

PLANNING FOR TRANSGENDER CLIENTS AND FAMILY MEMBERS (WITH FORMS)



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No discussion of modern estate planning would be complete without addressing the issues surrounding transgender family members. A report in 2011 by the Williams Institute estimated 0.3 percent of the American population identified as transgender.¹ However, a more recent 2016 analysis doubled that estimate, finding that 0.6 percent of the adult population is transgender—approximately 1.4 million adults.² This revised estimate does not reflect the increasing number of children identifying and embracing their transgender identity earlier in life than has been seen in prior decades.³

A transgender individual is a person whose gender assigned at birth does not align with their gender identity. Transgender does not imply any particular sexual orientation. Gender identity is an individual's perception of who they are, regardless of sex or sexual orientation—the inner sense of being a man, a woman, both, or neither.⁴

Beyond simply identifying as male or female, some individuals see themselves as defying the historical idea of a gender binary. In an effort to be more inclusive, many colleges and universities now ask incoming students to check off their preferred gender pronouns (PGP) during the initial course registration process: he, she, ze, hir, or they.⁵ In fact, a trend is

to ask only for the student's "pronoun" because to ask for a "preferred" pronoun connotes choice.⁶ The Oxford English Dictionary has also recently added Mx. as an alternative to Mr. and Mrs.⁷ In a significant move toward promoting inclusivity on the platform, Facebook added a custom gender option to user profiles in 2014. Selecting the custom option allows users to type in whatever descriptor they like. The field will also suggest potential matches from a set of 71 descriptors that was created in cooperation with the LGBTQ community.⁸

Some clients may identify as gender non-binary, genderqueer, or queer.⁹ It is critical to keep in mind that gender identity and gender expression are not the same thing as sexual orientation. Other terms related to or associated with transgender issues include drag, FTM (female to male), gender identity, gender non-binary, intersex, MTF (male to female), SRS (sexual reassignment surgery), transfemme, transition, transmasculine, and transsexual.¹⁰

LEGAL RIGHTS

The Supreme Court, in *Obergefell v. Hodges*,¹¹ ruled that same-sex marriage is a right guaranteed by the U.S. Constitution, and that states are required to both license a marriage between two people of

the same sex and recognize a lawful same-sex marriage performed out-of-state. While the *Obergefell* decision firmly established same-sex marriage as a constitutional right, it did little to improve the rights of transgender individuals.

One might assume that the Equal Protection Clause of the U.S. Constitution would protect a transgender individual from harassment and discrimination, that Title IX of the Education Amendments of 1972 would protect students from harassment and discrimination based on gender expression and identity, and that the First Amendment would protect the right to dress in accordance with one's gender identity. However, the Supreme Court has yet to address those questions.

TRANSITIONING

Part of transitioning to the gender one identifies as involves facing the myriad legal steps to ensure that legal documents and the gender-identifying markers contained in them reflect how a person identifies. These steps, the challenges, and the legal solutions are discussed below, along with a brief examination of what it means to be transgender from a medical perspective.

The medical perspective

Some individuals simply identify with a gender different from the one they were assigned at birth. Gender nonconformity is not itself a mental disorder. For many, it is simply a process of self-discovery, but for others there may be a significant amount of distress caused by gender dysphoria. In modern medical terminology, this is referred to as Gender Identity Disorder (GID).¹²

GID is recognized in both the American Psychiatric Association's Diagnostic and Statistical Manual of Mental Disorders (DSM-IV-TR) and the International Classification of Diseases and Health-Related Problems (ICD-10).¹³ The American Medical Association (AMA) has also recognized that transitioning is medically necessary for many individuals diagnosed with GID. Transitioning may include sexual reassignment surgery and/or hormone treatment either to

suppress the secondary sex characteristics of an individual's assigned gender or to stimulate production of secondary sex characteristics of an individual's identified gender.

In 2008, the AMA's House of Delegates passed a resolution at their annual meeting supporting public and private health insurance coverage for treatment of GID as recommended by the patient's physician.¹⁴ That resolution provided, in part, that "the AMA support[s] public and private health insurance coverage for treatment of gender identity disorder ... [and] the AMA oppose[s] categorical exclusions of coverage for treatment gender identity disorder when prescribed by a physician."¹⁵

After undergoing partial or full gender reassignment surgery,¹⁶ individuals are faced with many legal challenges to ensure that their legal documents—and the gender identification markers contained in those documents—reflect their identity. These steps are discussed below.¹⁷

Not all individuals choose to undergo surgical or other procedures as part of their gender transition—either for financial reasons or because they simply choose not to—nor is it required to legally transition. On June 16, 2010, the Board of Directors of the World Professional Association for Transgender Health (WPATH)¹⁸ issued the following statement:

No person should have to undergo surgery or accept sterilization as a condition of identity recognition. If a sex marker is required on an identity document, that marker could recognize the person's lived gender, regardless of reproductive capacity. The WPATH Board of Directors urges governments and other authoritative bodies to move to eliminate requirements for identity recognition that require surgical procedures.¹⁹

While WPATH standards have not been formally adopted in the United States, they are often followed as treatment guidelines by many medical providers.

Changing one's appearance is optional. Changing certain legal documents is not. Below is an examination of the process and the necessary legal steps to transition with the least amount of disruption to a client's life and embarrassment caused by mismatched documents and identity.

Name change and change of gender identification markers

An important first step in transitioning one's gender identity is to legally change one's name and gender identification markers. These may be found on federal identity documents such as U.S. passports, Veteran's Health Administration cards, and Social Security Administration records, as well as state-issued documents including driver's licenses, state identification cards, and birth certificates, to name just a few of the documents that may need to be changed.

