amendment*, Lambda Legal Issue Brief, July 2018. See also, <https://everychilddeservesafamily.com/no-adoption-discrimination-federal-funding/>.

⁴⁰ *Campaign for Southern Equality v. Mississippi Dept. of Human Services*, 175 F. Supp. 3d 691 (S.D. Miss. 2016).

⁴¹ *Foster and Adoption Laws*, Movement Advancement Project, available at: http://www.lgbtmap.org/equality-maps/foster_and_adoption_laws

⁴² *How Can I Find an LGBTQ-Friendly Adoption of Foster Care Agency?*, Human Rights Campaign, available at: <https://www.hrc.org/resources/how-can-i-find-an-lgbt-friendly-adoption-agency>

Equality Illinois has published a listing of all of the adoption agencies in Illinois and whether the agency will work with LGBTQ clients.⁴³

Affording adoption is another issue that families may encounter. The fees and costs for adoption depend on the agency, but the *average* cost to adopt is estimated to be \$30,000, although, agencies in the Chicago area typically have costs that are several thousand dollars more than the average.⁴⁴ To help offset this cost, there is a federal adoption credit and a new Illinois adoption credit. Additionally, many employers offer adoption assistance programs which provide reimbursement for some adoption-related costs and fees. For 2018, the federal adoption credit is equal to \$13,810 per child; however, this is subject to a modified adjusted gross income phaseout that begins at \$207,140 and ends at \$247,140.⁴⁵ The new Illinois adoption tax credit is equal to \$5,000 for a child adopted in Illinois and up to \$2,000 for a child adopted outside of Illinois.⁴⁶

7. Foster Care

Approximately 400,000 children in the United States are in foster care, and, of those, about 100,000 are legally free for adoption.⁴⁷ It is legal in all fifty states for LGBTQ persons to adopt from foster care; however, even though the various agencies overseeing foster care are contracted by the state, some states allow the agencies to refuse to place with same-sex couples if doing so would conflict with the agency's religious beliefs.⁴⁸ States that permit state-licensed child welfare agencies to refuse to place children with LGBTQ people and same-sex couples are Alabama, Kansas, Michigan, Mississippi, North Dakota, Oklahoma, South Carolina, South Dakota, Texas, and Virginia.⁴⁹ Again, guides like those produced by Equality Illinois are helpful for finding agencies that will work with LGBTQ clients.

A current case being litigated by Lambda Legal is *Marouf v. Azar*. Fatma Marouf, a Professor of Law and Director of the Immigrant Rights Clinic at Texas A & M University School of Law had become acquainted with the resettlement of refugee children from Syria in the United States through her work with the Immigrant Rights Clinic.⁵⁰ Fatma and her wife, Bryn, had decided that they wanted to adopt a refugee child.⁵¹ After the initial interview with the agency, which is affiliated with the United States Conference of Catholic Bishops and funded by the Department of Health and Human Services, they were denied the

⁴³ *Growing Your Family: A Guide for Prospective LGBT Adoptive Parents*, Equality Illinois, available at: http://www.equalityillinois.us/wp-content/uploads/2016/01/EI-Adoption-Guide_FINAL-1.20.pdf

⁴⁴ Kate Thayer, *New Illinois Adoption Tax Credit Eases Financial Burden on Families*, Chicago Tribune, July 18, 2018.

⁴⁵ Internal Revenue Service, *Topic Number 607- Adoption Credit and Adoption Assistance Programs*, available at: <https://www.irs.gov/taxtopics/tc607> (last visited February 18, 2019).

⁴⁶ Thayer, *New Illinois Adoption Tax Credit Eases Financial Burden on Families*.

⁴⁷ *Frequently asked questions about adopting from foster care*, Adopt US Kids, available at: <https://www.adoptuskids.org/adoption-and-foster-care/overview/faq> (last visited February 18, 2019).

⁴⁸ *Foster and Adoption Laws*.

⁴⁹ *Foster and Adoption Laws*.

⁵⁰ *Marouf v. Azar*, Lambda Legal, Complaint and Filings available at: <https://www.lambdalegal.org/in-court/cases/marouf-v-azar>

⁵¹ *Id.*

opportunity even to apply to serve as foster parents because they did not “mirror the Holy Family.”⁵² In February 2018, Lambda Legal filed suit on behalf of the couple and there has been no decision yet on the merits of the case.

8. International Adoption

International adoption is the adoption of a child from a country other than the United States through an agency or independently.⁵³ Not all countries that allow adoptions by Americans allow same-sex couples to adopt.⁵⁴ Countries where it *may* be possible for same-sex American couples to adopt include Colombia, Brazil, Mexico (some states), and the Philippines.⁵⁵ The Human Rights Campaign maintains a list of agencies providing services to American same-sex couples seeking to adopt from abroad.

ii. Surrogacy

Surrogacy is when a woman carries and gives birth to a baby for a couple who cannot conceive on their own. Surrogacy laws vary state by state, with some states banning surrogacy entirely.⁵⁶ To complicate matters, there are two types of surrogacy: traditional and gestational, and, for same-sex couples, a sperm or egg donor is needed. The surrogacy industry grew by 1000 percent internationally between 2006 and 2010 and the industry is now worth up to \$6 billion annually.⁵⁷

Partial surrogacy is where the surrogate’s eggs are used, and, therefore, the surrogate is genetically related to the child.⁵⁸ The term “traditional surrogacy” is also used, as this arrangement was first how surrogacy developed.⁵⁹ Full/ gestational surrogacy is where “all of the genetic material involved originates either from the intended parents or donors.”⁶⁰

New York, New Jersey, Indiana, and Michigan are the only states that expressly prohibit surrogacy.⁶¹ In some states, there are no statutes and the laws regarding surrogacy are based on case law.⁶²

⁵² *Id.*

⁵³ *Adoption Options Overview*, Human Rights Campaign, available at: <https://www.hrc.org/resources/adoption-options-overview> (last visited February 18, 2019).

⁵⁴ *Countries That Allow for International Adoptions by LGBT Prospective Parents*, The New Family, August 18, 2016, available at: <https://thenextfamily.com/2016/08/countries-that-allow-for-international-adoptions-by-lgbt-prospective-parents/> (last visited February 18, 2019).

⁵⁵ *Id.*

⁵⁶ Finkslstein, Alex, Sarah Mac Dougall, Angela Kintominas, and Anya Olsen, *Surrogacy Law and Policy in the U.S.: A National Conversation Informed by Global Lawmaking*, Report of the Columbia Law School Sexuality & Gender Law Clinic, May 2016, p. 3.

⁵⁷ *Id.* at p. 6.

⁵⁸ *Id.* at p. 5.

⁵⁹ *Id.* at p. 5.

⁶⁰ *Id.* at p. 5.

⁶¹ *Id.* at pp. 55-63.

⁶² States where surrogacy is governed by case law include: Arkansas, Arizona, Connecticut, Georgia, Hawaii, Idaho, Iowa, Kansas, Kentucky, Louisiana, Maryland, Massachusetts, Minnesota, Mississippi, Missouri, Montana, Nebraska, New Mexico, North Carolina, Ohio, Oklahoma, Oregon, Pennsylvania,

Finally, full and/or partial surrogacy is regulated by statute in 14 states.⁶³

If a male same-sex couple chooses to do full surrogacy, then it would be necessary for them to also find an egg donor. Sometimes, surrogacy agencies can help throughout the entire process - finding a surrogate mother, finding an egg donor, facilitating the process and assisting in the legal agreement. Other times, prospective parents need to seek out each aspect necessary for the process piecemeal.

With so many parties involved, it seems almost unnecessary to state that agreements among the parties involved should be in writing. In particular, finding an donor for genetic material carries legal, health and other risks that need to be evaluated and for which certain representations may be desired in writing.⁶⁴

Finally, female same sex couples may not need to find a surrogate parent as one or both partners could carry the child. They would only need a sperm donor. While the couple could go to a sperm bank to select an anonymous donor, they might also have a friend or relative in mind. There are many pitfalls and, if a couple decides to proceed with a known donor, it is important that all parties execute a written agreement regarding the donor's rights. The agreements documenting the surrogacy or donation of egg and/or sperm are beyond the scope of this outline.

In *C.G. v. J.H.*,⁶⁵ a lesbian couple had been living together in Florida. One of the moms gave birth to a child conceived via intrauterine insemination using an anonymous sperm donor in 2006. The couple continued to live with each other and the child until February 2012. After the dissolution of the couple's relationship, the biological mother would only allow the non-biological mom contact with the minor child once a week, despite requests for more time. The biological mom and child moved to Pennsylvania without notifying the non-biological mom. After the move, the non-biological mom had minimal and inconsistent contact with the child.

In 2015, the non-biological mom filed a custody complaint seeking shared legal and partial physical custody of the child, arguing that she "acted [and continues to act] as a mother to the minor child [and that] the minor child was conceived by the mutual consent of the parties, with the intent that both parties would co-parent and act as mothers to the minor child."⁶⁶ The biological mom objected to the complaint arguing that the non-biological mother lacked standing to bring an action because she is not a parent and does not and did not ever stand *in loco parentis* to the minor child. The biological mom further alleged that the non-biological mom made clear that she did not want the minor child and made minimal contributions to raising the minor child. The trial court found that the non-biological mother did not jointly participate in the minor

Rhode Island, South Carolina, South Dakota, Tennessee, Vermont, West Virginia, Wisconsin, and Wyoming. *Id.*

⁶³ Alabama, California, Colorado, Delaware, Florida, Illinois, Maine, Nevada, New Hampshire, North Dakota, Texas, Utah, Virginia, and Washington all have laws allowing, but regulating, surrogacy. *Id.*

⁶⁴ *How Do I Safely Find a Sperm or Egg Donor?*, surrogate.com, available at: <https://surrogate.com/intended-parents/the-surrogacy-process/how-do-i-safely-find-a-sperm-or-an-egg-donor/> (last visited February 18, 2019).

