WHEN IT COMES TO GENDER . . .

Estate Planning Considerations for the Transsexual Client

By Caryn B. Keppler, Svetlana Zagorina, and Joann Prinzivalli

With the enactment of the New York Marriage Equality Act on June 24, 2011, New York became the most populous state to "go gender-neutral" on marriage. The bill signed into law by Governor Andrew Cuomo specifically states that, "[w]hen necessary to implement the rights and responsibilities of spouses under the law, all gender-specific language or terms shall be construed in a gender-neutral manner. . . ." N.Y. St. Assemb. Bill No. A8354 § 10-A. The marriage equality movement has historically focused on extending the rights and obligations of marriage to gay and lesbian couples. But what about a marriage in which one party is a transsexual?

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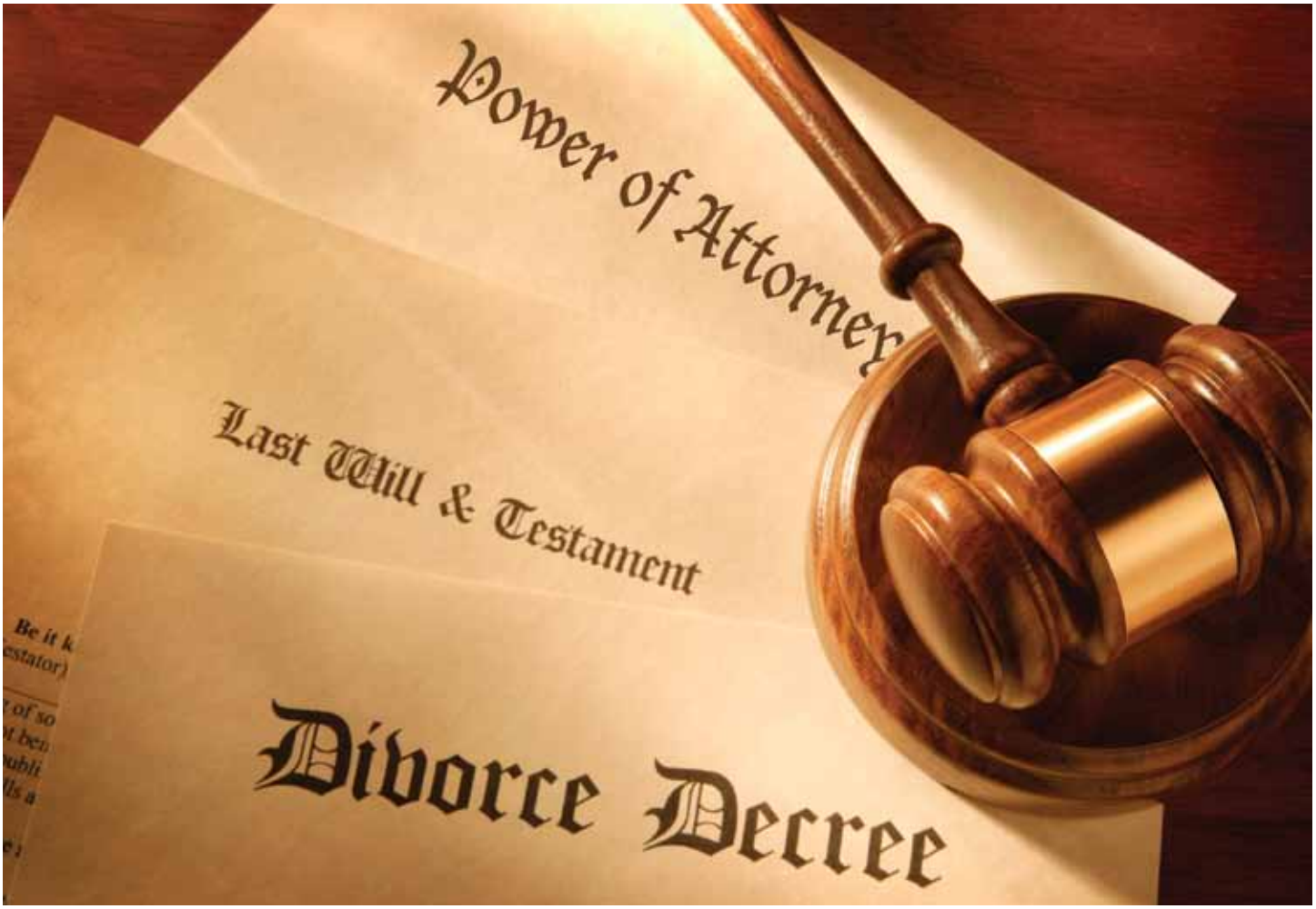

