

# ESTATE PLANNING FOR THE MODERN FAMILY



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## 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 conversations 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 died. The caller, who is the successor trustee of Kathy's trust, informs Betty that tragically, Vicki predeceased Kathy. Betty assures the trustee that Vicki's 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 Kathy intended to provide for Audrey, Betty nonetheless instructs the trustee to distribute the trust assets to a descendant trust for Audrey under the trust. Kathy's sister, Judy, however, who disapproved 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 result here is 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 common. In such situations, it is important to ask ourselves why the client omitted relevant or important information. Kathy did not appear to be reticent about discussing Vicki, Matt, and their baby, but was Kathy uncomfortable sharing with Betty the modern structure of Vicki's family? Could Betty have asked better questions to elicit the information? Had Betty looked at her boilerplate language 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 lesbian, gay, bisexual, transgender, and queer (LGBTQ) clients and their families experience in the world can make us better able to elicit information and encourage open communication.

## The Planner's Role

Much like internists and family doctors, estate planners 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 the specific legal and societal issues facing the LGBTQ community as a whole.

Many lesbian, gay, bisexual, and transgender persons are not comfortable enough to discuss their sexual orientation or gender identity with their healthcare providers.<sup>1</sup> Six percent of transgender people report having a negative experience with an attorney because of being transgender.<sup>2</sup> 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 their sexual orientation, gender identity, or that of their family members, with us. 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. To position ourselves to address the shortfalls in the law, we need to become educated about the particular issues LGBTQ persons 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.

## A Brief History of Marriage Equality

In *United States v. Windsor*,<sup>3</sup> the Supreme Court struck down the Defense of Marriage Act (DOMA) as unconstitutional and held that the federal government could not discriminate against gay and lesbian couples in the application of federal benefits.<sup>4</sup> *Windsor* was a particularly exciting decision for the estate planning community because it was the estate tax

exemption that ultimately led the Court to invalidate DOMA. While *Windsor* did not extend the right to marry to couples assigned the same sex at birth, it did allow such couples who were married under state law to enjoy the benefits conferred upon married couples under federal law. Previously, estate planning for LGBTQ couples was vastly different—similar to structuring plans for unmarried couples.

In the landmark decision of *Obergefell v. Hodges*,<sup>5</sup> the Supreme Court held that marriage was a fundamental right and that states must allow and recognize same-sex marriages pursuant to the Fourteenth Amendment. Prior to *Obergefell*, the regulation of marriage was an issue left to the states, whether through legislation or judicial decisions. Case law regarding the right to marry for couples where one party is transgender was murky. 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.<sup>6</sup>

However, in *In re Estate of Gardiner*, the Supreme Court of Kansas held that a couple with one transgender party was not legally married because they were assigned the same sex at birth.<sup>7</sup>

In *Obergefell*, the Supreme Court found that state laws requiring that persons must be of the opposite sex to marry were unconstitutional. and struck down bans on marriage between two members of the same sex in Michigan, Kentucky, Tennessee, and Ohio.<sup>8</sup> The Court specifically held that the Fourteenth Amendment required states to issue marriage licenses for two individuals regardless of their sex.<sup>9</sup>

*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 concerning healthcare, family planning, and other social services. Acknowledging that the struggle was not over for LGBTQ couples after the victory in *Obergefell*, then-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."<sup>10</sup>

