

LGBTQ Planning: What Skills Do Planners Need to Properly Serve the Modern Family?

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1

1

LGBTQ Planning: What Skills Do Planners Need to Properly Serve the Modern Family?

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2

2

Acknowledgement Regarding Materials

- Most of these materials were adapted from: "Estate Planning For The Modern Family: In Depth" by Steven L. Kriz and Lauren J. Wolven of Levenfeld Pearlstein, LLC, Chicago, IL.

3

3

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4

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6

6

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The world's largest suicide prevention and crisis intervention organization for LGBTQ young people.



7

Trevor Project

Why We Exist

- Suicide is the **2nd leading cause** of death among young people
- Up to **50% of all** trans people have made a suicide attempt – many before the age of 25
- Lesbian, gay, bisexual, and transgender youth are more than **4x more likely** to attempt suicide than their peers
- Accepting adults decrease the risk of LGBTQ youth attempting suicide **by 40%**

8

Trevor Project

Program Areas

- Provide direct 24/7 support to LGBTQ youth in crisis.
- Ensure youth don't enter a crisis in the first place.



Served 100,000+ LGBTQ Youth in 2019

9

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**Introduction;
Learning
Objectives**

10

10

LGBTQ Webinar Objectives/Intro

- The structure and composition of the modern family has evolved and continues to evolve.
- In 2018 approximately 4.5% of the U.S. population identified as lesbian, gay, bisexual, transgendered or queer ("LGBTQ").
- Estate planners, financial advisers, insurance consultants, trust officers, and others must be prepared to interpret existing estate planning documents and plans in light of the evolving family, and have the skills to craft new estate plans to address the modern family, including evolving concepts of gender. Attorneys need the skills to draft legal documentation to address these realities.
- Concepts like gender that once seemed fixed are now fluid due to the evolving social environment, advances in medical technology, and changes in the law (in at least one survey, 12% of Millennials identify as transgender or gender non-conforming).

11

11

LGBTQ Webinar Objectives/Intro

- The nuclear family has been redefined over the past decade, both in our culture and our laws. This webinar will discuss important planning considerations with a focus on addressing LGBTQ needs.
- This webinar will explain the vocabulary and planning tools practitioners in all disciplines need to serve not only LGBTQ clients but the modern family generally.
- Estate planners must understand a client's community to be an effective planner for the client.
- Advisers can better serve clients by learning about advising on issues facing LGBTQ, as well as issues they face with their families.

12

12

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LGBTQ More Common than Many Realize

13

13

LGBTQ More Common than Many Realize

- As of May 2018, almost 4.5% of the U.S. population identified as lesbian, gay, bisexual, transgendered, or queer ("LGBTQ").
- About 5.1% of women and 3.9% of men identify as LGBTQ.
- 8.2% of millennials (defined as birth years 1980-1999) identify as LGBTQ (perhaps as high as 20%).
- 3.5% of generation X (birth years 1965-1979) (perhaps as high as 12%).
- 2.4% of baby boomers (birthday 1946-1964) (perhaps as high as 7%).
- 1.4% of traditionalists (birth years 1913-1945) identify as LGBTQ.
- The distinct difference by age level, according to some, suggests that younger people are more open about their being LGBTQ while older generations are not. Thus, the statistics on the number and portion of the population, may well be substantially understated.
- The number of openly LGBTQ millionaires and billionaires is growing rapidly. As of 2014, about 0.4% of the 1,645 billionaires (about 65) globally identify as LGBTQ.

14

14

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The Role of Advisers for LGBTQ Clients

15

15

Adviser Role with the LGBTQ Client

- The definition and composition of "family" has been evolving substantially over time.
- Advisers should be thoughtful and create an environment of open communication with clients about their families.
- Recognize that clients may be reluctant to share information about their family structures due to bad past experiences.
- 6% of transgender people report having a negative experience with an attorney because of being transgender.
- Being thoughtful about the psychological impact of what LGBTQ clients and their families experience in the world can facilitate advisers obtaining the information and open communication necessary to representation.

16

16

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Terminology Critical

17

17

Terminology Is Important

- To create an open and trusting environment, it is important to understand the terminology used by LGBTQ persons, and how members of the LGBTQ community may feel about certain "charged" words or phrases.
- Just ask! It is ok to admit that you care about your client's feelings but that you are 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 in the relationship with that client.
- Practitioners should refer to and review the GLAAD Media Reference Guide – 10th edition, available at <https://www.glaad.org/reference>.