⁶⁵ *C.G. v. J.H.*, 193 A. 3d 891 (Penn. 2018)

⁶⁶ *Id.*

child’s conception and hold the child out as her own.⁶⁷ It further found “the ‘term’ parent is limited to the biological or adopted parents of the child” and rejected the non-biological mother’s intent argument.⁶⁸ The Pennsylvania Supreme Court agreed with the trial court and refused to reverse the decision of the trial court.⁶⁹

Contrast the decision in *C.G. v. J.H. with Partanen v. Gallagher*.⁷⁰ In that matter, a lesbian couple had been in a committed, non-marital relationship between 2001 and 2013. The parties did not dispute that the non-biological mother gave “full acknowledgement, participation, and consent” to the biological mother giving birth to two children using in vitro fertilization. The non-biological mother did not formally adopt the children. After the parties separated, the non-biological mother sought a declaration of parentage. The biological mother contested, arguing that the non-biological mother lacked a biological connection to the children as the children were not born to her.⁷¹ The Massachusetts Supreme Court reversed the finding of the trial court and found that a showing of a biological connection was unnecessary and that the non-biological mother showed that the pregnancies were “undertaken with the full acknowledgement, participation, and consent of” the non-biological mother.⁷² The Court also found that both mothers “received the child into their home and openly held out the child as their child.”⁷³

In light of these cases, committed, non-married couples using artificial reproductive technology to build a family should be sure to formalize their parentage through a stepparent/partner adoption or enter into a parentage agreement. Parties relying on courts to find – or not find – a legal parent-child relationship do so at great risk.

C. State Identification Documents

For transgender individuals who are planning to or have already begun to transition, name change may be important so that the person’s outward appearance and identification documents match. Documentation that does not match the person’s outward appearance could place a client at risk; in fact, almost 10% of transgender individuals have experienced violence due to their gender identity or expression.⁷⁴

Each state and the federal government have different requirements for changing a person’s legal name and gender on official documentation. These requirements and procedures are constantly evolving. Sometimes the evolution is by state legislative activity. Other times, change happens through the courts as in *F.V. v. Barron*, a 2018 case out of the U.S. District Court for Idaho, and *Love, et. al. v. Johnson*, a 2015

⁶⁷ *Id.* at 907.

⁶⁸ *Id.* at 898.

⁶⁹ *Id.* at 911.

⁷⁰ *Partanen v. Gallagher*, 475 Mass. 632, 59 N.E.2d 1133 (Mass. 2016).

⁷¹ *Id.* at 641, 1141.

⁷² *Id.* at 643-44, 1142-43.

⁷³ *Id.*

⁷⁴ Flores, *How Many Adults Identify As Transgender in the United States*. See also, Chase Strangio, *Deadly Violence Against Transgender People Is on the Rise. The Government Isn’t Helping*, The ACLU LGBT & HIV Project, August 21, 2018.

case out of the U.S. District Court for the Eastern District of Michigan.⁷⁵ Before describing the requirements in select states, a discussion of these cases are helpful to understand why legal name and gender change, and consistency in the documentation, is important for transgender individuals.

In *F.V.*, Plaintiffs asked the court for a declaration that Idaho’s policy that automatically denies applications to change the listed sex on a birth certificate for any reason other than error was a violation of their constitutional rights.⁷⁶ One of the plaintiffs, a transgender female assigned male at birth, knew she was female from approximately age 6, began to live openly as a female at age 15, and had taken steps medically and socially to bring her body and expression of gender in line with her female gender identity.⁷⁷ For her, “living with a birth certificate declaring she is male is a permanent and painful reminder that Idaho does not recognize her as she is – as a woman.”⁷⁸ She also felt, as discussed above, that “presenting an identity document that conflicts with her gender identity is both humiliating and dangerous” and it put her at risk for violence by disclosing against her will and intentions that she was a transgender individual.⁷⁹

The other plaintiff in the case, Dani Martin, also knew from a young age that she was female, although assigned male at birth, and had taken steps, both medically and socially, to bring her body and gender expression in line with her gender identity. This mismatch between Dani’s gender identity and the sex listed on her birth certificate had exposed her to harassment and embarrassment. In addition, the mismatch had also prevented her from making the change in other important records and perpetuated instances “where she [was] forced to disclose her transgender status, face embarrassment, harassment, and potential physical violence.”⁸⁰

The Court found that Idaho’s policy did not pass the rational basis test of the Equal Protection Clause of the Fourteenth Amendment, noting that Idaho could provide no justification for the policy to “automatically and categorically deny applications made by transgender people to amend the birth-assigned sex on their birth certificates to align with their gender identity.”⁸¹ The court analyzed whether discrimination against transgender individuals is sex-based discrimination in the context of Title VII and found that “to conclude discrimination based on gender identity or transsexual status is not discrimination based on sex is to depart from advanced medical understanding in favor of archaic reasoning.”⁸²

The Eastern District of Michigan similarly found for the Plaintiffs in *Love* based on the Fourteenth Amendment.⁸³ In *Love*, the plaintiffs sought a declaration that the Michigan Secretary of State’s policy for changing the sex on state-issued identification was unconstitutional in that it was unduly burdensome and in some cases impossible for Plaintiffs, and other transgender individuals, to obtain a state ID that accurately

⁷⁵ *F.V., et. al. v. Barron, et. al.*, 286 F.Supp.3d 1131 (D. ID 2018); *Love, et. al. v. Johnson*, 146 F.Supp.3d 848 (E.D. Mich. 2015).

⁷⁶ *F.V.*, at 1134.

⁷⁷ *Id.* at 1138.

⁷⁸ *Id.* at 1138-139.

⁷⁹ *Id.* at 1139.

⁸⁰ *Id.*

⁸¹ *Id.* at 1140.

⁸² *Id.* at 1142-143.

⁸³ *Love, et. al. v. Johnson*, 146 F.Supp.3d at 850.

reflected their gender. Michigan’s policy for “changing sex” on a state ID provided that a birth certificate was the only document accepted as proof to change an individual’s sex. The named plaintiff, Emani Love, was outed by a precinct worker as a transgender female when she went to vote and presented her state ID. Another plaintiff, a transgender male, had ordered drinks at a bar, presented her ID, and was consistently called “ma’am” by the workers at the bar. Another plaintiff, a transgender female was told “That’s not you” when presenting her ID at a retail store. A transgender male plaintiff had a hostile experience at a hardware store. The Court found that these experiences “cut at the very essence of personhood protected under the substantive component of the Due Process Clause.”⁸⁴ The Court discussed that state actions that infringe upon fundamental rights will be upheld under the substantive due process component of the Fourteenth Amendment “only where the governmental action furthers a compelling state interest, and is narrowly drawn to further the state interest.”⁸⁵ The Court found that Michigan’s policy “bears little, if any, connection to [the state’s] purported interest, and even assuming it did, there is no question that requiring an amended birth certificate to change the sex on one’s license is far from the least restrictive means of accomplishing the state’s goals.”⁸⁶

The Center for Transequality publishes “grades” for the laws of each state. For purposes of this outline, we discuss the current laws in Illinois, Minnesota, Indiana, Michigan, Iowa, California, Florida, New York and Texas. These states provide a view of the most and least trans-friendly laws and cover a sampling of different regions. If you have a client who needs assistance in any state not discussed here, a good starting place is the National Center for Transgender Equality (www.transequality.org). The law in this area is constantly in flux, so it is important to verify the laws and procedures with the relevant authority for each state before embarking on the path of assisting a client to change a legal name or gender.

i. Illinois

Illinois laws are considered somewhere in the middle of the pack as far as friendliness for trans individuals. The process is a bit complicated in Illinois, there are hurdles to name change, certification from a medical professional is needed, and no gender-neutral option is available.⁸⁷

1. Name Change

In Illinois, a person who has resided in the State for more than 6 months can petition the court to change their name.⁸⁸ In the heading, the petitioner must use their current name (not the new name).⁸⁹ The petition must be verified by an “affidavit of some credible person.”⁹⁰ Prior to the hearing, the person must publish notification of their name change once a week for three consecutive weeks.⁹¹ This process should

⁸⁴ *Id.* at 855

⁸⁵ *Id.*, at 856.

⁸⁶ *Id.*

⁸⁷ *ID Documents Center*, National Center for Transgender Equality. <https://transequality.org/documents>

⁸⁸ 735 ILCS 5/21-101

⁸⁹ *Guide to Name and Gender Marker Changes*, Equality Illinois, available at: <http://www.equalityillinois.us/wp-content/uploads/2016/02/EI-Name-Change-Toolkit-Guide.pdf>

⁹⁰ *ID Documents Center*.

⁹¹ *Guide to Name and Gender Marker Changes*, *supra*.

be started at least six weeks prior to the hearing.⁹² Once the person's name has been changed, he or she must notify the Secretary of State within 10 days.

There are some limitations in Illinois as to who can change their name. Anyone who has been convicted of a felony in any state must wait ten years from the completion and discharge from his or her sentence, unless he or she has been pardoned.⁹³ In addition, any person convicted of crime which requires the person to be registered on the sex offender registry cannot petition for a name change.⁹⁴

2. Driver's License

To obtain a new driver's license with a new name, the person must appear at a Secretary of State Department of Motor Vehicles office and apply for a corrected driver's license and/or state ID.⁹⁵ If the person is also changing their gender marker on their license or state ID, acceptable documentation includes:

- (i) A court order;
- (ii) Medical report form;
- (iii) Psychiatric report form;
- (iv) Physician's statement; or
- (v) Other acceptable documentation that a gender change has taken place or that the applicant is in the process of undergoing a gender change.

3. Birth Certificate

Effective January 1, 2018, persons born in Illinois may request to have their gender corrected on their birth certificate.⁹⁶ To do so, the applicant must submit the following to the Illinois Department of Vital Records:

- (i) An Affidavit and Certificate of Correction Request, which must be signed by the applicant and notarized;
- (ii) A Declaration of Gender Transition, which must be signed by a licensed health care professional or licensed mental health professional who has treated or evaluated the applicant stating that the applicant has undergone treatment that is *clinically appropriate* for that individual for the purpose of gender transition, based on contemporary medical

⁹² *ID Documents Center*.