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When it comes to gender, we live in a binary society. Individuals are expected to be either male or female. But gender is not black and white. Many of us do not meet societal definitions of a male or female, either because we are too feminine or too masculine, do not identify with our chromosomal makeup, or were born with ambiguous genitalia—the latter two categories being transsexuals and inter-sexed individuals.

The identity and status of an individual has an enormous effect on issues of estate planning. Is your client a "spouse," a "parent," a "son," a "daughter"? For the transsexual individual, the answers to these questions may be different depending on where she or he was born, transitions, and chooses to live his or her life.

A transsexual is an individual who does not identify with the biological sex assigned to him or her at birth because the sex-related structures of the transsexual's brain are incongruent with his or her physical genitalia. Although the latest science points to a genetic component, transsexuals have traditionally been described as persons whose "mind is trapped in the body of the opposite sex." A transsexual is not a cross-dresser or transvestite—a person who gains sexual satisfaction from appearing as the opposite sex—because a cross-dresser or a transvestite has no need to redress a physical incongruity. Both transsexuals and transvestites may be "transgender"—a general label used to categorize any individual who does not conform to accepted social rules of gender expression.

The most frequently quoted estimate of the prevalence of transsexuals in the general population is from the Amsterdam Gender Dysphoria Clinic. The clinic's data, presented in 1997, gives figures of 1:10,000 assigned males and 1:30,000 assigned females. A.B. Kaplan, *The Prevalence of Transgenderism*," Transgender Mental Health, Mar. 31, 2010, http://tgmentalhealth.com/2010/03/31/the-prevalence-of-transgenderism. Other estimates present the prevalence of male-to-female (MTF) transsexuals to be as high as 1:1,000 and female-to-male (FTM) transsexuals as 1:1,250. Femke Olyslager & Lynn Conway, *On the Calculation of the Prevalence of Transsexualism* (WPATH 2007), http://ai.eecs.umich.edu/people/conway/TS/Prevalence/Reports/Prevalence %20of%20Transsexualism.pdf.

Medical options for the transsexual include (1) hormone treatment for suppression of secondary sex characteristics of the sex assigned at birth and/or production of secondary sex characteristics of his or her identified gender and (2) sexual reassignment surgery. Many transsexuals choose not to undergo treatment for many reasons including the cost and lack of medical insurance coverage (sexual reassignment surgery can cost up to $75,000 for an MTF transsexual or $150,000 for an FTM transsexual), lack of satisfaction with medical results, and lack of desire to have surgery. Instead, many individuals "transition" by choosing to live as best as possible in their preferred identified gender with little or no medical intervention. Under standards set by the World Professional Association for Transgender Health (WPATH), transition occurs when the individual "actualizes (his/her) identity and finds a gender role or expression that is comfortable to (him/her)." See WPATH Standards of Care for the Treatment of Transsexual, Transgender and Gender Non-Conforming People, 7th vers., § V.

The transition to one's congruent gender is complicated by issues of legal identity. Legal identity, in turn, is critical to determining status, and status affects whether an individual can enter into a valid marriage. The availability of a valid marriage directly affects every aspect of an individual's life, including whether she or he may (1) inherit, (2) designate a guardian for a minor child, (3) sue for wrongful death or medical malpractice, (4) make funeral and burial arrangements, and (5) make medical and financial decisions for a spouse or partner who is incapacitated or incompetent. This article will address these issues and provide guidance to the legal advisor creating an estate plan for the transsexual client.

Identification Documents

The transsexual individual needs to confirm his or her identity on legal documents. This includes a legal change of name and gender on state and federal issued documents, such as birth certificates, drivers' licenses, and passports.

Most states have legal procedures for name changes. Once a court has issued an order for a name change, the amendment of birth certificates, passports, and drivers' licenses to reflect the new name is relatively simple. Court-ordered name changes are accepted by the U.S. Passport Office for the amendment of passports and by the Social Security Administration for the assignment of Social Security numbers.