18

18

Gender/ Sex Terminology

Identity
is how you, in your head, experience and define your gender based on how much you align (or don't align) with what you understand the options for gender to be.

Attraction
is how you feel yourself being drawn (or not drawn) to other people, in sexual, romantic, and/or other ways often categorized within genders.

Sex
is the physical traits you're born with or develop that we think of as "sex characteristics," as well as the sex you are assigned at birth.

Expression
is how you present gender through your actions, clothing and demeanor to make a first, and how those presentations are viewed based on social expectations.

Sex Assigned At Birth
 Female Intersex Male

Typically based solely on external genitalia present at birth, although internal anatomy, karyotype, and karyotype chromosome sets. Sex Assigned At Birth (SAAB) is key for distinguishing between the terms "transgender" (applicable only when gender identity and "assigned gender" labels it doesn't).

19

19

Gender/ Sex Terminology

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

20

20

Gender/ Sex Terminology

Gender Identity
→ Woman-ness
→ Man-ness

Gender Expression
→ Femininity
→ Masculinity

Anatomical Sex
→ Female-ness
→ Male-ness

21

21

Gender/ Sex Terminology

- **Androgynous:** Identifying and/or presenting as neither distinguishably masculine nor feminine.
- **Gender-fluid:** According to the Oxford English Dictionary, a person who does not identify with a single fixed gender, or of relating to a person having or expressing a fluid or unfixed gender identity.
- **Gender-expansive:** Conveys a wider, more flexible range of gender identity and/or expression than typically associated with the binary gender system.
- **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.
- **Queer:** A term people often use to express fluid identities and orientations. "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.

22

22

Transitioning Terminology

- **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.
- **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.
- **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.

23

23

Orientation Terminology

❤️ Sexually Attracted to... and/or (a/o)

- ➡️ Women a/o Feminine a/o Female People
- ➡️ Men a/o Masculine a/o Male People

❤️ Romantically Attracted to...

- ➡️ Women a/o Feminine a/o Female People
- ➡️ Men a/o Masculine a/o Male People

24

24

Orientation Terminology

- **Lesbian:** A woman who is emotionally, romantically or sexually attracted to other women.
- **Gay:** A person who is emotionally, romantically or sexually attracted to members of the same gender.
- **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.
- **Asexual:** The lack of a sexual attraction or desire for other people.
- **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.

25

25

Coming Out Terminology

- **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.
- **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.

26

26

Wrap-Up

Identity ≠ Expression ≠ Sex
Gender ≠ Sexual Orientation

27

27

Terms to Use; Terms not to Use

- **Use:** "Sexual orientation" (or, simply, "*orientation*") **Don't Use:** instead of "sexual preference."
- **Use:** If you must refer to someone orientation, use "gay", "gay man", "lesbian" or "gay person/ people" **Don't Use:** instead of "homosexual."
- **Don't Use:** Similarly, it is not necessary to identify a lifestyle as a "gay lifestyle" or "transgender lifestyle". Instead just **Use:** "lifestyle."
- **Don't Use:** 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. **Use:** Couple.

28

28

Pronouns; Grammar; Gender

- Each of us has pronouns we prefer to be called by.
- When speaking with a client, listen for clues as to how the person self-identifies. If you are not certain, just ask.
- For trans individuals, some people prefer pronouns that match their gender identity; others prefer more neutral pronouns.
 - "They/them/theirs"
- Most people use the terms "she/her/hers," "he/him/his," or "they/them/theirs."
- If you have an initial client questionnaire, this question may be best placed there. "What pronouns do you prefer?"
- Consider placing your pronouns in your e-mail signature.

29

29

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Financial, Insurance and Related Planning for LGBTQ Clients

30

30

LGBTQ Financial Planning Considerations

- Clients may consider a portfolio that invests in LGBTQ-friendly publicly traded companies. The Human Rights Campaign developed a "Corporate Equality Index" in 2002. Studies have shown that LGBTQ-friendly investments have not limited earnings.
- LGBTQ borrowers are more likely to be denied mortgage loans according to a study from Iowa State University.
- Planning for a family can be very expensive, whether it involves adoption, surrogacy, or IVF.
- LGBTQ individuals also tend to live in urban communities surrounded by like-minded neighbors resulting in a higher cost of living.
- In addition to stagnant wages and income, LGBTQ individuals must face job discrimination—LGBTQ individuals can be fired by a private employer in 28 states.