⁹³ 735 ILCS 5/21-101(a)

⁹⁴ *Id.*

⁹⁵ Illinois Secretary of State, Driver's License/ Commercial Driver's License/ State ID Card, available at: http://www.cyberdriveillinois.com/departments/drivers/drivers_license/drlicid.html#nameChange (last visited April 9, 2019).

⁹⁶ Public Act 100-0360

standards, or that the individual has an intersex condition, and that the sex designation on such person’s birth record should be changed (emphasis added); and

- (iii) A valid government ID.

It is important to note that gender confirming surgery is no longer needed in Illinois. Not every person is able to undergo gender confirming surgery and this relatively new public act allows persons who are unable to undergo gender confirming surgery to still change their gender designation on their birth certificate to confirm their gender.

ii. Minnesota

Minnesota has the most trans-friendly and progressive laws in the Midwest to change a person’s legal name, update their driver’s license, and update their birth certificate.⁹⁷

1. Name Change

Minnesota’s process is relatively simple. A person who has resided in Minnesota for at least six months need only submit a petition to court.⁹⁸ The person must appear personally at a hearing and present two (2) witnesses to prove the person’s identity.⁹⁹ This change in identity is, however, of public record.¹⁰⁰

2. Driver’s license

According to Minnesota’s Driver and Vehicle Services, sex is a self-designated descriptor.¹⁰¹ “Applicants are not required under state or federal law to present documentation that confirms the information they submit.”¹⁰² The Minnesota Driver and Vehicle Services allows individuals to choose a sex marker of M, F, or X.

3. Birth Certificate

Individuals can submit an application to amend the sex marker on their birth certificate.¹⁰³ To do so, the individual would need to include a letter from a physician confirming appropriate clinical treatment for gender transition *or* a court order for gender change.¹⁰⁴ The original birth certificate will be kept confidential and only disclosed by court order.¹⁰⁵

⁹⁷ *ID Documents Center*.

⁹⁸ Minn. Stat. Ann. §§ 259.10

⁹⁹ *Id.*

¹⁰⁰ *ID Documents Center*.

¹⁰¹ Minnesota Driver & Vehicle Services, available at: <https://dps.mn.gov/divisions/dvs/Pages/self-designated-descriptors.aspx>

¹⁰² *Id.*

¹⁰³ Minnesota Department of Health, *Birth Record Amendment Packet*, available at: <http://www.health.state.mn.us/divs/chs/osr/bamendia.pdf>

¹⁰⁴ Minn. Stat. Ann. §§ 144.218

¹⁰⁵ *Id.*

iii. Indiana

Indiana has slightly more favorable laws than Illinois.¹⁰⁶ Their forms are easy to understand; however, certification by a limited range of licensed professionals is necessary and a gender-neutral option is not available.¹⁰⁷

1. Name Change

In Indiana, any person may change their name, unless they are confined to a Department of Correction facility.¹⁰⁸ To begin the process, the individual can petition a circuit court, superior court, or probate court in the county in which the individual resides.¹⁰⁹ The petition must include the person's:

- (i) date of birth;
- (ii) current residence and mailing address;
- (iii) valid driver's license number, state identification card number or photo exempt identification card number;
- (iv) all previous names used by the person;
- (v) proof of United States citizenship;
- (vi) a statement as to whether the person holds a valid United States passport, and;
- (vii) a description of all felony convictions against the person.¹¹⁰

The petition must be subscribed and sworn to or affirmed before a notary public.¹¹¹

After filing the petition, but before the hearing, the person must give notice of the petition by three (3) weekly publications in a newspaper of general circulation published in the county in which the petition is filed, or, if none, then in a newspaper nearest to that county, with the last publication being at least thirty (30) days prior to the hearing.¹¹²

Unlike Illinois, persons with felony convictions in the last ten years can change their name, but the person must give notice of the filing petition to the sheriff of the county in which the petitioner resides, the prosecuting attorney of the county in which the petitioner resides, and the Indiana central repository for

¹⁰⁶ *ID Documents Center.*

¹⁰⁷ *Id.*

¹⁰⁸ Ind. Code Ann. §§34-28-2-1 and 1.5.

¹⁰⁹ Ind. Code Ann. §34-28-2-1

¹¹⁰ Ind. Code Ann. §34-28-2-2.5

¹¹¹ Ind. Code Ann. §34-28-2-2

¹¹² Ind. Code Ann. §34-28-2-3(a)

criminal history.¹¹³ While court records are usually public, a person can make a Rule 9 request that court records be sealed.¹¹⁴

2. Driver's license

The Indiana Bureau of Motor Vehicles requires a person to officially change their name on their Social Security documentation and allow at least one business day after completing the name change before visiting the Indiana Bureau of Motor Vehicles to change the name on a driver's license.¹¹⁵ The person must also provide documentation supporting a legal name change, such as a marriage license, divorce decree, court order approving a change of legal name, and an original or certified copy of an amended birth certificate showing a change of name.¹¹⁶

To change one's gender, an individual must provide one of the following:

- (a) A certified, amended birth certificate;
- (b) A Physician's Statement of Gender Change using State Form 55617; or
- (c) A physician's signed and dated statement, on letterhead that includes the following language: "<name> successfully underwent all treatment necessary to permanently change <name>'s gender from <prior gender> to <new gender>".¹¹⁷

As discussed below, Indiana does not require a physician's statement to change one's gender on the person's birth certificate – only a court order is needed; thus, it is possible to change one's gender marker in Indiana without treatment to permanently change one's gender.

3. Birth Certificate

Indiana does not have a specific statute regarding changing a person's gender.¹¹⁸ The code simply says that the Indiana state department may make additions to or corrections in a certificate of birth on receipt of adequate documentary evidence.¹¹⁹ Adequate documentary evidence would include a court order.¹²⁰

¹¹³ Ind. Code Ann. §34-28-2-3(c)

¹¹⁴ Indiana Court Rules, Administrative Rule 9(G)(5).

¹¹⁵ Indiana Bureau of Motor Vehicles, *Amending Your Driver's License or Identification Card* available at: <https://www.in.gov/bmv/2564.htm>

¹¹⁶ *Id.*

¹¹⁷ *Id.*

¹¹⁸ Ind. Code Ann. §16-37-2-10

¹¹⁹ Ind. Code Ann. §16-37-2-10(b)

¹²⁰ See *Court Forms for Name and Gender Marker Changes*, Indiana Legal Services, available at: <https://www.indianalegalservices.org/NameGenderMarkerCourtForms>. See also, *ID Documents Center*.

iv. Michigan

Michigan has a somewhat more burdensome process than Illinois. As proof of surgery is not required in Michigan, it still falls toward the middle of the pack for trans-friendly rules and procedures.¹²¹

1. Name Change

A person requesting a legal name change should file a petition with the circuit court of the county in which they reside.¹²² To do so, the person must be a resident of the county for at least one year.¹²³ The petition must provide a sufficient reason for the name change and show that the change is not sought with a fraudulent intent.¹²⁴ Under the statute, a person petitioning for a name change who has a “criminal record” is deemed to be seeking the change with a fraudulent intent, and the burden of proof is on the petitioner to rebut such a presumption.¹²⁵

Michigan requires two complete sets of fingerprints taken at a local police agency for petitioners who are age 22 or older.¹²⁶ The prints are then processed with the state police and the FBI for comparison of records and to determine whether there are any pending charges against the individual or any conviction against the individual.¹²⁷ If there are no pending charges or convictions against the individual, then the department of state police is instructed to destroy its copy of the petitioner’s fingerprints.¹²⁸ If the court ultimately grants the name change request to a petitioner who has a criminal record, then the order shall be forwarded to the Michigan state police and other agencies, as described in the statute.¹²⁹

Publication is generally required as set forth in Michigan Supreme Court rules. If the individual petitioning for the name change can show good cause that there should be no publication, the Court can set aside the publication requirement and also order that the record of the proceeding be confidential.¹³⁰ Good cause includes, but is not limited to “evidence that publication or availability of a record of the proceeding could place the petitioner or another individual in physical danger, such as evidence that the petitioner or another individual has been the victim of stalking or an assaultive crime.”¹³¹ Evidence should include the petitioner’s sworn statement stating the reason for the fear, but, if the fear is stalking or an assaultive crime, proof of an arrest or prosecution for the crime is not required.¹³²

¹²¹ *ID Documents Center*.

¹²² Mich. Comp. Laws Ann §711.1(1)

¹²³ *Id.*

¹²⁴ *Id.*

¹²⁵ *Id.*

¹²⁶ Mich. Comp. Laws Ann §711.1(2)

¹²⁷ *Id.*

¹²⁸ *Id.*

¹²⁹ Mich. Comp. Laws Ann §711.1(3)

¹³⁰ Mich. Comp. Laws Ann §711.3(1)

¹³¹ *Id.*

¹³² Mich. Comp. Laws Ann §711.3(2)

2. Driver's license

A person seeking to change their name on their driver's license or state identification card in Michigan must present their current, valid driver's license or state identification card, as well as proof of the name change (i.e., the court order).¹³³ If a person has changed their name more than once, then the person would need to bring in documentation showing their name change history (i.e., court orders, marriage certificates, or divorce decrees).¹³⁴

Until 2016, Michigan required proof of "gender confirmation surgery" to correct gender on state identification cards and driver's licenses.¹³⁵ As of March 10, 2016, the Michigan Secretary of State changed its policy to allow a passport denoting gender as sufficient proof to change the gender on Michigan state identification cards of driver's licenses.¹³⁶ The Michigan Secretary of State will also, reportedly, accept a court order of gender designation.¹³⁷

3. Birth Certificate

Obtaining a corrected birth certificate is more difficult than the other processes in Michigan. Under §333.2831 of the Michigan Public Health Code, the Department of Vital Records will only issue a new birth certificate with a corrected sex designation if the request is accompanied by an affidavit of a physician certifying that sex-reassignment surgery has been performed.

v. Iowa

Iowa has the most restrictive and least trans-friendly laws in the Midwest region. As described in greater detail below, the name change process is complex and burdensome. The state requires gender confirmation surgery in order to change a driver's license or birth certificate gender marker.