Changing the reference to one's gender on legal documents is not as simple. Three states forbid or have no statute or policy authorizing birth certificate amendment. Forty-seven states and the District of Columbia authorize the amendment of birth certificates in some form but not necessarily for the purpose of gender identification. The states that do authorize amendments all require evidence of the successful completion of sexual reassignment surgery before a person's sex can be changed on a birth certificate. See the table on pages 20-21.

The Social Security Administration requires the successful completion of sexual reassignment surgery before changing a gender marker on official documents. The U.S. Passport Office has two procedures, one providing a limited passport for those who have a physician's letter stating that they have begun transition and the other providing a full passport for those who have a physician's letter stating that they have completed transition. Surgery is no longer a requirement. The treating physician provides documentation of the required transition. See U.S. State Department Foreign Affairs Manual, 7 FAM 1300 Appendix M: Gender Change, available at www.state.gov/documents/organization/143160.pdf.

The Defense of Marriage Act

Even if one can change gender identity on legal documents, what effect does

that have on marital status? Can a transsexual enter into a valid marriage in his or her new gender? Will a marriage solemnized in one jurisdiction be recognized in another?

The federal Defense of Marriage Act (DOMA) defines marriage, for federal purposes, as the "legal union between one man and one woman as husband and wife." A "spouse" refers only to a person of the opposite sex who is a husband or a wife. Pub. L. No. 104-199, 110 Stat. 2419 (1996) (codified as amended at 1 U.S.C. § 7 and 28 U.S.C.A. § 1738C (2010)). DOMA also provides that no state "shall be required to give effect to any public act, record, or judicial proceeding of any persons of the same sex that is treated as marriage under the laws of such other State . . . or claim arising from such relationship." Seven jurisdictions (New York, Massachusetts, Connecticut, Iowa, Vermont, New Hampshire, and the District of Columbia) authorize marriages between same-sex couples. Other jurisdictions recognize, for some or limited purposes, same-sex marriages validly entered into in other jurisdictions and/or authorize the separate but not equal quasi-marital relationships. See the figure on page 23.

The majority of the states have enacted their own mini-DOMAs—specifically legislating the nonrecognition of same-sex marriages—some of which may be classified as "super-DOMAs" because they ban same-sex marriage and the recognition of all same-sex relationships, including domestic partnerships and civil unions. Twenty-eight states have passed constitutional amendments defining marriage as the legal union of one man and one woman. In one state, North Carolina, a constitutional amendment banning recognition of same-sex marriages is scheduled to appear on the 2012 general election ballot. Neither DOMA nor the mini-DOMAs provide for the recognition of marriages in which one or both of the parties is transsexual, and there are few decisions considering the validity of marriage in which one or both parties is a transsexual. Of the states that have considered the issue,

State Policies, Statutes, and Regulations Relating to the Amendment of Birth Certificates

Jurisdiction	Trans-specific Laws and Regulations Allowing Amendment	States Permitting Changes to Records/No Specific Authorization Regarding Sex	No Policy, Law, or Regulation Allowing	Changes Specifically Not Allowed
Alabama	Ala. Code § 22-9A-19(d)			
Alaska		Alaska Stat. § 18-50-290		
Arizona	Ariz. Rev. Stat. Ann. § 36-337(A)(3)			
Arkansas	Ark. Code Ann. § 20-18-307(d)			
California	Cal. Health & Safety Code § 103425			
Colorado	Colo. Rev. Stat. § 25-2-115(4)			
Connecticut	Conn. Gen. Stat. § 19a-42			
Delaware	16 Del. Code Ann. § 3131			
District of Columbia	D. C. Code § 7-217(d)			
Florida		Fla. Stat. § 382.016		
Georgia	Ga. Code Ann. § 31-10-23(e)			
Hawaii	Haw. Rev. Stat. § 338-17.7(a)(4)(B)			
Idaho			X	
Illinois	410 Ill. Comp. Stat. § 535/17(d)			
Indiana		Ind. Code § 16-37-2-10(b)		
Iowa	Iowa Code § 144.23(3)			
Kansas	Kan. Admin. Regs. § 28-17-20(b)(1)(A)(i)			
Kentucky	Ky. Rev. Stat. Ann. § 213.121(5)			
Louisiana	La. Rev. Stat. Ann. § 40:62(A)			
Maine		22 Me. Rev. Stat. Ann. § 2705		
Maryland	Md. Code Ann., Health-Gen. § 4-214(b)(5)			
Massachusetts	Mass. Gen. Law. ch. 46, § 13(e)			
Michigan	Mich. Comp. Laws § 333.2831(c)			
Minnesota		Minn. Stat. § 144.218		
Mississippi		Miss. Code Ann. § 41-57-21		
Missouri	Mo. Rev. Stat. § 193.215(9)			