## Who Are LGBTQ Clients?

As of 2022, an estimated 7.2 percent of the US population identified as lesbian, gay, bisexual, or transgendered.<sup>11</sup> This percentage has held steady the past few years and is almost double the self-identified percentage a decade ago.<sup>12</sup> A further seven percent of Americans did not self-identify as either heterosexual or part of the LGBTQ community.<sup>13</sup> About four percent of Americans, and half of the LGBTQ community, identifies as bisexual; 20 percent of the LGBTQ community identifies as gay, about 14 percent as lesbian, and 10 percent as transgender.<sup>14</sup> Five percent of LGBTQ adults identified as something other than lesbian, gay, bisexual, or transgender. Most of those persons preferred the term queer, pansexual, or asexual.<sup>15</sup> About five percent of women and four percent of men identify as LGBTQ.<sup>16</sup> There are wide differences among generations.<sup>17</sup> Approximately 20 percent of Generation Z and 11.2 percent of millennials identify as LGBTQ, while 3.3 percent of Generation X, 2.7 percent of Baby Boomers, and 1.7 percent of the Silent Generation identify as LGBTQ.<sup>18</sup> Approximately 0.5 percent of the US adult population and 1.43 percent of 13 to 17 year olds identify as transgender<sup>19</sup> Interestingly, the percentage of the US population that identifies as transgender has been holding steady.

The number of openly LGBTQ millionaires and billionaires is growing rapidly.<sup>20</sup> As of 2014, about 0.4 percent of the 1,645 billionaires (about 65) globally identify as LGBTQ.<sup>21</sup> Unfortunately, 2014 is the last study we have on this rapidly expanding group. Another interesting fact: gay married couples have higher incomes (\$123,600) than lesbian married couples (\$95,720) and straight married couples (\$96,930).<sup>22</sup>

## CREATING THE RIGHT ENVIRONMENT FOR LGBTQ CLIENTS

Estate planners must have a rapport with their clients to be an effective planner. Attorneys can start to build rapport with clients by using the language used in the client's community. After all, 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.

### Terminology to Know

Becoming comfortable with the terminology used by and preferred by the LGBTQ community helps have 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. There are countless reliable resources available on the internet that provide excellent educational material. The Appendix contains some common terms defined by the Human Rights Campaign "to help give people the words and meanings to help make conversations easier and more comfortable."<sup>23</sup> 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 likely to sense that hesitation and have difficulty engaging in an open and honest conversation.

### Words and Phrases to Avoid

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. A link to the Gay & Lesbian Alliance Against Defamation's (GLADD) Media Reference Guide is available in the footnotes, with express permission from GLADD.<sup>24</sup>

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."<sup>25</sup> The Associated Press, The New York Times, and The Washington Post restrict the use of the term "homosexual" which is a pretty good indicator that you should leave that word out of your vocabulary as well.

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. 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.

Most importantly, it is okay to admit if you are unsure 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 demonstrates that you care about your client's feelings and may actually increase the trust and openness of the relationship with the client.

### Grammar Usage and Gender

Remember sitting in grammar lessons in school? Your teacher may have drilled that "they" is plural; however, using "they" to refer to a single individual has been part of our language for hundreds of years.<sup>26</sup> According to the Merriam-Webster Dictionary, the "development of singular 'they' mirrors the development of the singular 'you' from the plural 'you.'"<sup>27</sup>

Current style guides reflect this growing acceptance of "they" as a singular pronoun. The MLA Handbook, for example, advises writers to follow the personal pronouns of individuals they write about.<sup>28</sup>

We all have preferred pronouns.<sup>29</sup> If you are a cisgender male (as a reminder, a *cisgender* person is



someone whose 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”); and
- 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.<sup>30</sup> 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.

## 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. With the rule against perpetuities being virtually non-applicable in most jurisdictions and the high federal tax exemptions relating to estate and generation-skipping transfers, there is likely to be an LGBTQ beneficiary of most long-lived trusts at some point in time. Thoughtful tweaks to boilerplate language can avoid ambiguities and litigation by recognizing and plugging gaps in the law or its application.

## Health Care

Adoption, surrogacy, and gender confirmation surgery are all very expensive. Many trustees have faced the dilemma of trying 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, support, and maintenance (HESM). None of those terms contains further definition in the document. Sandy and his partner Mark are hoping to adopt, but 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 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, 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 (Code) section 213(d), so clients could make an unlimited gift to a loved one for gender confirmation surgery under Code section 2503(e).<sup>31</sup> Note, however, that breast augmentation surgery for the same taxpayer was not allowed as a deductible medical expense.<sup>32</sup> 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 Code section 213.