Legal recognition of sex- and name-change is a critical step for a transgender adult, for self-determination as well as safety and the ability to work, travel, and function in society. Each state has a different procedure by which this may be accomplished.²⁰ In some states, this is permitted by common law; in others there is a statutory procedure. For example, in Washington, a name change may be obtained in district court in the judicial district where the applicant resides, and may be completed in one day.²¹ Illinois law allows a resident to change their name by filing a petition in the circuit court of the county in which they reside.²² Similarly, in California, a name change may be obtained by filing a petition in superior court in the county where the person resides.²³

While every state has a procedure for name changes, some states (or particular judges) still may deny a transgender person's name change,²⁴ or a legal change in one state might be denied recognition in another.²⁵ Where a name change is denied, the lawyer needs to be creative. One option in the event an individual desires to change their name, but does not have the need to change other legal documents, is a "common law" name change. A common law name change happens simply when a person uses a new name consistently for all purposes. A person has a

common law right to use a name different from the one on their birth certificate provided that it is not done with criminal intent. The common law method has many downsides, and very rarely does an individual simply want to change their name without the need to change other legal documents.

Another option is an affidavit of name change. An affidavit is a written statement explaining that an individual has changed their name for all purposes, provided that the change does not perpetrate fraud or enable criminal intent. A sample form of affidavit of name change is attached as Exhibit A. Unfortunately, similar to a common law name change, an affidavit may not create the paper trail necessary to change other identity documents. Most government agencies may require a court order showing a valid name change rather than an affidavit or a pattern of use.

Change of gender identifier on other legal documents

A client must also change the gender markers on government-issued documentation such as a driver's license, birth certificate, green card, military identification, Selective Service registration, immigration and citizenship documents, professional license, pilot's license, and other federal- or state-issued identification. In our mobile economy, legal photo identification is crucial.²⁶ It is important that photo identification matches the current identity of a client. Without this identification, an individual's ability to travel, drive, have access to financial institutions and credit, obtain employment and security clearances, make certain purchases, obtain medical treatment, enter government buildings, and engage in a whole host of other activities, will be severely limited.

Like name changes, each state sets its own procedure for gender changes on identification documents.²⁷ The most common documents requiring changes are discussed below.

Birth certificate

One of the most difficult documents to change is the birth certificate.²⁸ Some states have statutes

governing how birth certificates may be changed, with requirements from a doctor's letter to proof of gender reassignment surgery, while other states simply do not allow changes. Those that allow amendment may issue new birth certificates or simply strike out the old information and write in the new.²⁹ Some states, including California, seal the old birth certificate and issue a new one.

Not all courts recognize a changed gender marker. To avoid the potential for non-recognition, a court order declaring a legal change of gender is the best practice (typically obtained at the same time as a court-ordered name change).

Driver's license

Typically, evidence of adoption of a different gender is required to change a driver's license. The procedure varies from state to state, but is typically easier than changing gender markers on other types of legal identification. While in many states the motor vehicle departments require neither legal nor medical documentation, some still require proof of surgical gender reassignment.

Social Security

The Social Security Administration (SSA) requires evidence of gender reassignment before allowing a change of gender identification.³⁰ The SSA will accept any of the following forms of evidence for a gender marker change:³¹

- A U.S. passport showing the correct gender (discussed below);
- A birth certificate showing the correct gender;
- A court order recognizing the correct gender; or
- A signed letter from a health care provider confirming the individual has had appropriate clinical treatment for gender transition (which does not necessarily mean surgery).³²

Attached as Exhibit B is a sample letter from a health care provider, with variations depending on state law requirements. Exhibit C is a form of statement

that may be required in some states to correct a gender marker error.

The following additional documents must also be provided to the local SSA office (all documents must be originals or copies certified by the issuing agency):

- A completed Form SS-5, "Application for a Social Security card;
- Proof of new identity;
- Proof of former identity; and
- Proof of citizenship or immigration status.

A U.S. citizen can document immigration status with a U.S. birth certificate or passport. If foreign born, a citizen may provide a:

- U.S. passport;
- Certificate of Naturalization (N-550/N-570);
- Certificate of Citizenship (N-560/N-561);
- Certification of Report of Birth (DS-1350); or
- Consular Report of Birth Abroad (FS-240).

A U.S. citizen who has not previously established citizenship with the SSA must present a birth certificate, U.S. passport, or other proof of citizenship. The birth certificate or other document establishing citizenship does not need to show current name or gender, but it must show proof that the applicant is the same person.

A non-citizen must provide documents proving immigration status and work eligibility. These documents could include a:

- Current U.S. immigration document, which may include Form I-551 (Lawful Permanent Resident card/employment permit);
- Form I-766 Employment Authorization Card;
- Form I-688B Employment Authorization Document; or
- Form I-94 (Arrival/Departure Record), along with an unexpired foreign passport containing an admission stamp.

F-1 or M-1 students must show Form I-20 (Certificate of Eligibility for Nonimmigrant Student Status). J-1 or J-2 exchange visitors must show Form DS-2019 (Certificate of Eligibility for Exchange Visitor Status).

Because the law in this area changes often, an applicant should contact the SSA to confirm the required documents before submitting an application.

Attached as Exhibit D is a letter to the SSA requesting the issuance of a new Social Security card with a changed gender marker.

While a Social Security card is not as important as a driver's license on a daily basis, failure to change one's gender with the SSA may lead to a gender mismatch, which could be brought to the attention of an employer and other agencies requesting various legal documents. The SSA in the past notified an employer with a "No-Match Letter" if the information it had on file for an employee did not match the information provided by the employer.