1. Name Change

Persons who have attained the age of majority may petition the court for a legal name change.¹³⁸ The petition should be verified and filed in the district court of the county where the petitioner resides.¹³⁹ The petition should include all of the following information:

- i. Name at the time the petition is filed and county of residence;

¹³³ Michigan Secretary of State, *How to Change your Name on a Driver's License or State ID Card*, available at: <https://www.michigan.gov/sos/0,1607,7-127--25240--,00.html>

¹³⁴ *Id.*

¹³⁵ Brad Devereaux, *Transgender People Can Now Change Gender Marker on Michigan ID Without Surgery*, MLive, March 18, 2016, available at: https://www.mlive.com/news/index.ssf/2016/03/transgender_people_can_now_cha.html (last visited April 9, 2019).

¹³⁶ *Id.*

¹³⁷ *ID Documents Center*.

¹³⁸ Iowa Code Ann. §674.1

¹³⁹ Iowa Code Ann. §674.2

- ii. A description of the person, including height, weight, color of hair, color of eyes, race, sex, and date and place of birth;
- iii. Residence at time of petitioner and any prior residences for the past five years;
- iv. Reason for change of name, briefly and concisely stated;
- v. A legal description of all real property in this state owned by the petition; and
- vi. The name the petitioner proposes to take.¹⁴⁰

The petitioner should also include a certified copy of their birth certificate, and, if unavailable, the reason for the unavailability and other forms of identification.¹⁴¹ In addition to being filed with the clerk of court, the petition needs to be filed with the Iowa Department of Public Health.¹⁴² If the person is married, the petitioner must give legal notice to the spouse.¹⁴³

The court may grant the petition any time after thirty days from the date the petition was filed.¹⁴⁴ The decree granting the name change must provide the following information:

- i. Petitioner’s name and former name;
- ii. Petitioner’s height, weight, color of hair, color of eyes, race, sex, date and place of birth;
- iii. The name of Petitioner’s spouse and any minor children affected by the change; and
- iv. A legal description of all real property owned by the petitioner.¹⁴⁵

As with the petition, a copy of the decree must be furnished to the Iowa Department of Public Health.¹⁴⁶ The petition must also be sent to every county in Iowa where the petitioner owns real property.¹⁴⁷ The county recorder and auditor of each county where the petition owns real estate must index a change of name for each parcel of real estate.¹⁴⁸

One of the more egregious parts of the Iowa Code provides that after the legal name change has been granted, “any new birth certificate issued to a person granted a change of name shall reflect the former name of the person issued the new birth certificate.”¹⁴⁹ This forever requires the individual to reveal their

¹⁴⁰ *Id.*

¹⁴¹ *Id.*

¹⁴² Iowa Code Ann. §674.3

¹⁴³ Iowa Code Ann. §674.6

¹⁴⁴ Iowa Code Ann. §674.4

¹⁴⁵ Iowa Code Ann. §674.5

¹⁴⁶ Iowa Code Ann. §674.7

¹⁴⁷ Iowa Code Ann. §674.8

¹⁴⁸ Iowa Code Ann. §674.14

¹⁴⁹ Iowa Code Ann. §674.9

history when they present their birth certificate. In addition, Iowa’s code provides that the entire proceeding will be kept in the clerk of court’s record and is to be indexed under the person’s original name and their new name.¹⁵⁰

2. Driver’s license

Pursuant to Chapter 601 of the Iowa Administrative Code, a person who was born in Iowa and is requesting a change of sex designation on their state identification card or driver’s license “must submit a certified amended or new Iowa birth certificate that documents the change of sex designation.”¹⁵¹ Persons who were born outside of Iowa may submit other documentation as described in the Code, but “the department may make further investigation or require further information necessary to determine whether a change of sex designation occurred.”¹⁵²

3. Birth Certificate

Changing sex designation on a birth certificate in Iowa requires surgery, so an Iowa resident who was born in Iowa, must have had surgery in order to obtain a sex marker change on the person’s driver’s license.¹⁵³ Along with the application to change the person’s sex marker designation, the Iowa Administrative Code provides that “After surgery or other treatment to change a sex designation, the registrant shall submit to the state registrar a notarized affidavit from the physician and surgeon, or osteopathic physician and surgeon, completing the sex designation treatment stating the following:

- a. The sex designation has been permanently changed by surgery or other treatment;
- b. Description of the medical procedures; and
- c. The physician and surgeon or osteopathic physician and surgeon’s full name, address, state of medical license, and medical license number.”¹⁵⁴

The Iowa Administrative Code does provide that the county registrar and state registrar shall seal the original birth certificate and all related documents only to be opened by the state registrar for administrative purposes or upon a court order.¹⁵⁵

vi. California

California has some of the most trans-friendly laws and procedures for changing one’s legal name and gender. The process is simple and streamlined.

¹⁵⁰ Iowa Code Ann. §674.11

¹⁵¹ Iowa Administrative Code §601.5(7)(a)

¹⁵² Iowa Administrative Code §601.5(7)(b)

¹⁵³ Iowa Administrative Code §99.20

¹⁵⁴ Iowa Administrative Code §99.20(1)

¹⁵⁵ Iowa Administrative Code §99.20(5)

1. Name Change

Changing name and gender can be completed in one step in California. A person only needs to fill out the form petition for name change (counties may have their own form) and file with the court in the county in which the person resides.¹⁵⁶ A person may not even need to appear at the hearing. As long as no good cause objection is filed within six weeks, the court will issue the order without a hearing.¹⁵⁷

2. Driver's license

California is one of the few states that allow a selection of “non-binary.” In order to update a person's gender marker on their driver's license or state identification card, a person simply can self-select “male,” “female,” or “nonbinary” on the application form.¹⁵⁸

3. Birth Certificate

California also has simplified the process for updating a birth certificate. A person simply needs to submit an affidavit attesting, under penalty of perjury, that the request for a change of gender is to conform their legal gender to their gender identity and not for any fraudulent purpose. Like the driver's license, a person can choose “male,” “female,” or “nonbinary.”¹⁵⁹ California does not require a physician's declaration.

vii. Florida

Florida's procedures are more complex for name change, but now are fairly simple for gender update on a driver's license or birth certificate.

1. Name Change

To obtain a name change in Florida, a person must file a petition in the county in which the individual resides.¹⁶⁰ The petition must show:

- “(a) That the petitioner is a bona fide resident of and domiciled in the county where the change of name is sought.
- (b) If known, the date and place of birth of the petitioner, the petitioner's father's name, the petitioner's mother's maiden name, and where the petitioner has resided since birth.
- (c) If the petitioner is married, the name of the petitioner's spouse and if the petitioner has children, the names and ages of each and where they reside.

¹⁵⁶ *How to Change your Name AND Gender (Adult)*, California Courts, available at: <http://www.courts.ca.gov/25797.htm> (last visited February 12, 2019).

¹⁵⁷ *Id.*

¹⁵⁸ CA Senate Bill 179, Sections 16, 17, and 18.

¹⁵⁹ CA Senate Bill 179, Sections 11 and 14.

¹⁶⁰ Fla. Stat. Ann. 68.07(1)

(d) If the petitioner's name has previously been changed and when and where and by what court.

(e) The petitioner's occupation and where the petitioner is employed and has been employed for 5 years next preceding the filing of the petition. If the petitioner owns and operates a business, the name and place of it shall be stated and the petitioner's connection therewith and how long the petitioner has been identified with that business. If the petitioner is in a profession, the profession shall be stated, where the petitioner has practiced the profession, and if a graduate of a school or schools, the name or names thereof, date of graduation, and degrees received.

(f) Whether the petitioner has been generally known or called by any other names and if so, by what names and where.

(g) Whether the petitioner has ever been adjudicated a bankrupt and if so, where and when.

(h) Whether the petitioner has ever been arrested for or charged with, pled guilty or nolo contendere to, or been found to have committed a criminal offense, regardless of adjudication, and if so, when and where.

(i) Whether the petitioner has ever been required to register as a sexual predator.

(j) Whether any money judgment has ever been entered against the petitioner and if so, the name of the judgment creditor, the amount and date thereof, the court by which entered, and whether the judgment has been satisfied.

(k) That the petition is filed for no ulterior or illegal purpose and granting it will not in any manner invade the property rights of others, whether partnership, patent, good will, privacy, trademark, or otherwise.

(l) That the petitioner's civil rights have never been suspended or, if the petitioner's civil rights have been suspended, that full restoration of civil rights has occurred."¹⁶¹

Before a hearing on the petition, the person must submit fingerprints for processing with the state police and FBI.¹⁶² After the final judgment, the clerk of court will notify the Office of Vital Statistics and the Department of Law Enforcement.¹⁶³

¹⁶¹ Fla. Stat. Ann. 68.07(3)

¹⁶² Fla. Stat. Ann. 68.07(2)

¹⁶³ Fla. Stat. Ann. 68.07(5) and (6)

2. Driver's license

To change the name on the driver's license, an individual must simply provide the order for name change to the Division of Motorist Services.¹⁶⁴

In 2011, the Florida Division of Motorist Services changed its policy regarding Gender Reassignment Requirements to provide that an individual no longer was required to have sex reassignment surgery to change their gender marker on their driver's license. Now, a person merely needs to obtain a letter from the person's attending medical provider with the following information:

1. Physician's full name;
2. Medical license or certificate number;
3. Issuing state or other jurisdiction of medical/ license certificate;
4. Drug Enforcement Administration registration number assigned;
5. Address and telephone number of the physician;
6. Language stating that he/she is the attending physician for the customer and that he/she has a doctor/ patient relationship with the customer;
7. Language stating that the customer is undergoing appropriate clinical treatment for transition to the new gender; and
8. Language stating "I declare under penalty of perjury under the laws of the United States the foregoing is true and correct."¹⁶⁵

3. Birth Certificate

As of March 20, 2018, Florida no longer requires sex reassignment surgery to change gender marker on a birth certificate.¹⁶⁶ A person simply needs to provide the same letter as the one described above for the Department of Motor Vehicles in order to change gender marker on a driver's license.¹⁶⁷ This update has not been codified yet, but General Counsel for the Department of Health has publicly stated the change of policy.¹⁶⁸

viii. New York

New York is unique in that New York State and New York City have different laws and procedures. New York City has recently made changes that are quite progressive.