31

31

Financial Planning Considerations for Transgender Individuals

- A 2015 Transgender Survey found that transgender individuals were three times more likely to be unemployed and twice as likely to be living in poverty.
- The cost of treatments for transgender individuals can be costly.
- 13 states and D.C. ban insurance exclusions for transgender healthcare and provide inclusive health benefits for state employees: CA, CT, DE, D.C., MD, MA, MN, NV, NJ, NY, OR, RI, VT, and WA. An additional 8 states ban insurance exclusions for transgender health care: CO, HI, IL, ME, MI, NH, NM, PA. Montana provides transgender-inclusive health benefits for state employees.

32

32

Financial, Insurance and Related Planning for LGBTQ Clients

- Generally, sexual orientation does not impact eligibility for a life insurance policy. As with unmarried non-LGBTQ couples, life insurance companies will consider insurable interest of unmarried LGBTQ couples.
- There are some companies that now provide life insurance coverage for those living with HIV/AIDS.
- Life insurance companies historically gave transgender people rates that corresponded with their sex assigned at birth
- Recently, life insurance companies have started to underwrite persons based on their gender, not their sex assigned at birth (but this may not be a written policy)
- Transgender persons may need to provide medical records confirming their gender

33

33

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Drafting Legal Documents

34

34

Drafting Legal Documents Generally

- Consider including a definitional provision that any gender references are intended as being inclusive of all possible genders (masculine, feminine, neutral).
- Marriage laws are now gender blind, so drafting documents for LGBTQ persons is now largely the same as drafting for cisgender straight clients. "Cisgender" is a person whose gender identity aligns with those typically associated with the sex assigned to them at birth.
- In Obergefell, the Supreme Court found the requirement that persons must be of the opposite sex to marry was unconstitutional and struck down state bans on marriage between two members of the same sex. The Supreme Court specifically held that the Fourteenth Amendment required states to issue marriage licenses for two individuals regardless of their sex. *Obergefell v. Hodges*, 576 U.S. , 135 S. Ct. 2584, 192 L. Ed. 2d 609 (2015).

35

35

Drafting Legal Documents Generally

- Consider - if the clients are not part of the LGBTQ community, there still may be an LGBTQ beneficiary of a dynastic trust at some future time.
- Bottom line - every lawyer should give consideration to LGBTQ terms and other issues regardless of who their clients are. This will require modifications of boilerplate language.

36

36

Client Intake Form/Interview

- It is not uncommon for LGBTQ clients and their families to withhold information that may be critical in preparing estate planning documents.
- In addition to becoming familiar with the terminology discussed earlier, consider making changes to client intake forms.
- For example, you may consider asking for a detailed family tree—name, relationship, legal relationship, gender identity, preferred pronouns, etc.
- You may also consider asking clients about their family in an intake interview. For example, consider the following:
More and more families have loved ones in non-traditional relationships. In order to plan for all persons, are any potential beneficiaries who may be in non-traditional family relationships, treated as a descendant but not legally adopted, or who may be a member of the LGBTQ community?

37

37

Naming Considerations

- 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, (1) Sarah Smith (legal name: Sean Smith); or (2) Sarah Smith a/k/a Sean Smith— note: referencing the legal name may be preferable than the "a/k/a" identifier because the individual has intentionally ceased using the dead name.
- Regarding a name change, 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.