As of September 2011, the SSA announced that it would no longer allow gender to be matched in its Social Security Number Verification System.³³ This resulted in the immediate cessation of the SSA policy of sending notifications that alert employers when the gender marker on an employee's W-2 does not match Social Security records,³⁴ although, anecdotally, No-Match Letters are still being sent from time to time so planners should help clients avoid the possibility of a No-Match Letter.

Passports

The Department of Homeland Security has the authority to issue U.S. passports.³⁵ Since June 10, 2010, when a passport applicant presents a certification from an attending physician that the applicant has undergone appropriate clinical treatment for gender transition, the passport will reflect the new gender. A new passport reflecting a person's new gender may be obtained using Form DS-5504.³⁶

It is also possible to obtain a limited-validity passport if the physician's statement shows the applicant is in the process of gender transition.³⁷ No additional

medical records are now required, and gender reassignment surgery is no longer a prerequisite for passport issuance. The new policies and procedures are based on standards and recommendations of the World Professional Association for Transgender Health, recognized by the AMA as the authority in this area of medicine.³⁸ The new policies and procedures also contain a model letter for licensed physicians to certify an applicant's gender change and provide guidelines for incorrect gender markers on an applicant's original passport.

School records

The Family Educational Rights and Privacy Act (FERPA)³⁹ protects the privacy of student educational records and also gives current and former students the right to amend those records to match their legal documents if they are "inaccurate, misleading, or otherwise in violation of the student's privacy rights."⁴⁰

FERPA also gives parents certain rights with respect to their children's educational records. These rights transfer to the student when the child reaches age 18 or attends a school beyond the high school level.⁴¹

Selective service

American citizens and resident aliens ages 18 through 25 who were assigned male at birth are required to register with the Selective Service System in the event a draft is ever reinstated. All U.S. citizens whose birth-assigned sex was male must register within 30 days of their 18th birthday.

People assigned a female gender marker at birth need not register, even if they later transition to male.⁴² However, applications for federal financial aid for higher education, federal employment, U.S. citizenship, and other government benefits may be contingent upon Selective Service registration in order to encourage compliance. As a result, when applying for government benefits, transgender people may be faced with challenges due to their Selective Service registration status.⁴³ For individuals who have transitioned from male to female, the Selective Service has a form to elect out of registering.⁴⁴

Medical expenses and income tax considerations

Gender reassignment surgery can also require life-long care that may include primary care, gynecologic and urologic care, reproductive options, voice and communication therapy, mental health services (e.g., assessment, counseling, psychotherapy), and hormonal and surgical treatments. All of this comes at great expense, and often may not be covered by insurance if designated as an elective procedure. Whether the costs of gender reassignment surgery and follow-up care are tax deductible is also an important issue for most individuals. Internal Revenue Code (Code) section 213(d)(9)(B) allows taxpayers to deduct medical expenses, but not cosmetic surgery, which it defines as “any procedure which is directed at improving the patient’s appearance and does not meaningfully promote the proper function of the body or prevent or treat illness or disease.”⁴⁵ However, in Revenue Ruling 2003-57, 2003-1 CB 959, the IRS held that breast reconstruction following a mastectomy was a deductible expense.

In a remarkable 69-page opinion with 70 pages of concurring and dissenting opinions, the Tax Court ruled in *O’Donnabhain v. Commissioner*⁴⁶ that necessary treatment for GID (in this case, male to female gender reassignment surgery) qualifies as a deductible medical expense under Code section 213, and therefore costs related to that treatment are deductible from federal income taxes (as limited by section 213).⁴⁷

Specifically, the Tax Court acknowledged that the taxpayer had been diagnosed with GID, a medically recognized “disease” within the meaning of Code section 213(d)(1)(A) and that the taxpayer’s hormone therapy and gender reassignment surgery treated this disease; therefore, the surgery costs were deductible medical expenses.

Because the deduction is limited to necessary treatment, breast augmentation surgery costs are not consistently treated as tax deductible expenses of gender reassignment surgery. While the court did not permit Ms. O’Donnabhain to deduct the costs of her breast augmentation, the court recognized that augmentation surgery for transgender women may

be an allowable deduction when the taxpayer can show documentation from one or more health care providers that the surgery was medically indicated to achieve breast development that is not obtainable through hormone therapy.⁴⁸

Marriage

The validity of a marriage is determined by the couple’s status at the time the marriage is performed. Prior to *Obergefell*, some states took the position that gender is determined at birth and that reassignment surgery will not be recognized for purposes of determining whether a marriage was valid. Even before *Obergefell*, some states recognized as valid a heterosexual marriage in which, before the marriage, one member of the couple changed genders.⁴⁹ After *Obergefell*, gender is no longer relevant, and not a consideration in determining whether a marriage is valid.

Estate planning documents

In addition to ensuring that a transgender client has the basic estate planning documents that reflect their wishes, intent, and goals, there are other unique issues that must also be taken into consideration. First, consider whether gender identity in legal documents is relevant. A client’s preferred gender identification may change over time. For that reason, drafting documents with complete gender-neutrality so that gender-identifying pronouns are not necessary is often ideal. On the other hand, where a client is afraid that family members who do not recognize their transition may attempt to recharacterize their gender post-mortem, including statements about gender identity in estate planning documents is critical.

If it is necessary to use a gender identifier in documents such as wills, trusts, powers of attorney, and pleadings, it is important to make statements about the client’s identity, using names and pronouns consistent with how that person identifies. Do not assume that the client would want to be identified as “he” or “she.”