### **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.

Consider including a definitional provision that any gender references are intended to be 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.

### **Name Changes**

If a client (or their loved one) has not made a legal name change but is in the process of pursuing one or is using 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 a common name and a legal name are: (i) Sarah Smith (legal

name: Sean Smith); or (ii) Sarah Smith a/k/a Sean Smith.

The name change issue arises even with cisgender clients, 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 and more accurate 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.

### **Change of Gender**

Providing that gender change and 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 have survived because Brian is now "Judy" and the settlor's daughter? Just as we provide for successor corporations when we make charitable gifts or name corporate fiduciaries in order to avoid confusion, we should 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 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.

### **Timing Issues with Gender-Specific Gifts**

Clients sometimes want to leave specific gifts to a person or class that may not be born at the time of drafting. 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. The client subsequently 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 with a gender-specific gift is a bequest of "\$1,000 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.

### **Defining Descendants**

When children or grandchildren become a part of a family through adoption or surrogacy, standard boilerplate language may not adequately address how those descendants are to be treated. Particularly where at least one parent is not the biological parent 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 statutory

and common law) may exclude adopted children 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 inheritance,<sup>33</sup> 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 provisions will not include that child in the non-biological parent's document as a descendant. Consider modifying language 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 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.

### **Powers of Attorney**

Most states provide that a spouse may make health-care 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, however, LGBTQ persons may have parents or other immediate family members that do not support them.

To avoid conflicts in carrying out the client's wishes, rather than 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. Medical providers generally will respect a valid health care agency document and will honor the wishes expressed by the client.

### **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 an adult decision-maker designate in the event of incapacity generally is a good idea, 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, 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.

## ADVISING BEYOND THE FOUR CORNERS

Estate planning extends beyond the four corners of the documents that we draft and our clients sign. 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.

### Employment

As of 2017, one in four LGBTQ employees reported having experienced discrimination in the workplace.<sup>34</sup> 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.<sup>35</sup> Seventy-seven percent of respondents have taken steps to avoid mistreatment in the workplace.<sup>36</sup>

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, 22 states and the District of Columbia prohibit discrimination based on both sexual orientation and gender identity: California, Colorado, Connecticut, Delaware, Hawaii, Illinois, Iowa, Maine, Maryland, Massachusetts, Minnesota, Nevada, New Hampshire, New Jersey, New Mexico, New York, Oregon, Rhode Island, Utah, Vermont, Virginia, and Washington.<sup>37</sup> Nine states have extended existing sex discrimination laws to cover sexual orientation and gender identity: Alaska, Arizona, Florida, Kansas, Michigan, Nebraska, North Dakota, Pennsylvania, and Texas.<sup>38</sup> Employment discrimination based on sexual orientation is prohibited in Wisconsin.<sup>39</sup> 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 rates companies, municipalities, and healthcare facilities on their LGBTQ-inclusive policies.<sup>40</sup> This list may be a helpful starting place for clients evaluating potential employers.

### 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.<sup>41</sup> Of those, 68 percent are raising children that are biologically related to one partner, 21.4 percent are raising adopted children, and 2.9 percent have foster children. For comparison, just three percent of different-sex couples are raising adopted children and 0.4 percent have foster children.<sup>42</sup>

### 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).<sup>43</sup> 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 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:

- 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;
- Allowed “service providers to turn away qualified adoptive and foster parents based on their religion, marital status, sexual orientation, or gender identity”; and
- Punished “states with non-discrimination protections by withholding federal adoption funding, further harming all children in foster care.”<sup>44</sup>

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.