38

38

Drafting for Gender Change

- Consider specifying in estate planning documents that a gender change, or legal name change, are not designed to write a person out of the document. This may be important to avoid disputes.
- Example: A document provides for a gift of "\$100,000 to my son, Brian, if he survives me." Is Brian considered not survive because Brian is now "Judy" and the settlor's daughter? Sample Provision: "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."
- Consider designating a person in a non-fiduciary capacity to hold a special power of appointment to clarify the class of beneficiaries as to any potential beneficiary who has undergone a transition . This would be analogous to the provisions used to create a hybrid-DAPT but applied in this more narrow manner

39

39

Specific Bequests and Gift Provisions – Gender Considerations

- Example: Engagement ring to first-born daughter.
- Example: Bequest of "\$1000 to each of my then living grandsons."
- Alternative drafting options:
 - "To my oldest living child assigned a female at birth."
 - "To my oldest living cisgender daughter."
- If a gift relates to gender identity, then specifying the timing for determination of gender can help to avoid unnecessary ambiguities and trust controversies.
- Similar consideration should be give to provisions permitting an agent under a power of attorney or trustee under a revocable trust can make gifts. Consider the comments above in terms of a revocable trust for providing a limited power of appointment so such provisions can be modified if appropriate.

40

40

Definitions of Descendants

- When children or grandchildren become a part of a family through adoption or surrogacy, standard language may not adequately address how those descendants are to be treated.
- 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.
- 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.

41

41

Definitions of Descendants

- When children or grandchildren become a part of a family through adoption or surrogacy, standard provisions 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 occurred, 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.
- Consider specifying that a legally adopted descendant is a descendants for purposes of the instrument.
- Where a couple does not actually go through a re-adoption process for the non-biological parent, most standard language will not include that child in the non-biological parent's documents as a "descendant."

42

42

Definitions of Descendants

- One approach is to modify documents 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. This, however, may raise an issue with the trustee's fiduciary responsibility to the other beneficiaries. Also, what if another beneficiary contests the decision?
- An alternative approach would be to designate a person in a non-fiduciary capacity to hold a special power of appointment to add to the class of beneficiaries a person meeting the criteria above. This would be analogous to the provisions used to create a hybrid-DAPT but applied in this more narrow manner.

43

43

Drafting Medical and Health Standards in Trusts

- For LGBTQ clients consider what terms like "health" and "health, education, maintenance and support ("HEMS") mean to them.
- If trust distribution standards don't clearly encompass adoption, surrogacy, and gender confirmation surgery, will a trustee make a distribution? Even if a trustee will make a distribution for these purposes, these are all very expensive and another beneficiary could object to the expenditure.
- Broaden the definition of "health" "HEMS" to include the cost of family planning, such as gender confirmation, adoption, infertility treatment, and surrogacy.

44

44

Drafting Medical and Health Standards in Powers of Attorney and Trusts

- Powers of attorney should address the same issues as noted above for trusts.
- Many powers of attorney include standard language permitting an agent to make distributions to named donees for annual exclusion gifts and in accordance with Sec. 2503(e).
- The Tax Court has included gender confirmation surgery as an allowable deduction under Internal Revenue Code Sec. 213(d), so clients could make an unlimited gift to a loved one for gender confirmation surgery under Internal Revenue Code Sec. 2503(e), but note this cannot be used for surgeries deemed "cosmetic."

45

45

For Unmarried Couples

- Domestic Partnerships and Civil Unions
- No benefit of unlimited marital deduction or portability
 - Consider life insurance held outside the estate (ILIT)
 - Fully utilize each exemption during life or upon each death
- Drafting considerations:
 - Last Will & Testament—Name partner as guardian and personal representative
 - Durable Power of Attorney for Property and Health Care—Grant partner power of attorney to make important decision regarding finances and health; a power of attorney will grant partner visitation in the hospital room and the ability to consult with doctors
 - Advance Medical Directive—Ensure client's end-of-life wishes are known, regardless of whether a partner is given a power of attorney

46

46

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Surrogacy

47

47

Surrogacy

- Surrogacy is an issue that may have to be addressed for LGBTQ clients with more frequency than cisgender clients.
- 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.
- If a male same-sex couple chooses surrogacy, then it would be necessary for them to find a surrogate and to also identify an egg donor.
- 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 with surrogacy and it is important that all parties execute a written agreement regarding the rights of all parties involved.

48

48

Conclusion and Additional Information

LGBTQ Planning

49

49

Conclusions

- If your client shares with you their whole self, you can ensure that their legacy remains intact.
- Creating an open, trusting environment for your LGBTQ clients leads to better client retention and referrals.
- You can create an open environment by:
 - Using the language used in the LGBTQ community.
 - Understanding the challenges LGBTQ people face.
 - Providing a holistic client experience.

50

50

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51

  

51

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52