Consider giving the fiduciary the right and the directive to do whatever is necessary to preserve a client's self-identity postmortem. When the transgender individual is the beneficiary of a trust, consider whether psychological and medical expenses for realigning gender and physical sex are covered as permissible expenses. This could be done by expressly including such expenses in a definition of medical expenses, or by simply drafting the definition broadly so that these expenses would not be excluded. This could be done by adding a sentence such as: "Medical expenses shall also be construed liberally to include elective procedures."

Draft documents to protect the validity of a client's documents based on competency issues. Some disgruntled potential heirs may attempt to claim that a decedent's gender identity is an indication of lack of competency or the product of undue influence. This may also include the use of will substitutes such as revocable trusts, joint tenancy with right of survivorship, and pay on death accounts, which are harder to challenge and afford more privacy than a probate proceeding.

Medical powers of attorney are often statutory forms that allow patients to select a surrogate decision-maker to make certain medical decisions when patients are temporarily or permanently unable to communicate or make such decisions. Statutory forms typically will not cover certain issues particular to the transgender client. Again, because of the possibility of challenges by family members, a medical power of attorney should specifically grant visitation rights to certain individuals, or even provide who may not visit. The principal should consider allowing the agent the power to control who may visit, in order to eliminate visitation by hostile family members. A medical power of attorney should also direct whether certain medical therapies such as hormone replacement therapy should be continued during a period of incompetence, and when they should be discontinued.

Any instructions for the disposition of a client's remains should also require that the client's gender be respected at death. Transgender people run

a risk that, without documentation in place, a family member may mischaracterize their gender on a death certificate, gender marker, and other post-death documentation.⁵⁰

Court proceedings

If a client's name and/or gender identity changes during the course of your representation, documents may need to reflect or acknowledge that change. If documents have been filed with the court, and older pleadings refer to a client with a former name, consider using the term "now known as," in the caption in future pleadings.⁵¹ Discuss with your client, if relevant, whether and how to disclose to the court that a client is transitioning. Some clients may prefer a discussion in open court; others may wish a sidebar or discussion in the judge's chambers. Others may simply wish to proceed without formally disclosing that they are transitioning.

PRACTICE POINTERS

"Transgender" is a broad term that includes people who may not identify with their birth sex and those who do not conform to traditional gender norms. And as mentioned previously, it is separate from sexual orientation; a transgender person may identify as gay, straight, pansexual, queer, etc. An individual's gender is fundamental to that person's identity. Their gender identity may play a significant role in their representation. Others may simply wish to proceed without formally disclosing that they are transitioning. At the same time, it is important to avoid inappropriately focusing on the client's gender identity if they do not deem it to be an issue.

Well-intentioned lawyers may have no idea how to communicate appropriately with their transgender clients. Whether a client is a man, woman, son, daughter, husband, or wife can change, depending on how that person self-identifies, and where that person is in the process of transitioning. It is important to be open and receptive to your client's self-identification. It is easy to assume a person's gender based on appearances. This assumption may not always be accurate. A person's expression or identity may be non-stereotypical or defy expectations.

The use of inclusive language is important, and a lawyer must ensure that all staff show respect to one another. The use of pejorative terms, incorrect gender-signifying pronouns, or the use of a transgender person's former name can indicate disrespect, ignorance, or bias. It is not enough for a judicial officer alone to use inclusive language.

Rather than making assumptions, if you are unsure of the appropriate pronoun to use to refer to a person, just ask the client how they would prefer to be addressed in email, correspondence, and conversation: he, she, they, ze, or something else of their choosing. However, unless it is absolutely necessary for the representation, it is never appropriate to inquire about whether a transgender person has undergone any medical procedures as part of their transition. When referring to past events of a transgender person, maintain the preferred pronouns presently in use for the historical narrative.

Terminology is evolving. The connotations of some terms have changed over time—and they continue to evolve—such that their usage can suggest insensitivity or bias. To stay up to date, an excellent resource is the *Stylebook Supplement on Lesbian, Gay, Bisexual, & Transgender Terminology*, published by the National Lesbian and Gay Journalists Association.⁵² Within the LGBTQ community there has been a reclamation of some words historically used pejoratively against LGBTQ persons. And, although LGBTQ people may use these terms as “insiders” of the community, others continue to use these words in a derogatory manner. One should exercise extreme caution with respect to such words.

There are many simple things you can do to ensure that transgender clients feel comfortable in your office. Any intake forms or information gathering documents should permit space for clients to list a preferred name, as well as all prior names used. Respect for the personal needs of a transgender client is as important as the legal matters at hand. Restrooms should be accessible based on gender identity, not genital anatomy. In many settings, the trend is to move to gender-neutral bathrooms. However, where there are facilities available based

on gender identity, transgender clients should *never* be forced to use non-gendered facilities. Administrative assistants, paralegals, and office staff must understand that like all other clients, transgender clients are entitled to competent, respectful, courteous, and professional representation.

Finally, if your office has a nondiscrimination policy, consider following best workplace practices by amending it to include gender identity and expression. If your office does not have such a policy, consider putting a policy in place that demonstrates a commitment to transgender inclusion and equality.

CONCLUSION

Transgender Americans do not yet receive the same level of civil rights protections as cisgender Americans. Transgender individuals may face discrimination in school or the workplace, housing discrimination, discrimination in public accommodations and restrooms, and hate-motivated violence. Until the U.S. Supreme Court extends the protections of the Fourteenth Amendment's Equal Protection Clause and other fundamental protections to ensure the rights of transgender individuals—including the right to dress in a manner consistent with one's gender identity and the right to express one's gender through personal appearance and mannerisms—it is incumbent upon lawyers to protect these clients to the best of our abilities. Transgender adults require legal assistance in transitioning, properly and respectfully drafting legal documents, an understanding of the issues that these clients may face, and respect for their choice of gender identity and expression of that identity.