### Domestic Adoption

Domestic adoption is the placement of US-born infants for adoption by their birth parents, who legally consent to the adoption, with an adoptive family residing in the US. 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.<sup>45</sup>

Although adoption by same-sex couples is legal in all 50 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.<sup>46</sup> 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.<sup>47</sup> In Illinois, Equality Illinois has published a listing of all of the adoption agencies in Illinois and whether the agency will work with LGBTQ clients.<sup>48</sup>

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.<sup>49</sup> To help offset this cost, there is a federal adoption credit and state adoption credits. Additionally, many employers offer adoption assistance programs which provide reimbursement for some adoption-related costs and fees. For 2022, the federal adoption credit was equal to \$14,890 per child; however, this is subject to a modified adjusted gross income phaseout that begins at \$223,410 and ends at \$263,410.<sup>50</sup> 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.<sup>51</sup>

### 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.<sup>52</sup> It is legal in all 50 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.<sup>53</sup> 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.<sup>54</sup> 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, Director of the Immigrant Rights Clinic at Texas A & M University School of Law, and her wife Bryn wanted to adopt a refugee child from Syria.<sup>55</sup> 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 opportunity even to apply to serve as foster parents because they did not “mirror the Holy Family.”<sup>56</sup> 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 as of October 2023.

### International Adoption

International adoption is the adoption of a child from a country other than the United States through an agency or independently.<sup>57</sup> Not all countries that allow adoptions by Americans allow same-sex couples to adopt.<sup>58</sup> Countries where it *may* be possible for same-sex American couples to adopt include Colombia, Brazil, Mexico (some states), and the Philippines.<sup>59</sup> The Human Rights Campaign maintains a list of agencies providing services to American same-sex couples seeking to adopt from abroad.<sup>60</sup>

### Surrogacy

Surrogacy refers to the process in which 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.<sup>61</sup> 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 1,000 percent internationally between 2006 and 2010 and the industry is now worth up to \$6 billion annually.<sup>62</sup>

Partial surrogacy, also known as traditional surrogacy, occurs when the surrogate’s eggs are used, and, therefore, the surrogate is genetically related to the child.<sup>63</sup> Full/gestational surrogacy is one where

“all of the genetic material involved originates either from the intended parents or donors.”<sup>64</sup>

New York, New Jersey, Indiana, and Michigan are the only states that expressly prohibit surrogacy.<sup>65</sup> In some states, there are no statutes and the laws regarding surrogacy are based on case law.<sup>66</sup> Finally, full and/or partial surrogacy is regulated by statute in 14 states.<sup>67</sup>

Male same-sex couples who choose full surrogacy must also find an egg donor. Sometimes, surrogacy agencies can help throughout the entire process (e.g., 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 a 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.<sup>68</sup>

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, either from a sperm bank or a friend or relative. 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 sperm are beyond the scope of this outline.

In *C.G. v. J.H.*,<sup>69</sup> a lesbian couple had been living together in Florida. One of the mothers 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 mother contact with the minor child once a week, despite requests for more time. The biological mother and child moved to

Pennsylvania without notifying the non-biological mother. After the move, the non-biological mother had minimal and inconsistent contact with the child.

In 2015, the non-biological mother 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.”<sup>70</sup> The biological mother objected to the complaint arguing that the non-biological mother lacked standing to bring an action because she was not a parent and did not stand in loco parentis to the minor child. The trial court found that the non-biological mother did not jointly participate in the minor child’s conception or hold the child out as her own.<sup>71</sup> 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.<sup>72</sup> The Pennsylvania Supreme Court agreed with the trial court and refused to reverse the decision of the trial court.<sup>73</sup>

Contrast the decision in *C.G. v. J.H. with Partanen v. Gallagher*.<sup>74</sup> 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.<sup>75</sup> 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.<sup>76</sup> The court also found that both mothers “received the child into their home and openly held out the child as their child.”<sup>77</sup>

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.

## State Identification Documents

For transgender individuals who are planning to or have already begun to transition, a 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, in fact, place a client at risk; almost 10 percent of transgender individuals have experienced violence due to their gender identity or expression.<sup>78</sup>

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, by state legislative activity or through the courts.