Jurisdiction	Trans-specific Laws and Regulations Allowing Amendment	States Permitting Changes to Records/No Specific Authorization Regarding Sex	No Policy, Law, or Regulation Allowing	Changes Specifically Not Allowed
Montana	Mont. Admin. R. 37.8.107(6)			
Nebraska	Neb. Rev. Stat. § 71-604.01			
Nevada	Nev. Admin. Code § 440.130			
New Hampshire	N.H. Code Admin. R. Ann. He-P § 7007.03(e)			
New Jersey	N.J. Stat. Ann. § 26:8-40.12			
New Mexico	N.M. Stat. § 24-14-25(D)			
New York		N.Y. Pub. Health Law § 4138		
North Carolina	N.C. Gen. Stat. § 130A-118(b)(4)			
North Dakota	N.D. Admin. Code § 33-04-12-02			
Ohio				*In re Ladrach*, 513 N.E.2d 828 (Ohio Ct. Common Pleas 1987)
Oklahoma		63 Okla. Stat. § 1-321		
Oregon	Or. Rev. Stat. § 432.235(4)			
Pennsylvania		35 Pa. Cons. Stat. § 450.603		
Rhode Island		R.I. Gen. Laws § 23-3-21		
South Carolina		S.C. Code Ann. § 44-63-150		
South Dakota		S.D. Admin. R. 44:09:05:02		
Tennessee				Tenn. Code Ann. § 68-3-203(d)
Texas		Tex. Health & Safety Code Ann. §§ 191.028 & 192.011		
Utah	Utah Code Ann. § 26-2-11			
Vermont		18 Vt. Stat. Ann. § 5075		
Virginia	Va. Code Ann. § 32.1-269(E)			
West Virginia		W. Va. Code § 16-5-24		
Wisconsin	Wis. Stat. § 69.15			
Wyoming	10 Wyo. R. & Reg. Hlth VR § 4(e)(iii)			

only New Jersey provides specific legal recognition to the marriage of a post-surgical transsexual. See *M.T. v. J.T.*, 355 A.2d 204 (N.J. Super. Ct. App. Div. 1976), in which the marriage of an MTF transsexual, married after sexual reassignment surgery to a male, was recognized in an action for support and maintenance; the court noted that the plaintiff was female for marital purposes, when she became "physically and psychologically unified and fully capable of sexual activity consistent with her reconciled sexual attributes of gender and anatomy." Similarly, in *In re Lovo-Lara*, 23 I. & N. Dec. (BNA) 746 (Bd. Immig. App. 2005), the Board of Immigration Appeals has held that, for immigration purposes, North Carolina must recognize a marriage as valid and heterosexual in which one of the spouses had undergone sexual reassignment surgery, and her birth certificate had been amended to reflect her gender as female.

Other reported decisions are more rigid—decreeing that despite medical procedures to the contrary, a person's sex is determined at birth and gender cannot be changed. In the first reported trans-marriage case, a British court held that a post-operative MTF transsexual was a man. *Corbett v. Corbett*, 2 All E.R. 22 (P. 1970). Although overturned by legislation and earlier by way of the European Court of Human Rights, this case continues to be cited in transsexual marriage cases in the United States.

In *Kantaras v. Kantaras*, 884 So. 2d 155 (Fla. Dist. Ct. App. 2004), a custody case, the Florida District Court of Appeals invalidated the 10-year marriage of an FTM transsexual and a biological female. The court, noting that Florida expressly banned same–sex marriage, ruled that there was no legislative authority authorizing a post-operative transsexual to marry in his or her re-assigned sex. Until the legislature expressly addressed the matter, for purposes of marriage, gender was to be determined by biological sex at birth and could never be changed.