When advising any modern family, it is helpful to recognize that at some point there may be a transgender family member whose needs must be recognized and met. This sensitivity should permeate all client relationships and drafting of estate planning instruments. 🌟

Notes

- 1 Gary J. Gates, How Many People are Lesbian, Gay, Bisexual and Transgender?, The Williams Institute (Apr. 2011), available at <https://williamsinstitute.law.ucla.edu/research/census-lgbt-demographics-studies/how-many-people-are-lesbian-gay-bisexual-and-transgender/>.
- 2 Jan Hoffman, Estimate of U.S. Transgender Population Doubles to 1.4 Million Adults, N.Y. Times, Jun. 30, 2016, available at <https://nytimes.com/2016/07/01/health/transgender-population.html>.
- 3 Posey Gruener & Marcie Sillman, When Do Kids Know They're Transgender? Younger Than You'd Think, KUOW (Jan. 20, 2016), available at <http://kuow.org/post/when-do-kids-know-they-re-transgender-younger-you-d-think/>. But see Am. Acad. of Pediatrics, Gender Non-Conforming & Transgender Children, available at <http://www.healthychildren.org/English/ages-stages/gradeschool/Pages/Gender-Non-Conforming-Transgender-Children.aspx>; Human Rights Campaign, Ask the Experts – Is My Child Transgender?, <https://www.hrc.org/resources/transgender-children-youth-ask-the-expert-is-my-child-transgender>.
- 4 For thorough and thoughtful analyses of this topic, see Ally Windsor Howell, Transgender Persons and the Law, 2nd Edition (ABA 2015) and A. Spencer Bergstedt, Estate Planning and the Transgender Client, 30 W. New Eng. L. Rev. 675 (2008).
- 5 See, e.g., Astead W. Herndon, Harvard allows students to pick new gender pronouns, Boston Globe, Sept. 2, 2015, available at <https://www.bostonglobe.com/metro/2015/09/02/harvard-allows-students-pick-new-gender-pronouns/C0EXpZHw09zwCzo4hVhjdJ/story.html>; Williams College, <https://lgbt.williams.edu/resources/trans-resources/pronouns/>; Hampshire College, <https://www.ccsu.edu/lgbt/files/PreferredGenderPronounsForFaculty.pdf>; Ohio University, <https://www.ohio.edu/lgbt/pronouns.cfm>; Middlebury, <http://www.middlebury.edu/student-life/community-living/diversity-inclusivity/preferred-name/pronounsfaq>; Stanford University, <https://www.christianpost.com/news/no-gender-specific-pronouns-stanford-professors-lgbt-redefine-male-female-169299/> (Sept 9, 2016); University of Wisconsin Milwaukee, <https://uwm.edu/lgbtrc/support/gender-pronouns/>.
- 6 KJ Cerankowski, Creating Trans* Inclusive Classrooms, Stanford Program in Feminist, Gender, and Sexuality Studies, available at https://drive.google.com/file/d/10I4hG_nG2K3su9APKp6RqJl17e00240n/view

“How to ask about pronouns:

 - (a) Ask for someone’s ‘pronouns’ rather than their ‘preferred pronouns’ or ‘preferred gender pronouns (PGPs)’;
 - (b) Normalize the inclusion of pronouns as part of your introductory process. For example, ‘Let’s all go around and say our name, pronoun, and where we’re from’;
 - (c) If not sure how to broach the question, simply say something like, ‘I just want to make sure I get your pronouns right; can you tell me which pronouns you use?’”
- 7 Heidi Stevens, ‘Mx.’ Instead of ‘Mr.’ or ‘Mrs.’? It’s in the dictionary now, Chi. Trib., Nov. 11, 2015, available at <https://www.chicagotribune.com/lifestyles/ct-mx-pronoun-added-to-dictionary-balancing-heidi-stevens-1111-20151111-column.html>.
- 8 For a glossary of some of the more common terms used for gender identification, see What Each of Facebook’s 51 New Gender Options Means, The Daily Beast (Feb. 15, 2014), <https://www.thedailybeast.com/articles/2014/02/15/the-complete-glossary-of-facebook-s-51-gender-options.html>.
- 9 While some clients may identify as queer, planners should not assume that all LGBTQ clients are comfortable with this label and should avoid using it without permission. The term has been reclaimed by many in the LGBTQ community following its use as a slur in past decades, but some remain uncomfortable with it, and it is primarily used by those within the community to describe *themselves*. See 3 Differences Between the Terms ‘Gay’ and ‘Queer’—and Why It Matters, Everyday Feminism (Mar. 1, 2016), <https://everydayfeminism.com/2016/03/difference-between-gay-queer/>.
- 10 “Transsexual” is a term that some older LGBTQ individuals use as a self-identifier but is not generally appropriate to describe the trans community. It should be used as a descriptor only where a trans client dictates. See also Transsexual, Transgender, Transvestite: Here’s what you should actually call trans people, Pink News (Mar. 19, 2018), <https://www.pinknews.co.uk/2018/03/19/transsexual-transgender-transvestite-what-should-you-call-trans-people/>.
- 11 Obergefell v. Hodges, 576 U.S. 644 (2015).
- 12 Gender identity is an individual’s perception of whether he or she is male or female, regardless of sex or sexual orientation; the inner sense of being a man, a woman, both, or neither. Gender identity may or may not align with a person’s birth-assigned sex. See Caryn B. Keppler et al., When It Comes to Gender...Estate Planning Considerations for the Transsexual Client, 26 Prob. & Prop. 18 (Mar./Apr. 2012), for definitions of many of the applicable terms and a state-by-state analysis of requirements for amending a birth certificate.
- 13 Am. Psych. Ass’n, Diagnostic & Statistical Manual of Mental Disorders (DSM-IV-TR) (4th ed., text rev. 2000); International Statistical Classification of Diseases & Health Related Problems (ICD10) (2d ed., 10th rev. 2010).
- 14 AMA House of Delegates Resolution 122(A08) (2008), http://www.tgender.net/taw/ama_resolutions.pdf.
- 15 Id.
- 16 Gender reassignment surgery is one of a variety of surgeries involved in the process of transition from one gender to another. Many transgender people will not undergo gender reassignment surgery for health or financial reasons, or because they choose not to.
- 17 For a thorough discussion of the steps that should be taken, see Eric Bigley et al., The Iowa Guide to Changing Legal Identity Documents (Apr. 24, 2014), <http://www>.