1. Name Change

For name changes, New York State and New York City have the same rules and procedures. A petition for name change should be filed in the county court or supreme court in the county in which the

¹⁶⁴ Florida Department of Highway Safety and Motor Vehicles, *Name Changes*, available at: <https://www.flhsmv.gov/ddl/namechange.html> (last visited February 16, 2019).

¹⁶⁵ Department of Highway Safety and Motor Vehicles, Division of Motorist Services, *Gender Reassignment Requirements*, Document ID Number: 034-2011 (July 29, 2011).

¹⁶⁶ Equality Florida, *Florida to Amend Birth Certificate Gender Marker Change Requirements*, available at <https://www.eqfl.org/transactionfl/birth-certificates> (last visited February 16, 2019).

¹⁶⁷ *Id.*

¹⁶⁸ *Id.*

person resides, or, if the person lives in New York City, either the supreme court or any branch of the civil court of New York City or a county of the city.¹⁶⁹ The name change petition needs to be verified and include the name, date of birth, place of birth, age, and residence of the individual and the proposed name.¹⁷⁰ The petition shall also specify:

- “(a) whether or not the petitioner has been convicted of a crime or adjudicated a bankrupt;
- (b) whether or not there are any judgments or liens of record against the petitioner or actions or proceedings pending to which the petitioner is a party, and, if so, the petitioner shall give descriptive details in connection therewith sufficient to readily identify the matter referred to;
- (c) whether or not the petitioner is responsible for child support obligations;
- (d) whether or not the petitioner’s child support obligations have been satisfied and are up to date;
- (e) the amount of a child support arrearage that currently is outstanding along with the identity of the court which issued the support order and the county child support collections unit;
- (f) whether or not the petitioner is responsible for spousal support obligations;
- (g) whether or not the petitioner’s spousal support obligations have been satisfied and are up to date; and
- (h) the amount of spousal support arrearage that currently is outstanding along with the identity of the court which issued the support order.”¹⁷¹

2. Driver’s license

To change a name for a New York State driver’s licenses or identification, a person must provide the court order.¹⁷² To change one’s gender, a person must provide “proof of a gender change,” which can be a written statement from a physician, psychologist, psychiatrist, life counselor, clinical social worker, or other professional that is overseeing the gender change and certifies the change in gender.¹⁷³

¹⁶⁹ NY Civ. Rights Law §60

¹⁷⁰ NY Civ. Rights Law §61(1)

¹⁷¹ *Id.*

¹⁷² New York State Department of Motor Vehicles, *Change Information on DMV Documents*, available at: <https://dmv.ny.gov/address-change/change-your-name-or-non-address-information-dmv-documents> (last visited February 16, 2019).

¹⁷³ *Id.*

For New York City residents, individuals can change their gender on their Municipal Identification Card by marking their desired gender on the application.¹⁷⁴ People have the option to choose male, female, or no gender.¹⁷⁵

3. Birth Certificate

Finally, New York City and New York State separately issue birth certificates.

For individuals born in New York State, other than in New York City, a person must make a written request to the New York State Department of Health, Bureau of Vital Records.¹⁷⁶ The person must also provide a notarized affidavit from a physician, nurse practitioner or physician assistant: (1) “confirming that surgical procedures have been performed on the applicant to complete sex reassignment” or (2) “that the applicant has undergone appropriate clinical treatment for a person diagnosed with Gender Dysphoria as defined in the most current edition of the *Diagnostic and Statistical Manual of Mental Disorders* or language stating that the applicant has undergone appropriate clinical treatment for a person diagnosed with Transsexualism as defined in the most current edition of *International Statistical Classification of Diseases and Related Health Problems*; or as these diagnoses may be referred to in future editions.”¹⁷⁷

As of January 1, 2019, New York City has adopted progressive procedures regarding a change of gender on birth certificates for persons born in New York City. The city has eliminated the requirement to submit a letter from a physician, noting that practitioners simply comply with their patients’ request, so the requirement did not add sufficient value.¹⁷⁸ Now, a person need only submit the completed birth certificate correction application and a signed and notarized attestation of gender identity signed by the applicant (if over 18) or by the person’s parent or guardian (if a minor).¹⁷⁹ Additionally, individuals may choose the “X” gender marker, in addition to “M” or “F”.¹⁸⁰

¹⁷⁴ Sylvia Rivera Law Project, *How to Change Your ID Documents for Trans, Gender Non-Conforming, and Intersex (TGNCI) Individuals*, current as of 2019, available at <https://srlp.org/resources/changeid/#IDNY> (last visited February 16, 2019).

¹⁷⁵ *Id.*

¹⁷⁶ See Letter dated September 28, 2015 from Guy Warner, Director of Bureau of Vital Records available at: <http://www.transequality.org/sites/default/files/docs/id/Instruction%20sheet%2005-23-14.docx#overlay-context=documents/state/new-york> (last visited February 17, 2019).

¹⁷⁷ *Id.*

¹⁷⁸ New York City Department of Health and Mental Hygiene Board of Health, *Notice of Adoption of Amendment to Article 207 of the New York City Health Code*, available at: <https://www1.nyc.gov/assets/doh/downloads/pdf/notice/2018/noa-amend-article207-section207-05.pdf> (last visited February 17, 2019).

¹⁷⁹ *Id.*

¹⁸⁰ *Id.*

ix. Texas

Texas law is problematic for gender change, as the Texas courts have held that there is no process in the statutes to authorize a legal change in gender.

1. Name Change

Obtaining a name change is relatively easy in Texas. The applicant must file the petition for name change in the county in which the person resides.¹⁸¹ The petition must be verified and include the following information:

- “(1) the present name and place of residence of the petitioner;
- (2) the full name requested for the petitioner;
- (3) the reason the change in name is requested;
- (4) whether the petitioner has been the subject of a final felony conviction;
- (5) whether the petitioner is subject to [the sex offender registration program];

(6) a legible and complete set of the petitioner’s fingerprints on a fingerprint card format acceptable to Department of Public Safety and the Federal Bureau of Investigation;”

(7) the petitioner’s sex, race, date of birth, driver’s license number for any driver’s license issued in the 10 years preceding the date of the petitioner; social security number; and assigned FBI number, state identification number, or any other reference number in a criminal history record system that identifies the petitioner.¹⁸²

2. Driver’s license

To change one’s name for purposes of a driver’s license, a person needs to provide a court order or an amended birth certificate indicating the name change.¹⁸³ In order to change gender marker on a driver’s license in Texas, a person must provide either a court order or an amended birth certificate.¹⁸⁴

3. Birth Certificate

As with changing a person’s gender marker on the driver’s license, a person needs to provide a court order to the Texas Vital Statistics that denotes the change in “sex” (note: the order must say “sex” and

¹⁸¹ Tex. Fam. Code Ann. §45.101.

¹⁸² Tex. Fam. Code Ann §45.102.

¹⁸³ Texas Department of Public Safety, *How to Change Information on your Driver License or ID Card*, available at <http://www.dps.texas.gov/DriverLicense/changes.htm> (last visited February 17, 2019).

¹⁸⁴ *Id.*

not “gender” to comply with the statute).¹⁸⁵ This is problematic because judges may not order the change in gender (or sex).

For example, in *In re Brandon Groves McReynolds*, the Court of Appeals of Texas denied a petition of a transgender male who had completed gender confirming surgery.¹⁸⁶ Brandon was asking the trial court to change his legal gender from female to male.¹⁸⁷ The trial court did not grant his petition, finding that the Texas code did not allow for such a change.¹⁸⁸ The appellate court agreed, finding that “there is no statutory scheme expressly authorizing sex change orders or establishing procedures for obtaining such an order.”¹⁸⁹ This finding prevented Brandon from receiving an amended birth certificate and a change in the gender marker on his driver’s license, so his outward appearance and legal documents would not match.

D. Federal Identification Documents

i. U.S. Passport

Currently, the United States Department of State Foreign Affairs Manual provides that it is the policy of the Department that “sex reassignment surgery is not a prerequisite for passport issuance based on gender change.”¹⁹⁰ The only documentation that is required is medical certification of gender transition from a licensed physician “who has treated the applicant for her/his gender-related care or reviewed and evaluated the gender-related medical history of the applicant.”¹⁹¹

The signed, original certification or statement must be on the physician’s office letterhead.¹⁹² Licensed physicians are defined only as doctors of osteopathy (D.O.s) or medical doctors (M.D.s).¹⁹³ The medical certification must include certain information of the doctor, as well as language stating (1) “that she/he has treated the applicant or has reviewed and evaluated the medical history of the applicant and that she/he has a doctor/patient relationship with the applicant”; and (2) “the applicant has had appropriate clinical treatment for gender transition to the new gender of either male or female.”¹⁹⁴ A two-year limited validity passport is available for persons who have just begun and are in the initial states of the gender transition process, so long as the physician certification states that the individual is in the process of gender transition.¹⁹⁵

¹⁸⁵ Tex. Health & Safety Code §192.011.

¹⁸⁶ *In Re Brandon Groves McReynolds*, 502 S.W.3d 884, 885 (TX Crt. of Appeals, Dallas 2016).