In *F.V. v. Barron*, plaintiffs sought to invalidate Idaho’s policy that automatically denied applications to change the listed sex on a birth certificate for any reason other than error.<sup>79</sup> One of the plaintiffs, a transgender female assigned male at birth, knew she was female from approximately age six, 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.<sup>80</sup> 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.”<sup>81</sup> She also felt 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.<sup>82</sup>

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."<sup>83</sup>

The US District Court of Idaho 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."<sup>84</sup> 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."<sup>85</sup>

In *Love v. Johnson*, the Eastern District of Michigan similarly found that the Fourteenth Amendment prohibited Michigan's policy that a birth certificate was the only document acceptable as proof to change the sex on a state-issued identification (ID).<sup>86</sup> 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."<sup>87</sup> The court noted 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."<sup>88</sup> 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."<sup>89</sup>

The Center for Transequality publishes "grades" for the laws of each state. If you have a client who needs assistance in any state, a good starting place is the National Center for Transgender Equality.<sup>90</sup> 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.

## US Passport

Currently, the United States Department of State Foreign Affairs Manual provides that "sex reassignment surgery is not a prerequisite for passport issuance based on gender change."<sup>91</sup> The only documentation that is required is a 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."<sup>92</sup>

The signed, original certification or statement must be on the physician's office letterhead.<sup>93</sup> Licensed physicians are defined only as doctors of osteopathy (DOs) or medical doctors (MDs).<sup>94</sup> The medical certification must include certain information of the doctor, as well as language stating: (i) "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 (ii) "the applicant has had appropriate clinical treatment for gender transition to the new gender of either male or female."<sup>95</sup> 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.<sup>96</sup>

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.<sup>97</sup>

### 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.<sup>98</sup> This information can then be used to verify the identity of an individual.<sup>99</sup> 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.<sup>100</sup> If a person's gender does not match the sex as kept by the Social Security Administration, a "No-Match" could occur.<sup>101</sup>

In addition to "Identity" documents (such as a US driver's license, state-issued identification card, or US passport), persons wishing to change their gender marker should provide one of the following:

- A fully-valid, 10-year US passport showing the new gender;
- State-issued amended birth certificate showing the new gender;
- Court order directing legal recognition of change of gender; or
- Medical certification of appropriate clinical treatment for gender transition in the form of an original letter from a licensed physician.<sup>102</sup>

Any of the documents the applicant provides must have enough biographical data to clearly identify the individual.<sup>103</sup>

### 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.<sup>104</sup> This means that male-to-female individuals must register.<sup>105</sup> Female-to-male individuals are not required to register.<sup>106</sup> 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.<sup>107</sup>

### Healthcare

For LGBTQ persons and their families, discrimination in the healthcare setting 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 the doctor's religious beliefs.<sup>108</sup> 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.<sup>109</sup> A 39-year-old teacher allegedly died after not getting appropriate medical care from emergency medical technicians (EMTs) after they discovered she was a lesbian.<sup>110</sup> 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."<sup>111</sup>

In May 2016, the Obama Administration clarified Section 1557 of the Affordable Health Care Act with a rule that discrimination based on sex stereotyping was impermissible gender discrimination in the healthcare setting.<sup>112</sup> In December 2016, the US District Court for the Northern District of Texas issued a nationwide injunction on this rule, and the Trump administration did not defend the regulation.<sup>113</sup>

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.<sup>114</sup>

## Public Services

LGBTQ persons also sometimes face discrimination when seeking access to public accommodations.<sup>115</sup> Public accommodations are the services provided to the general public (e.g., restaurants, movie theaters, libraries, and shops) by both governmental entities and private businesses.<sup>116</sup>

Currently, 20 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.<sup>117</sup> Additionally, Wisconsin prohibits discrimination based on sexual orientation only.<sup>118</sup>

Even though certain states prohibit discrimination, businesses still may discriminate. *Zawadski v. Brewer Funeral Services* arose when a funeral home in Mississippi allegedly refused to provide funeral or cremation services to a gay man.<sup>119</sup> Jack Zawadski and Bob Huskey were a couple for 52 years and had moved to Picayune, Mississippi two decades ago and married in 2015.<sup>120</sup> When Bob died in 2016, the funeral home refused to pick up Bob's body from the nursing home, allegedly saying it does not "deal with their kind."<sup>121</sup> To avoid such issues, LGBTQ persons should make arrangements at a facility they know will be LGBTQ friendly.