Similarly, an Ohio probate court denied the application of an MTF transsexual and her male partner for

a marriage license on the grounds that the MTF was a male at birth. *In re Ladrach,* 513 N.E.2d 828 (Ohio 1987). In New York, the marriage of a man to an MTF transsexual was declared invalid when the court found that at the time of the marriage ceremony the "wife" was male; post-ceremony sexual reassignment surgery was irrelevant. *Anonymous v. Anonymous,* 325 N.Y.S.2d 499 (N.Y. Sup. Ct. 1971). The husband/plaintiff claimed that he did not know that he was marrying a transsexual; discovery was allegedly made on their wedding night.

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Thus, even if a ceremonial marriage of a post-surgical transsexual and his or her spouse is authorized under the law of one jurisdiction, there is no guarantee that the marriage will be recognized in a different state. Although, under the principle of full faith and credit, a marriage between a pre-surgical transsexual to a person of the opposite biological gender should remain viable after one party undergoes sexual reassignment surgery, the decisions are few and inconsistent from jurisdiction to jurisdiction.

So how do we protect our transsexual clients and their spouses? Without full recognition of legal status in all jurisdictions, every transsexual contemplating marriage should enter into a pre- or post-nuptial agreement with the proposed spouse and also execute basic estate planning documents, including but not limited to wills, beneficiary designations, powers of attorney, health-care proxies and instruction directives, and designations of guardians of any minor children.

Inheritance Rights

Inheritance rights, taken for granted by most of us, cannot be assumed by the transsexual person. A validly solemnized marriage does not guarantee that a transsexual spouse will be treated as a spouse under the laws of any particular jurisdiction. So long as DOMA remains in force, the transsexual client cannot rely on state intestacy statutes and spousal rights such as the right of election or the right to sue for wrongful death or loss of consortium. Relying on the availability of the estate and gift tax marital deduction, both federal and state, is also questionable.

In Kansas, a post-surgical MTF transsexual spouse of a biological male was denied letters of administration despite having a validly issued birth certificate from another state that reflected her new sex. Their marriage was declared void as against public policy. *In re Estate of Gardiner,* 42 P.3d 120 (Kan. 2002).

Similarly, in *Littleton v. Prange,* 9 S.W.3d 223 (Tex. App. 1999), the Texas Court of Appeals found that the marriage of a man to an MTF transsexual was invalid and that the surviving MTF spouse had no standing to bring a claim for wrongful death. The plaintiff had undergone sexual reassignment surgery, officially changed her birth certificate to reflect her sex as female, and was married to the decedent (who knew she was a transsexual) for over seven years. The court refused to be bound by the plaintiff's amended birth certificate and ruled that, as a matter of law, the plaintiff was a male because at the time of her birth she was "a male, both anatomically and genetically."

In response to the decision in *Littleton v. Prange,* in 2009, Tex. Fam. Code § 2.005 was amended to include a certified court order of sex change as proof of identity to obtain a marriage license.

More recently, a Texas judge nullified the marriage of a transgender woman whose firefighter husband died in the line of duty. Nikki Araguz, the widow of firefighter Thomas Araguz who was killed in 2010, was sued by her husband's former wife, Heather Delgado, for $600,000 in death benefits and assets. Heather argued that the inheritance should go to Thomas's two sons from their marriage. In an order issued on May 26, 2011, Judge Randy Clapp decreed that Thomas was not married on the date of his death and that "any purported marriage" between Thomas and Nikki was "void as a matter of law." Nikki and Thomas had used Nikki's Texas driver's license, which noted her sex as "female," to obtain a marriage license. In March 2011, largely in response to the Araguz matter, Texas Senator Tommy Williams introduced a bill to eliminate a "certified court order of sex change" as proof of identity under Tex. Fam. Code § 2.005. Nikki Araguz's motions for reconsideration and a new trial were denied on July 6, 2011. She has appealed the May 26 and June 26 orders; those appeals are scheduled to be heard during 2012.

The *Gardiner, Littleton*, and *Araguz* decisions emphasize the need for proper planning. In all of those cases, the results may have been different if the parties had executed appropriate estate planning documents that provided for the appointment of each spouse as the representative and beneficiary of the survivor's estate.