¹⁸⁷ *Id.*

¹⁸⁸ *Id.*

¹⁸⁹ *Id.* at 888.

¹⁹⁰ 8 FAM 403.3-1(d)

¹⁹¹ 8 FAM 403.3-1(e); 8 FAM 403.3-2(B)(a)

¹⁹² 8 FAM 403.3-2(B)(a)

¹⁹³ 8 FAM 403.3-2(B)(c)

¹⁹⁴ 8 FAM 403.3-2(B)(d)

¹⁹⁵ 8 FAM 403.3-2(B)(f)

Note: the language in the physician’s letter should mirror the language in the Foreign Affairs Manual and failure to do so may result in rejection of the application to update the person’s gender marker.¹⁹⁶

ii. Social Security

While the social security card itself merely states a person’s name and social security number, sex is one piece of information currently requested on the SS-5 form to obtain a social security number and is maintained by the Social Security Administration.¹⁹⁷ This information can then be used to verify the identity of an individual.¹⁹⁸ The largest verification system, the Social Security Number Verification System, eliminated gender in the verification process in 2011; however, smaller systems may still match gender against Social Security Administration records.¹⁹⁹ If a person’s gender does not match the sex as kept by the Social Security Administration, a “No-Match” could occur.²⁰⁰

In addition to “Identity” documents (such as a U.S. driver’s license, state- issued identification card, or U.S. passport), persons wishing to change their gender marker should provide one of the following:

- i. A fully-valid, 10-year U.S. passport showing the new gender;
- ii. State-issued amended birth certificate showing the new gender;
- iii. Court order directing legal recognition of change of gender; or
- iv. Medical certification of appropriate clinical treatment for gender transition in the form of an original letter from a licensed physician.²⁰¹

Any of the documents the applicant provides must have enough biographical data to clearly identify the individual.²⁰²

iii. Selective Service

Current law provides that persons who were assigned male at birth and living in the United States must register with the Selective Service System within 30 days of their 18th birthday.²⁰³ This means that

¹⁹⁶ *Know Your Rights*, National Center for Transgender Equality, available at: <https://transequality.org/know-your-rights/passports> (last visited February 12, 2019).

¹⁹⁷ Carolyn Puckett, *The Story of the Social Security Number*, Social Security Bulletin, Vol 69, No. 2, 2009.

¹⁹⁸ *Id.*

¹⁹⁹ *Know Your Rights*, *supra*

²⁰⁰ *Know Your Rights*, *supra*

²⁰¹ How Do I Change My Gender on Social Security’s Records?, available at: <https://faq.ssa.gov/en-us/Topic/article/KA-01453> (last visited February 12, 2019).

²⁰² *Id.*

²⁰³ *Selective Service Registration and the LGBTQ Community*, available at https://www.sss.gov/Portals/0/Resources/Newsletter/LGBTQ_Youth.docx (last visited February 12, 2019).

male-to-female individuals must register.²⁰⁴ Female-to-male individuals are not required to register.²⁰⁵ Failure to register can mean a person could be permanently barred from federal student loan programs, placement in federally funded job training programs, placement in government jobs, including law enforcement, and obtaining a driver's licenses in some states.²⁰⁶

E. Healthcare

It would seem like every patient could expect healthcare without being denied service, but for LGBTQ persons and their families, discrimination in the healthcare setting is something that is a very real worry. In 2014, a pediatrician in Michigan refused to accept a newborn child of a lesbian couple as a patient due to her religious beliefs.²⁰⁷ In 2018, a pharmacist at a CVS in Arizona refused to fill a transgender woman's hormone prescription – and humiliated her in front of other customers.²⁰⁸ A 39-year-old teacher allegedly died after not getting appropriate medical care from EMTs after they discovered she was a lesbian.²⁰⁹ A gay man with HIV who was admitted to a hospital was refused HIV medication because “This is what he gets for going against God's will.”²¹⁰

In May 2016, the Obama Administration clarified Section 1557 of the Affordable Health Care Act with a rule that discrimination based on sex stereotyping and gender discrimination was impermissible sex discrimination in the healthcare setting.²¹¹ In December 2016, the U.S. District Court for the Northern District of Texas issued a nationwide injunction on this rule, and the Trump administration has not defended the regulation.²¹²

Until the law prohibits discrimination in the healthcare setting, both the Human Rights Campaign and Advocate Magazine provide lists of LGBTQ inclusive health care organizations that have rules and procedures in place to prohibit discrimination against LGBTQ individuals.²¹³ In the Chicago area, providers

²⁰⁴ *Id.*

²⁰⁵ *Id.*

²⁰⁶ *Id.*

²⁰⁷ Matt Baume, *Here's Why That Michigan Doctor Is Allowed to Turn Away Lesbian Moms*, The Advocate, February 19, 2015.

²⁰⁸ Emanuella Grinberg, *CVS Apologizes After a Pharmacist Refused to Fill a Transgender Woman's Prescription*, CNN Health, July 22, 2018.

²⁰⁹ National Women's Law Center, *Health Care Refusals Harm Patients: The Threat to LGBT People and Individuals Living with HIV/AIDS*, May 2014, available at: https://nwlrc.org/wp-content/uploads/2015/08/lgbt_refusals_factsheet_05-09-14.pdf (last visited February 12, 2019).

²¹⁰ *Id.*

²¹¹ Sharita Gruberg and Frank J. Bewkes, *The ACA's LGBTQ Nondiscrimination Regulations Prove Crucial*, The Center for American Progress, March 7, 2018.

²¹² *Id.*

²¹³ Healthcare Equality Index 2018, Human Rights Campaign, accessed at: https://assets2.hrc.org/files/assets/resources/HEI-2018-FinalReport.pdf?_ga=2.83163477.255810642.1547437929-1458405870.1543427552. See also: Charles Hicks, *153 of the Most LGBT-Friendly Hospitals*, The Advocate, June 19, 2012, available at: <https://www.advocate.com/health/2012/06/19/153-most-lgbt-friendly-hospitals?pg=1#article-content> (last visited February 12, 2019).

affiliated with Advocate Illinois Masonic Medical Center, Lurie Children’s Hospital, Howard Brown Health Center, Northwestern Memorial Hospital, Rush University Medical Center, Rush Oak Park Hospital, University of Chicago Medical Center, University of Illinois Hospital & Health Sciences System, VA Illiana Health Care System, and VA Edward Hines Jr. Hospital are noted as committed to LGBTQ healthcare equality.²¹⁴

F. Public Services

LGBTQ persons also sometimes face discrimination not experienced by cisgender straight persons. There are several matters currently being litigated regarding public accommodation.²¹⁵ Public accommodation is the services provided to the general public such as restaurants, movie theaters, libraries, and shops by both governmental entities and private businesses.²¹⁶ A current case out of Mississippi, *Zawadski v. Brewer Funeral Services*, arose when a funeral home in Mississippi allegedly refused to provide funeral or cremation services to a gay man.²¹⁷

Jack Zawadski and Bob Huskey were a couple for 52 years and had moved to Picayune, Mississippi two decades ago.²¹⁸ After being married in 2015, Bob’s health began to fail and he entered a nursing home.²¹⁹ As his health continued to fail, the family made arrangements for Bob to be cremated at the only crematorium in the county.²²⁰ When Bob passed in 2016, the funeral home was provided with Bob’s personal information, including the name of his spouse.²²¹ The funeral home refused to pick up Bob’s body from the nursing home, allegedly saying they do not deal with “their kind.”²²² To avoid such issues, it may be advisable for LGBTQ persons to make arrangements at a facility they know will be LGBTQ friendly.

Currently, twenty states and the District of Columbia prohibit discrimination in public accommodation against persons based on sexual orientation *and* gender identity, namely: California, Colorado, Connecticut, Delaware, District of Columbia, Hawaii, Illinois, Iowa, Maine, Maryland, Massachusetts, Minnesota, Nevada, New Hampshire, New Jersey, New Mexico, New York, Oregon, Rhode Island, Vermont, and Washington.²²³ Additionally, Wisconsin prohibits discrimination based on sexual orientation *only*.²²⁴

²¹⁴ *Id.*

²¹⁵ *Lambda Legal Docket*, <https://www.lambdalegal.org/in-court/cases/docket>

²¹⁶ *Map of Public Accommodations Laws*, Human Rights Campaign, available at: <https://www.hrc.org/state-maps/pdf-all> (last visited February 12, 2019).

²¹⁷ *Zawadski v. Brewer Funeral Services*, Lambda Legal, available at: https://www.lambdalegal.org/in-court/cases/ms_zawadski-v-brewer-funeral-services (last visited February 12, 2019).

²¹⁸ *Id.*

²¹⁹ *Id.*

²²⁰ *Id.*

²²¹ *Id.*

²²² *Id.*

²²³ *Map of Public Accommodations Laws*, Human Rights Campaign, available at: <https://www.hrc.org/state-maps/pdf-all> (last visited February 12, 2019).

²²⁴ *Id.*

Even though certain states prohibit discrimination, businesses still may discriminate. For example, in the Masterpiece Cake Shop case, a Colorado baker refused to bake a wedding cake for a gay couple, citing his religious beliefs as a basis for the denial.²²⁵ The Colorado Civil Rights Commission found that the bakery violated Colorado's public accommodation law and discriminated against the couple.²²⁶ The lower courts all agreed.²²⁷ The Supreme Court found for the bakery, but on *very* narrow grounds, finding that the record showed that the Colorado Civil Rights Commission was hostile toward the bakery.²²⁸ The decision did not ban governments from enacting and enforcing anti-LGBTQ discrimination laws.