- pflagcr.com/wp-content/uploads/2014/10/Iowa-Guide-To-Changing-Legal-Identity-Documents43014.pdf.
- 18 WPATH has articulated standards of care and clinical guidance for health care professionals to assist transgender people in achieving optimal health.
 - 19 WPATH Press Release (June 16, 2010), https://amo_hub_content.s3.amazonaws.com/Association140/files/Identity%20Recognition%20Statement%206-6-10%20on%20letterhead.pdf.
 - 20 See Nat'l Ctr. for Transgender Equality, ID Documents Center, available at <https://transequality.org/documents> (last updated May 2018), for a summary of name and gender change rules and procedures in the United States and Canada. See also Am. Assoc. of Motor Vehicle Admins., Resource Guide on Gender Designation on Driver's Licenses and Identification Cards (Sept. 2016), https://www.aamva.org/GenderDesignationOnDLID_Sept2016/, which includes rules for correcting various gender marker errors.
 - 21 RCW 4.24.130.
 - 22 735 Ill. Comp. Stat. 5/21-101. See the Illinois State website for procedure and contact information, Ill. Dep't. of Pub. Health, Gender Reassignment, available at www.idph.state.il.us/vitalrecords/gender.htm.
 - 23 Cal. Civ. Proc. Code § 1275.
 - 24 The following are just a few of the cases demonstrating the disparate treatment from state to state: In re Marriage of Simmons, 825 N.E.2d 303, 310 (Ill. App. Ct.) (pursuant to Illinois Vital Records Act, 410 Ill. Comp. Stat. 535, the State Registrar issued a new birth certificate with changed name and sex, but the court held that issuance of birth certificate is "ministerial act" that generally does not involve fact-finding, therefore a male birth certificate was found to be not conclusive of male sex and as a result the individual's marriage was deemed invalid), appeal denied, 839 N.E.2d 1037 (Ill. 2005); Littleton v. Prange, 9 S.W.3d 223 (Tex. App. 1999) (court held that it is not bound by an amended birth certificate except to allow corrections to information that was inaccurate at the time of birth), cert. denied, 531 U.S. 872 (2000); In re Ladrach, 513 N.E.2d 828 (Ohio Prob. Ct. 1987) (Ohio birth certificate statute only authorizes corrections if there was an error in the original entry); K. v. Health Div., Dep't of Human Res., 560 P.2d 1070 (Or. 1977) (reversing court of appeals order granting new birth certificate changing sex based on statutory interpretation, and holding that a statutory change is a matter of public policy to be decided by the legislature, until which issuing a new birth certificate will not be permitted); Darnell v. Lloyd, 395 F. Supp. 1210 (D. Conn. 1975) (State Commission of Health violated Connecticut's Equal Protection Clause by denying some requests for birth certificate changes and must show a substantial state interest for its policy of refusing to change birth certificates to reflect sex change); In re Heilig, 816 A.2d 68 (Md. 2003) (holding that jurisdiction exists to determine and declare that a person has changed gender, but that the petitioner did not sufficiently establish a gender change; remanded to the lower court where the petitioner has the burden to present sufficient medical evidence of relevant criteria for determining gender and of the fact that, based on that criteria, he has completed a permanent and irreversible change from male to female).
 - 25 In re Estate of Gardiner, 42 P.3d 120 (Kan. 2002) (Wisconsin court ordered a new birth certificate with changed name and sex to be issued, the transgender plaintiff argued unsuccessfully that Kansas must give full faith and credit to a Wisconsin court order and birth certificate; instead, the Kansas Supreme Court held holding that the Wisconsin marriage of a transwoman and man violated Kansas' policy against same-sex marriage), cert. denied, 537 U.S. 825 (2002); In re Marriage License for Nash, Nos. 2002-T-0149, 2002-T-0179, 2003 WL 23097095 (Ohio Ct. App. Dec. 31, 2003) (amended Massachusetts birth certificate is considered by Massachusetts to be prima facie evidence, but not conclusive proof, of the facts recorded therein; full faith and credit is not violated when granting full faith and credit to another state's record that would violate Massachusetts' public policy (here, Ohio's policy against same-sex marriage)).
 - 26 See, e.g., Cal. Health & Safety Code § 103425 (regarding the modification of a birth certificate in California).
 - 27 See Lambda Legal, Changing Birth Certificate Sex Designation: State by State Guidelines, <http://www.lambdalegal.org/know-your-rights/transgender/changing-birth-certificate-sex-designations/> (last visited June 13, 2018), for a state-by-state guide to name and gender change procedures.
 - 28 See Stephanie Markowitz, Change of Sex Designation on Transsexuals' Birth Certificates: Public Policy and Equal Protection, 14 Cardozo J.L. & Gender 705 (2008).
 - 29 California law permits a transgender individual born there, who has undergone sex-reassignment surgery, to obtain a new birth certificate, at which point the old birth certificate is sealed. Cal. Health & Safety Code § 103425; see California Courts, How to Change Your Name AND Gender, <http://www.courts.ca.gov/25797.htm> (California name and gender change forms).
 - 30 The Social Security Act is codified at chapter 7 of title 42 of the U.S. Code. See generally 42 U.S.C. §§ 301-1399.
 - 31 POMS RM 10212.200.
 - 32 See also Nat'l Ctr. for Transgender Equality, Know Your Rights—Social Security, <http://www.transequality.org/know-your-rights/social-security> (including sample language for the medical provider letter).
 - 33 For more on No-Match Letters, see Nat'l Ctr. for Transgender Equality, Social Security Administration No Longer Notifying Employers About Gender (Sept. 15, 2011), <https://www.transequality.org/press/releases/social-security-administration-no-longer-notifying-employers-about-gender/>.
 - 34 NanHunter, Hunter of Justice, Social Security Ends No-Match Letters for Gender Differences, http://hunterforjustice.typepad.com/hunter_of_justice/2011/09/ss-ends-no-match-.html (Sept. 16, 2011).
 - 35 22 U.S.C. § 211a.
 - 36 Passport forms may be obtained at <https://travel.state.gov/content/passports/en/passports.html>.