In addition to making sure that transsexual clients (and their spouses) have basic estate planning documents reflecting their wishes, the estate planning practitioner who undertakes to design an effective estate plan for a transsexual client must be aware of the unique issues facing the transsexual client and his or her family.

- Even in states where the transsexual client may enter into a valid marriage, the transsexual client and his or her spouse or partner should enter into a written agreement clearly defining their rights in each other's property and estates. Although doing so cannot ensure recognition of the marriage, a properly executed agreement provides an expression of intent concerning those rights. The agreement should include a provision acknowledging the gender status of each party to avoid the nontranssexual party (or his or her family) from later claiming that she or he was unaware that the other party was a transsexual.
- Take care to ensure that the validity of estate planning documents will

not be called into question because of the competency of the client or claims of undue influence. Many transsexuals have less than cordial relationships with their blood relatives. Compile a full history of your client's family relations and recognize that any family member may institute a will contest.

- Because ongoing and consistent psychotherapy by a qualified mental health professional is recommended under the WPATH Standards of Care, take care to prevent or minimize any potential challenges to estate planning documents based on claims of incompetency. Make sure that the client understands the provisions of his or her documents and that the witnesses can, if necessary, attest to the client's competency. WPATH Standards of Care for the Treatment of Transsexual, Transgender and Gender Non-Conforming People, 7th vers., § VII, www.wpath.org/documents/Standards%20of%20Care%20V7%20-%202011%20WPATH.pdf.
- Consider testamentary substitutes—such as jointly held property, payable on death accounts, and revocable trusts—to effectuate the estate plan. Although subject to attack on the grounds of incompetency and undue influence, these testamentary substitutes are better insulated from attacks by unhappy family members because they avoid probate notice requirements and allow for more privacy.
- Make sure that your client and his or her spouse execute beneficiary designations for their nonprobate property. Consider having your client and his or her spouse refer to each other by name and not by status, that is, avoid using terms such as "spouse," "husband," or "wife." Or, if your clients want to refer to each other by status, make sure that, in their documents, they clearly define "spouse," "husband," and "wife" to include their transsexual spouse.
- A transsexual client and his or her spouse with differing views of their estate plans should have separate representation. If you do represent both parties, however, they should sign a waiver of your continued representation of and acknowledgment of the possibility of full disclosure to both.

Burial Instructions

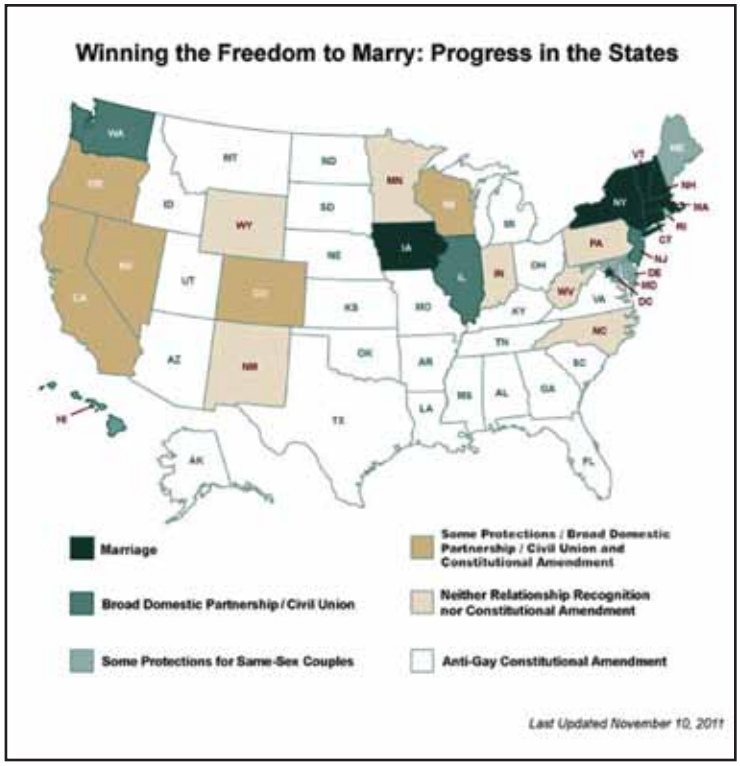
Funeral and burial instructions should be in writing. Some states, such as New York, allow an individual to designate an agent to make funeral and burial arrangements and otherwise to dispose of his or her remains. N.Y. Pub. Health Law § 4201. Instructions for the funeral and inscriptions on a headstone also can be given to the agent who, absent legal designation as a burial agent, may not have legal standing to make those decisions.