G. Housing

The final issue to address when working with older clients is housing. As clients age, where they will live and the care they will receive as their ability to care for themselves independently is a concern. For LGBTQ clients, they have the added worry of finding a place where they can be open and that is welcoming to them. Currently, seventeen states and the District of Columbia prohibit housing discrimination based on sexual orientation *and* gender identity: California, Colorado, Connecticut, Delaware, District of Columbia, Hawaii, Illinois, Iowa, Maine, Massachusetts, Minnesota, Nevada, New Jersey, New Mexico, Oregon, Rhode Island, Vermont and Washington.²²⁹ Another four states prohibit discrimination in housing based upon sexual orientation *only*: Maryland, New Hampshire, New York, and Wisconsin.²³⁰

Recent studies have found that 75% of LGBTQ seniors would not be open about being LGBTQ in an assisted care facility.²³¹ Another study found that 8.3% of LGBTQ seniors in New York state have reported being neglected because of being LGBTQ.²³²

When assessing long-term care facilities for LGBTQ seniors, suggest that your clients (and their loved ones) ask questions to be sure that the facility will be a comfortable home for them. SageCARE is a New York based advocacy group for Seniors that provides credentialing in providing care to LGBTQ seniors.²³³ In June 2018, The Merion in Evanston became the first Illinois long-term care facility to

²²⁵ *Masterpiece Cake Shop, Ltd. v. Colorado Civil Rights Comm.*, 138 S. Ct. 1719 (2018).

²²⁶ *Id.*

²²⁷ *Id.* at 1725-1726.

²²⁸ *Id.* at 1732.

²²⁹ Housing for LGBTQ People: What You Need to Know About Property Ownership and Discrimination, Human Right Campaign, <https://www.hrc.org/resources/housing-for-lgbt-people-what-you-need-to-know-about-property-ownership-and> (last visited February 12, 2019).

²³⁰ *Id.*

²³¹ Florence Gelo, *Invisible Individuals—LGBT Elders*, AGING WELL, Vol. 1 No. 3 P. 36 (Summer 2008), available at: <http://www.todaysgeriatricmedicine.com/archive/071708p36.shtml> (last visited February 12, 2019).

²³²M. Somjen Frazer, *LGBT Health and Human Services Needs in New York State*, pg. 16, Empire State Pride Agenda Foundation: Albany, NY (2009).

²³³ See: <https://sageusa.care/why-sagecare/resources/> (last visited February 12, 2019).

complete Sage’s credentialing process.²³⁴ Asking the facility whether it has completed Sage’s program may assist in evaluating the facility.

H. Schools

A developing complex area that has received much attention in the press is school bathrooms and locker rooms. To illustrate these complexities take *Doe v. Boyertown Area School District*,²³⁵ where parents of high school students attending a school that had a policy of allowing transgender students to use the bathrooms and locker rooms of the sex to which they identify brought suit against the school district to cease the practice and require all students to only use the privacy facilities corresponding to their biological sex.²³⁶

In 2016, one of the named plaintiffs, a cisgender male, alleged that he was changing in the boys’ locker room for mandatory physical education course when he noticed a transgender male student wearing nothing but shorts and a bra.²³⁷ Another cisgender male student also alleged that he was changing in the boys’ locker room for physical education class and was in his underwear when he saw classmates gesturing and looking at something behind them – a transgender male student in the locker room with him.²³⁸ Another plaintiff, a cisgender female student, had an experience in a girls’ bathroom and saw a transgender female student washing her hands in the sink.²³⁹ The final plaintiff, a cisgender female student, had no specific experience, but due to the district’s policies, she alleges she holds her bladder, “refrains from using the restrooms as much as possible, and stresses about whether she can use a restroom without running into members of the opposite sex.”²⁴⁰ All four of the plaintiffs alleged that the district’s policies made them experience immediate confusion, embarrassment, humiliation, and loss of dignity.²⁴¹

The court also considered the experience of a transgender male student at the high school. Aiden DeStefano began identifying as a male while attending junior high school.²⁴² He could not use the girls’ bathroom, because the girls thought that he was male, so in junior high, he used the nurse’s bathroom. When he started high school, he again attempted to use the girls’ bathroom, but all of the girls yelled at him and told him not to come back. They also stared at him because he did not look like the girls in the bathroom. Aiden discussed the situation with his counselor, and, because of concern for his safety, they decided that he would again use the bathroom in the nurse’s office. Aiden began officially transitioning during high school by starting hormone replacement therapy and legally changed his name to Aiden. He played on girls’ sports teams until he started taking hormone replacement therapy. During his senior year, Aiden’s counselor told him that he could use the bathroom and locker room corresponding to his gender identity,

²³⁴ See: <https://www.merionevanston.com/blog/merion-becomes-illinois-first-credentialed-lgbt-friendly-senior-living-community> (last visited February 12, 2019).

²³⁵ *Doe v. Boyertown Area School Dist.*, 276 F.Supp. 3d 324 (E.D. Penn. 2017).

²³⁶ *Id.* at 329-330.

²³⁷ *Id.* at 332.

²³⁸ *Id.* at 333.

²³⁹ *Id.*

²⁴⁰ *Id.* at 334.

²⁴¹ *Id.* at 332-334.

²⁴² *Id.* at 373.

which Aiden “loved hearing” and made him “speechless.” Of his experience in the boys’ locker room, Aiden says that he had “no trouble in the bathrooms or locker room. Sometimes someone stares, but usually I am treated just like all of the other guys. No one harasses me or questions me. The support from the students is really amazing.”²⁴³ The student support was so amazing that Aiden was named to homecoming court as a male member and was almost named homecoming king.²⁴⁴

The court ultimately found that “[d]espite the plaintiffs’ concerns about gender fluidity, gender nonconformity, and other gender identity issues that fall along the spectrum..., there is no evidence ... that any of the students that have requested and received permission from the School District have done anything other than live in a manner consistent with their gender identity.”²⁴⁵ The court found that the plaintiffs “have no constitutional right not to share restrooms and locker rooms with transgender students whose sex assigned at birth is different from theirs.”²⁴⁶ Another aspect the court pointed out was that “there are privacy stalls in the shower area with curtains and toilet stalls with doors and locks for students use if the student desires to not be viewed by a transgender student while changing.”²⁴⁷ Thus, if a student felt uncomfortable, they have options for privacy. Other courts have had similar findings.²⁴⁸

Being on the front lines of communication between clients and the legal field, clients who have transgender children may have questions for you if and when issues arise at school. Lambda Legal is an excellent resource if a transgender student is facing issues with bathroom and locker room use at school.

I. Sports

Another hotly debated topic is sports. Transgender athletes competing in professional sports is nothing new, but in recent years, as transgender persons become more accepted in society, there remains a question as to whether a trans person can compete with the gender which they identify or the gender of birth.

A pioneer was Dr. Reneé Richards.²⁴⁹ Reneé was born Richard Raskind, but in the 1970s, underwent a gender reassignment surgery.²⁵⁰ At the age of 41, she “became a female, psychologically, socially, and physically, as [had] been attested to by [her] doctors.”²⁵¹ She felt she would “go mad”

²⁴³ *Id.* at 374.

²⁴⁴ *Id.* at 373.

²⁴⁵ *Id.* at 386.

²⁴⁶ *Id.* at 387.

²⁴⁷ *Id.*

²⁴⁸ See *Students v. U.S. Dept. of Education*, 2016 WL 6134121 (N.D. Illinois 2016); *GG v. Gloucester County School Bd.*, 822 F.3d. 709 (4th Cir. 2016).

²⁴⁹ Mollie Brown, *Top 15 Famous Transgender Athletes*, The Sportster, July 24, 2015, available at <https://www.thesportster.com/entertainment/top-15-famous-transgender-athletes/> (last visited March 3, 2019).

²⁵⁰ Steve Tignor, *40 Years Later, Reneé Richards’ Breakthrough Is As Important As Ever*, Tennis.com, September 20, 2017, available at <http://www.tennis.com/pro-game/2017/07/40-years-later-renee-richards-breakthrough-important-ever/68064/> (last visited March 3, 2019).

²⁵¹ *Richards v. U.S. Tennis Association, et. al.*, 93 Misc. 2d 713 (NY Supreme Court 1977).

otherwise.²⁵² As Richard, Reneé had captained the Yale tennis team, went to medical school, became a surgeon, married, and had a son. After her gender reassignment surgery, she moved to Newport Beach, California to start a new life. She impressed members at her new club with her tennis skills, which garnered attention from the press. Some of the reports included quotes from governing bodies of tennis which said that she would not be allowed to partake in major championships for women, so, although never having been an activist, she decided to take on that role because she wanted “to prove that [transgender persons] as well as other persons fighting social stigmas can hold their heads up high.”²⁵³

After several professional matches, she tried to enter the U.S. Open, but was denied entry in 1976. Ray Cohn took her case, alleging a violation of the New York State Human Rights Law.²⁵⁴ The U.S. Tennis Association wanted her to take a DNA test to determine the presence of either two “X” chromosomes (meaning she possessed female genetic markers) or one “X” chromosome and one “Y” chromosome (meaning she possessed male genetic markers). Reneé refused to take the test. The court ultimately found for Reneé.²⁵⁵ “When an individual such as plaintiff, a successful physician, a husband and father, finds it necessary for his own mental sanity to undergo a sex reassignment, the unfounded fears and misconceptions of defendants must give way to the overwhelming medical evidence that this person is now female.”²⁵⁶

Organizations have approached the topic differently. Some organizations have requirements based upon gender. For example, a trans person wishing to enter a men’s contest need only self-identify as to gender; while a trans person wishing to enter a women’s contest must show a corresponding “F” on her birth certificate.²⁵⁷ This disparity is perhaps “based on the sexist assumption that trans men could never dominate their sports,” which itself is based upon the assumption that women could never dominate men in sports.²⁵⁸ Just this year, when Nicole Hanselmann almost caught up with the men who had set off 10 minutes before the women racers at a cycling race in Belgium, she was requested to stop at the side of the race while organizers restored the gap between the two groups.²⁵⁹

At least one study on the issue has shown that “hormone therapy that facilitates male-to-female transition does more than just suppress testosterone... as testosterone levels approach female norms, trans women experience a decrease in muscle mass, bone density and other physical characteristics.”²⁶⁰ The

²⁵² Tignor, *40 Years Later, Reneé Richards’ Breakthrough Is As Important As Ever*

²⁵³ *Id.*

²⁵⁴ *Richards*, at 714.