Recently, the Supreme Court has ruled on two cases where anti-discrimination laws conflict with the First Amendment.

In *Masterpiece Cakeshop v. Colorado Civil Rights Commission*, a Colorado baker refused to bake a wedding cake for a gay couple, citing his religious beliefs as a basis for the denial.<sup>122</sup> The Colorado Civil Rights Commission found that the bakery violated Colorado's public accommodation law and discriminated against the couple.<sup>123</sup> The lower courts all agreed.<sup>124</sup> The Supreme Court found for the bakery, but on the narrow grounds that the Colorado Civil Rights Commission was hostile toward the baker's religious

beliefs.<sup>125</sup> The decision did not ban governments from enacting and enforcing anti-LGBTQ discrimination laws.

In *303 Creative LLC v. Elenis*, the Court explicitly held that the First Amendment protected a website designer who violated Colorado's anti-discrimination law by refusing to create a website for a same-sex wedding.<sup>126</sup> The Court stated that although public accommodation laws are not per se unconstitutional, a businessperson cannot be compelled to create an "expressive activity" which conflicts with their values and which they would not produce for any client.<sup>127</sup>

## Housing

The final issue to address when working with older clients is housing, particularly where they will live and the care they will receive as they age and their ability to care for themselves declines. Currently, 23 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, Maryland, Massachusetts, Michigan, Minnesota, Nevada, New Hampshire, New Jersey, New Mexico, New York, Oregon, Rhode Island, Utah, Vermont, Virginia, and Washington.<sup>128</sup> Wisconsin prohibits discrimination in housing based upon sexual orientation *only*.<sup>129</sup>

LGBTQ clients must find an assisted living or nursing home that is welcoming to them. One study found that 73 percent of LGBTQ seniors believed discrimination exists in assisted care facilities and 34 percent believed they would have to hide their orientation if they moved to a retirement facility.<sup>130</sup> Another study found that 8.3 percent of LGBTQ seniors in New York state have reported being neglected because of being LGBTQ.<sup>131</sup>

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.<sup>132</sup>

Asking the facility whether it has completed Sage's program may assist in evaluating the facility.

## CONCLUSION

Planners are in the unique position of working with clients on a very personal level. We can become a more complete resource for our clients by learning about the specific legal and societal issues facing the LGBTQ community in order to prevent, resolve, and plan in anticipation of potential problems they face. 📌

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## APPENDIX 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 transitioning:* 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.



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## Notes

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- 65 *Id.* at pp. 55-63.
- 66 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, Rhode Island, South Carolina, South Dakota, Tennessee, Vermont, West Virginia, Wisconsin, and Wyoming. *Id.*
- 67 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.*
- 68 *How Can We Safely Find a Sperm or an 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/>.
- 69 *C.G. v. J.H.*, 193 A. 3d 891 (Penn. 2018).
- 70 *Id.*
- 71 *Id.* at 907.
- 72 *Id.* at 898.
- 73 *Id.* at 911.
- 74 *Partanen v. Gallagher*, 475 Mass. 632, 59 N.E.2d 1133 (Mass. 2016).
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- 92 *Id.* at 8 FAM 403.3-1(e); 8 FAM 403.3-2(B)(a).
- 93 *Id.* at 8 FAM 403.3-2(B)(a).
- 94 *Id.* at 8 FAM 403.3-2(B)(c).
- 95 *Id.* at 8 FAM 403.3-2(B)(d).
- 96 *Id.* at 8 FAM 403.3-2(B)(f).

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