Guardianship and Custody of Minor Children

Paternity decisions vary from jurisdiction to jurisdiction. In *In re Marriage of Simmons*, 825 N.E.2d 303 (Ill. App. Ct. 2005), the marriage of an FTM transsexual to a woman was deemed invalid because Illinois law did not recognize same-sex marriage. As a result, the Illinois appellate court determined there was no presumption of paternity to children born during the marriage. Therefore, Mr. Simmons could not be a father and had no custody rights to children born during the marriage. As a result of the *Simmons* decision, even in cases in which the partners believe they have a valid heterosexual marriage, which arguably should give rise to a presumption of paternity, make sure your clients undergo a single-parent adoption by the nonbiological parent.

Conversely, a California court has recognized an FTM transsexual as a male for purposes of marriage and paternity. The wife had asked the trial court to declare the marriage invalid on the grounds that it was a same-sex marriage and to waive her husband's parental rights. The husband had undergone sexual reassignment surgery 20 years before the marriage and the wife claimed that she was unaware of the surgery. *Vecchione v. Vecchione*, No. 96D003769 (Orange Cnty., Cal., Sup. Ct. Nov. 26, 1997).

At least one court has terminated a transsexual parent's parental rights. In *Daly v. Daly*, 715 P.2d 56 (Nev. 1986), the Nevada Supreme Court characterized an MTF transsexual parent as "selfish" and terminated his parental rights, stating that "[i]t was strictly Tim Daly's choice to discard his fatherhood and assume the role of a female who could never be either mother or sister to his daughter." See also *In re Darnell*, 619 P.2d 1349 (Or. Ct. App. 1980), in which a mother's parental rights were terminated when she continued her relationship with her former husband, an FTM transsexual on the grounds that it was detrimental to the best interests of the child; the father's parental rights had been terminated in an earlier proceeding.



Jurisdictional Treatment of Same-Sex Relationships (courtesy of Freedom to Marry), www.freedomtomarry.org/states.

Other courts have granted custody or visitation to transsexual parents only when the parent agreed to hide his or her transsexual status. See *J.L.S. v. D.K.S.*, 943 S.W.2d 766 (Mo. Ct. App. 1997), and *B. v. B.*, 585 N.Y.S.2d 65 (N.Y. App. Div. 1992).

Your transsexual client and his or her spouse should state, in writing, their wishes regarding the guardianship and custody of minor children born of the marriage. Despite the fact that, as with traditional couples, the designation of a guardian is a nonbinding indication of intent, the parties also can consider stating their wishes in an agreement.

Powers of Attorney

A non-accepting family member of a transsexual may attempt to exclude the spouse, or the family of the nontranssexual member may attempt to exclude the transsexual spouse, from making financial decisions for the other spouse. A validly executed power of attorney can ensure that the client's wishes are carried out for financial matters. Include specific powers granting the attorney-in-fact the authority to implement or complete any plans for changing name and gender identity on various legal documents.

Health-Care Decision Making

A validly executed instructional directive or health-care proxy may avoid any issues raised about the implementation of medical decisions, including whether or not the agent has rights of visitation in a hospital—often denied to persons not considered spouses under local law. Also the directive or proxy should enable the agent to continue and maintain medical treatment for transition.

Additional Documents

Whether or not your client is a transsexual, a full estate planning package should include a living will, a HIPAA release, hospital visitation documents, and a pre- or post-nuptial agreement (and in the case of a transsexual client, one in which both parties acknowledge each other's gender status).

Conclusion

The gender identity issues faced by transsexual clients are unique. When drafting legislation, we do not always consider the complexity of our society. Despite the prevalence of transsexual individuals in our society, courts are reluctant to accommodate transsexuals in the complex issues they face. Without clear legislative direction that is consistent from state to state, transsexuals are in a "no-person's land." Careful planning for transsexual clients is necessary to ensure that their wishes are respected and effectuated. ■