²⁵⁵ *Id.*, at 722.

²⁵⁶ *Id.*

²⁵⁷ Steven Petrow, *Do transgender athletes have an unfair advantage at the Olympics?*, The Washington Post, August 8, 2016.

²⁵⁸ *Id.*

²⁵⁹ Alex Hess, *Women’s cycling race forced to pause after lead rider catches men’s race*, The Guardian, March 3, 2019, available at: https://www.theguardian.com/sport/2019/mar/03/belgian-cycling-nicole-hanselmann?CMP=fb_gu&fbclid=IwAR3YuCBDN2y0bibRxP0JfVyX0Ydi7yYno5TRq58thIOJwQyNf2u0pG_r3fM (last visited March 3, 2019).

²⁶⁰ *Petrow, Do transgender athletes have an unfair advantage at the Olympics?*

study's author states that, "Together these changes lead to a loss of speed, strength, and endurance – all key components of athleticism... It's not the anatomy that matters, it's the hormones."²⁶¹

In 2015, the International Olympic Committee ("IOC") adopted guidelines for determining eligibility to compete in male or female competition. Among their findings, the IOC found that "to require surgical anatomical changes as a pre-condition to participation is not necessary to preserve fair competition and may be inconsistent with developing legislation and notions of human rights."²⁶² The IOC set forth the following requirements:

Trans males: Athletes are eligible to compete in the male category without restriction.

Trans females: The athlete must declare her gender identity is female, which cannot be changed for sporting purposes for a minimum of four years. The athlete must demonstrate that her total testosterone level in serum is below 10 nmol/L for at least 12 months prior to her first competition (which length of time can be longer as determined on a confidential case-by-case basis) and must remain below 10 nmol/L for the entire period of desired eligibility.

The U.S. Golf Association (USGA) also allows transgender players to participate; however, its policy requires gender confirmation surgery.²⁶³ The policy appears consistent as to trans males and trans females.

Finally, the National Collegiate Athletic Association (NCAA) has adopted a policy on transgender student-athlete participation.

Trans males: Athletes who have received a medical exception for treatment with testosterone may compete on a men's team and are no longer eligible to compete on a women's team (without changing the team status to a mixed team). A trans male athlete who is not taking testosterone related to a gender transition may participate on a men's or women's team.

Trans females: Trans female athletes being treated with testosterone suppression medication may continue to compete on a men's team and can compete on a women's team without changing it to a mixed team status if the athlete has completed one calendar year of testosterone suppression treatment. A trans female athlete not taking hormone treatments related to gender transition may not compete on a women's team.

Of course, the policies of the various organizations are changing constantly, so if a question arises, the best place to start is to contact the organization itself. Transathlete.com also has some helpful information on policies for K-12, recreational, and professional sports.

²⁶¹ *Id.*

²⁶² International Olympic Committee, *IOC Consensus Meeting on Sex Reassignment and Hyperandrogenism*, November 2015.

²⁶³ USGA, *Gender Policy for USGA Championships*, available at: <http://www.usga.org/genderpolicy.html> (last visited March 3, 2019).

V. Looking Ahead

Procedures in Minnesota and California for changing a person's legal name are simple and straightforward. As transgender issues become more acknowledged, other states hopefully will simplify and streamline their process for legal name changes. More states may also provide for ways to make the court proceedings confidential. There are a few states that do not allow legal change of gender, and we may see those states come on board.

States are starting to eliminate the requirement of gender confirmation surgery to change a person's gender on driver's licenses and birth certificates. In late 2018, Colorado became the fifth state to allow the non-binary designation for gender, following Washington, D.C., Oregon, Minnesota, and Maine.²⁶⁴ We may start to see the option for a non-binary "X" designation for gender in more places.

The 2019/2020 Enrollment Form for Washington, D.C. schools will allow people to choose "Non-Binary" for Gender. We may start to see more schools embrace the non-binary designation.²⁶⁵

Businesses are beginning to embrace an option for those who identify as "non-binary." Several American airlines have added or are in the process of adding "unspecified" or "undisclosed" gender options (namely, Alaska Airlines, American Airlines, Delta Airlines, Hawaiian Airlines, JetBlue, Southwest, and United).²⁶⁶ While the U.N.'s International Civil Aviation Organization requires a sex identifier on passports, it does allow the non-binary "X" designation, and such designation is already allowed by countries such as Canada, Malta, New Zealand, and Pakistan.²⁶⁷

²⁶⁴ Angela K. Evans, *Colorado Becomes Fifth State to Allow 'X' Gender Marker on Driver's License*, Boulder Weekly, November 15, 2018, available at: <https://www.boulderweekly.com/news/colorado-becomes-fifth-state-to-allow-x-gender-marker/> (last visited February 20, 2019).

²⁶⁵ Donna De La Cruz, *Some Schools Allow Children to Register With a Gender Option Besides Girl or Boy*, New York Times, November 19, 2018.

²⁶⁶ Amanda Jackson, *Airlines will add new gender options for non-binary passengers*, CNN, February 18, 2019, available at: <https://www.cnn.com/travel/article/gender-options-airline-passengers-trnd/index.html> (last visited February 19, 2019).

²⁶⁷ Evans, *Colorado Becomes Fifth State to Allow 'X' Gender Marker on Driver's License*.

APPENDIX A

HUMAN RIGHTS CAMPAIGN GLOSSARY OF TERMS

Androgynous: Identifying and/or presenting as neither distinguishably masculine nor feminine.

Asexual: The lack of a sexual attraction or desire for other people.

Bisexual: A person emotionally, romantically or sexually attracted to more than one sex, gender or gender identity though not necessarily simultaneously, in the same way or to the same degree.

Cisgender: A term used to describe a person whose gender identity aligns with those typically associated with the sex assigned to them at birth.

Closeted: Describes an LGBTQ person who has not disclosed their sexual orientation or gender identity.

Coming out: The process in which a person first acknowledges, accepts and appreciates their sexual orientation or gender identity and begins to share that with others.

Dead name: (n.) Name assigned at birth, if an individual chooses to no longer use that name (also can be “birth name” or “given name”). Note: not everyone chooses to change their name; (v.) the act of calling someone by the name assigned to birth rather than the individual’s chosen name.

Gay: A person who is emotionally, romantically or sexually attracted to members of the same gender.

Gender dysphoria: Clinically significant distress caused when a person's assigned birth gender is not the same as the one with which they identify. According to the American Psychiatric Association's Diagnostic and Statistical Manual of Mental Disorders (DSM), the term - which replaces Gender Identity Disorder - “is intended to better characterize the experiences of affected children, adolescents, and adults.”

Gender-expansive: Conveys a wider, more flexible range of gender identity and/or expression than typically associated with the binary gender system.

Gender expression: External appearance of one's gender identity, usually expressed through behavior, clothing, haircut or voice, and which may or may not conform to socially defined behaviors and characteristics typically associated with being either masculine or feminine.

Gender-fluid: According to the Oxford English Dictionary, a person who does not identify with a single fixed gender; of or relating to a person having or expressing a fluid or unfixed gender identity.

Gender identity: One’s innermost concept of self as male, female, a blend of both or neither – how individuals perceive themselves and what they call themselves. One's gender identity can be the same or different from their sex assigned at birth.

Gender transition: The process by which some people strive to more closely align their internal knowledge of gender with its outward appearance. Some people socially transition, whereby they might begin dressing,

using names and pronouns and/or be socially recognized as another gender. Others undergo physical transitions in which they modify their bodies through medical interventions.

Intersex: An umbrella term used to describe a wide range of natural bodily variations. In some cases, these traits are visible at birth, and in others, they are not apparent until puberty. Some chromosomal variations of this type may not be physically apparent at all.

Lesbian: A woman who is emotionally, romantically or sexually attracted to other women.

LGBTQ: An acronym for “lesbian, gay, bisexual, transgender and queer.

Living openly: A state in which LGBTQ people are comfortably out about their sexual orientation or gender identity – where and when it feels appropriate to them.

Non-binary: An adjective describing a person who does not identify exclusively as a man or a woman. Non-binary people may identify as being both a man and a woman, somewhere in between, or as falling completely outside these categories. While many also identify as transgender, not all non-binary people do.

Outing: Exposing someone’s lesbian, gay, bisexual or transgender identity to others without their permission. Outing someone can have serious repercussions on employment, economic stability, personal safety or religious or family situations.

Pansexual: Describes someone who has the potential for emotional, romantic or sexual attraction to people of any gender though not necessarily simultaneously, in the same way or to the same degree.

Queer: A term people often use to express fluid identities and orientations. Often used interchangeably with “LGBTQ.”

Sex assigned at birth: The sex (male or female) given to a child at birth, most often based on the child's external anatomy. This is also referred to as “assigned sex at birth.”

Sexual orientation: The scientifically accurate term for an individual's enduring physical, romantic and/ or emotional attraction to members of the same and/or opposite sex, including lesbian, gay, bisexual, and heterosexual (straight) orientations. Avoid the offensive term “sexual preference,” which is used to suggest that being gay, lesbian, or bisexual is voluntary and therefore “curable.” People need not have had specific sexual experiences to know their own sexual orientation; in fact, they need not have had any sexual experience at all.

Social transition: This term refers to the number of changes that can be made in a trans person’s social life and situation, including use of a different name, use of different pronouns, surface transformations of the physical appearance, use of a bathroom that suits the person’s gender more accurately, and other differences in social role or living situation.

Transgender: An umbrella term for people whose gender identity and/or expression is different from cultural expectations based on the sex they were assigned at birth. Being transgender does not imply any specific sexual orientation. Therefore, transgender people may identify as straight, gay, lesbian, bisexual, etc.