- 37 The U.S. Department of State passport rules regarding gender change are found in the U.S. Department of State Foreign Affairs Manual, Volume 7, Consular Affairs (7 FAM) 1300, Appendix M, Gender Change, <https://fam.state.gov/fam/07fam/07fam1300apM.html/> (Mar. 31, 2016).
- 38 7 FAM 1321, Appendix M, Documents to Be Submitted with the Form DS-11 Passport Application.
- 39 20 U.S.C. § 1232g; 34 C.F.R. pt. 99.
- 40 34 C.F.R. § 99.7(a)(2)(ii).
- 41 34 C.F.R. § 99.4-.5. For more information, see Lambda Legal, A Transgender Advocate's Guide to Updating and Amending School Records at <http://www.lambdalegal.org/know-your-rights/transgender/ferpa-faq/> (last visited June 13, 2018).
- 42 Selective Service System, Women and the Draft, <https://www.sss.gov/Registration/Women-And-Draft/> (last visited June 13, 2018).
- 43 To obtain a Status Information Letter showing that an individual is exempt, a form can be downloaded or requested from the Selective Service. at http://www.sss.gov/PDFs/SilForm_Instructions.pdf or 1-888-655-1825 (last visited June 13, 2018).
- 44 Request for Status Information Letter, <https://www.sss.gov/Portals/0/PDFs/Status.pdf> (July 20, 2015). For more information on Selective Service registration, see Nat'l Ctr. for Transgender Equality, Selective Service and Transgender People, <http://www.transequality.org/issues/resources/selective-service-and-transgender-people/> (May 27, 2005).
- 45 I.R.C. § 213(d)(1)(A) allows for the deduction of expenses for medical care, which includes amounts paid "for the diagnosis, cure, mitigation, treatment, or prevention of disease or for the purpose of affecting any structure or function of the body."
- 46 134 T.C. 34 (2010), acq. in result, A.O.D. 2011-03, I.R.B. No. 2011-47 (Nov. 21, 2011), 2011-47 I.R.B. 789 (Nov. 21, 2011).
- 47 This reversed the IRS's earlier position in I.R.S. Chief Couns. Adv. 200603025 (Jan. 20, 2006). For a critique of O'Donnabhain, see Katherine Pratt, The Tax Definition of "Medical Care:" A Critique of the Startling IRS Arguments in O'Donnabhain v. Commissioner, 23 Mich. J. Gender & L. 313 (2016), available at <http://repository.law.umich.edu/mjgl/vol23/iss2/2/>.
- 48 O'Donnabhain, 134 T.C. at 72-74.
- 49 *Beatie v. Beatie*, 333 P.3d 754, 760 (Ariz. Ct. App. 2014) (concluding Family Court erred by not recognizing Hawaii marriage of transgender person in part because "Arizona has enacted an explicit extension of the federal Full Faith and Credit Clause to marriages entered into in other states" (citing Ariz. Rev. Stat. § 25112(A)); *Donlann v. Macgurn*, 55 P.3d 74, 77 (Ariz. Ct. App. 2002); *Vecchione v. Vecchione*, CA Civ. No. 96D003769 (Cal. App. Dep't Sup. Ct. 1997) (holding that gender for the purpose of marriage is determined after surgery); *In re Anonymous*, 293 N.Y.S.2d 834, 835 (Civ. Ct. 1968); *In re Lovo-Lara*, 23 I. & N. Dec. 746, 753 (B.I.A. 2005) (Board of Immigration Appeals found a North Carolina marriage between a post-operative transsexual female and a foreign male to be valid because North Carolina allows a person to amend his or her birth certificate following gender-reassignment surgery).
- 50 *Delaney Naumann, A Woman in Life, but a Man after Death: Protecting the Postmortem Identities of Transgender Individuals*, 10 Est. Plan. & Cmty. Prop. L.J. 181 (2017).
- 51 The name that would be indicated in this case is commonly known in the trans community as the individual's "dead name." This name can be triggering, and any discussion or use of it should be done with extreme caution. See *What Is Deadnaming*, Healthline, <https://www.healthline.com/health/transgender/deadnaming>.
- 52 *Stylebook Supplement on Lesbian, Gay, Bisexual, & Transgender Terminology*, Nat'l Lesbian and Gay Journalists Ass'n available at <https://www.nlgja.org/stylebook/>.

**EXHIBIT B
SAMPLE DOCTOR LETTER**

**Letter Certifying Applicant's Gender Change
Print on Physician's Letterhead**

I, _____,
(Physician's Full Name)

_____, _____,
(Physician's medical license/certificate number) (Issuing state/country of license/certificate)

am the physician of _____,
(Name of Patient)

with whom I have a doctor/patient relationship and whom I have treated, or with whom I have a doctor/
patient relationship and whose medical history I have reviewed and evaluated.

_____ has had
(Name of Patient)

appropriate clinical treatment for gender transition to the new gender of

male female.

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

Signature of Physician

Typed Name of Physician

Date

Medical License # _____

DEA # _____

[if for NYS Birth Certificate, it must be notarized]

EXHIBIT C
NOTARIZED AFFIDAVIT OF GENDER ERROR

I, _____, being duly sworn, hereby depose and say:
(Print Name)

1. I submit this affidavit in connection with the Application for Correction of Certificate of Birth.
2. I believe that the gender assigned to me at birth was incorrect.
3. I am seeking to have my gender designation on my birth certificate corrected.
4. I have been living in my corrected gender immediately preceding this application.
5. I am not currently incarcerated; however, if I am I have submitted the required documentation regarding my criminal history.
6. I am not currently under community supervision; however, if I am I have submitted the required documentation regarding my criminal history.
7. I declare under penalty of perjury that the foregoing is true and correct.

Signature

Date

Print or Type Name

Title

Notary

Date

EXHIBIT D
Letter to the SSA
Requesting the Issuance of a Social Security Card
with a Changed Gender Marker

Date

Social Security Administration
(Insert address of local SSA office)

Re: Name and Gender Change: (insert former name)

To Whom It May Concern:

Please issue a new Social Security card for (new name) (formerly known as (former name)) and change his Numident data to "male" for gender. To this end, we have enclosed the following, pursuant to instructions found on your website, and pursuant to POMS RM 10212.200:

1. SSA form SS-5 Application for a Social Security card;
2. Certified copy of birth certificate (for former name);
3. Copy of school identification for (new name) before his name change, with his former name
" _____";
4. Copy of passport issued to (new name) before his name and gender change, with his former name
" _____" and former gender (female) listed;
5. Copies of passports and Washington driver's licenses for (new name)'s parents,
_____ and _____
[REQUIRED ONLY FOR MINORS];
6. Certified copy of Order Changing Name, King County District Court # _____;
and
7. Letter from physician regarding gender change (originally to Washington State Department of Health).

The new Social Security card and any other correspondence can be sent to me at the following address:

Please feel free to contact _____ at _____
if you have any questions or need any further information regarding this request.

EXHIBIT E

BIBLIOGRAPHY OF INTERNET RESOURCES

1. Compilations of links for transgender legal resources on a state-by-state basis can be found at:

- a. National Center for Transgender Equality, <http://transequality.org/know-your-rights>.
- b. ACLU, <https://aclu.org/lgbt-rights/transgender>.
- c. Lambda Legal, <http://www.lambdalegal.org/know-your-rights/transgender/changing-your-documents-resources>.
- d. New York name change procedures, <http://srlp.org/resources/changeid/>.
- e. Transgender Legal Defense & Education Fund, <http://www.transgenderlegal.org/>.
- f. Transgender Law Center, <https://transgenderlawcenter.org/> (with many resources specific to California).
The Transgender Law Center also has a fact sheet on how the Affordable Care Act applies to transgender people at <http://transgenderlawcenter.org/resources/health/aca-fact-sheet>.

2. Advocacy Organizations:

- a. National Center for Transgender Equality (NCTE), <http://www.transequality.org/>.
- b. Massachusetts Transgender Political Coalition (MTPC), <http://www.masstpc.org/>.
- c. Trans Women of Color Collective (TWOCC), <http://www.twocc.us/>.
- d. Black Trans Advocacy, <https://www.blacktrans.org/>.
- e. TransLatina Coalition, <http://translatinacoalition.org/>.
- f. SPART*A (advocacy for trans military service members), <http://www.spartapride.org/>.

3. Support and Education:

- a. Gender Spectrum (support for families, trans youth, and educators), <https://genderspectrum.org/>.

- b. Trans Youth Equality Foundation (TYEF) (support for families and trans youth), <http://www.transyouthequality.org/>.
- c. TransYouth Family Allies (TYFA) (support for families and trans youth), <http://www.imatyfa.org/>.
- d. COLAGE Kids of Trans Community (support for kids of trans parents), <http://www.colage.org>.
- e. PFLAG Transgender Support Network (support services), <https://www.pflag.org/transgender>.
- f. Human Rights Campaign (transgender resources), <http://www.hrc.org/resources/transgender>.
- g. Lambda Legal, Out, Safe, & Respected Toolkit, <http://www.lambdalegal.org/publications/out-safe-respected> (resources for parents and students dealing with bullying/harassment based on actual or perceived sexual orientation or gender identity).
- h. Human Rights Campaign Foundation et al., Supporting & Caring for Transgender Children (Sept. 2016), <https://assets2.hrc.org/files/documents/SupportingCaringforTransChildren.pdf>.

4. Legal Services:

- a. GLBTQ Legal Advocates & Defenders (GLAD) (legal services), <https://www.glad.org/>.
- b. National Center for Lesbian Rights (legal services), <http://www.nclrights.org/our-work/transgender-law/>.
- c. Immigration Equality (immigration issues), <http://www.immigrationequality.org>.

5. Veterans:

- a. Transgender American Veterans Association (advocacy for trans veterans), <http://transveteran.org/>.

6. Athletes:

- a. TransAthlete.com (info about trans athletes), <https://transathlete.com/>.