ESTATE PLANNING AND THE TRANSGENDER CLIENT

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INTRODUCTION

The right to transfer assets upon death, by written document or
force of law, has long been established.1 The right to determine
who can act on one’s behalf during a time of incapacity or incompe­
tence has a similarly long history.2 The legal effect of these rights
relies on the identity and status of the people involved—both the
decedent or incapacitated person and the person exercising the
right.3

The issues of identity and status are vital to understanding the
estate planning concerns of transgender people. This Article will
provide an overview of the issues that are specific and unique to
transgender people when creating an effective estate plan and the
potential consequences of creating one. This Article will also pro­

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friends and colleagues who have done, and continue to do, excellent legal work on
behalf of transgender people around the world: Paisley Currah, Phyllis Frye, Jen Levi,
Sharon McGowan, Alyson Meiselman, Shannon Minter, Lisa Mottet, Cole Thaler, and
Stephen Whittle.

1. See JOHN LOCKE, TWO TREATISES OF GOVERNMENT § 88 (Peter Laslett ed.,
Cambridge Univ. Press 1988) (1690) (“Parents, when they dye, without actually Trans­
ferring their Right to another, why does it not return again to the common stock of
Mankind? ‘Twill perhaps be answered, that common consent hath disposed of it, to the
Children.”).

2. As Plutarch noted, “[T]he drugs were given him by Callisthenes in order to win
more of his love, in the belief that they had such a power, but they drove him from his
senses and overwhelmed his reason so that even while he was still alive, his brother
managed his property.” 11 PLUTARCH, PLUTARCH’S LIVES 609-11 (Bernadotte Perrin
trans., Harvard Univ. Press 1982) (1914); see also Jone Johnson Lewis, Women’s His­
tory: Mary Wollstonecraft—Inlay and Wallstonecraft, ABOUT.COM, http://womenshis­
tory.about.com/library/weekly/aa092099c.htm (last visited Mar. 24, 2008) (discussing the
unusual nature of Mary Wollstonecraft, an eighteenth century female author, holding a
power of attorney).

3. See, e.g., WASH. REV. CODE ANN. § 11.94.010 (West 2006) (designating who a
principal may and may not appoint as attorney-in-fact).
vide some basic information about transgender people and their estate planning needs, along with suggestions for how to effectively address the unique needs of transgender clients. Part I will discuss the underlying identity and status issues affecting estate planning for transgender people. Part II will provide an overview of relevant estate planning and probate issues for transgender people. Part III will provide suggestions on how to craft effective estate plans for transgender people.

I. Identity Documentation and Marital Status

There are two areas that have a tremendous impact on the estate planning needs of a transgender person's life: (a) identity documentation or status, and (b) marital status. The law, as it relates to transgender people and marriage, is complicated and can lead to unexpected results for couples when one spouse is transgender.

A. Identity Documentation and Status

For many transgender people, especially transsexuals, living an authentic life means changing some or all of their identity documentation to reflect the way they see themselves versus the way society sees or identifies them. In most states, the procedure to change documentation is relatively easy and fairly inexpensive—at

4. For the purposes of this Article, the term "transgender" is meant to be broadly interpreted to include transsexuals, crossdressers, gender-queer, and androgynous persons, rather than as the more restrictive use often found in the legal system where transgender tends to be used interchangeably with transsexual. A transsexual person is someone who uses medical or surgical intervention to alter his or her body to match a gender opposite to his or her assigned birth sex. When discussing transsexual people, the term will be used specifically. The terms transwomen or MTF are used for male-to-female transsexuals and the terms transmen or FTM are used for female-to-male transsexuals. An intersexed person is someone who has both male and female physical or genetic characteristics. When discussing intersex people, the term will be used specifically. See generally JASON CROMWELL, TRANS MEN AND FTMs: IDENTITIES, BODIES, GENDER & SEXUALITIES (1999); THE TRANSGENDER STUDIES READER (Susan Stryker & Stephen Whittle eds., 2006).

5. Other areas that are also greatly important to a transgender person's life are the ability to inherit and pursue postmortem causes of action.

6. In the context of this Article, the term spouse will refer to legal relationships such as marriages or domestic partnerships whereas the term partner will refer to the existence of a long-term, intimate relationship that may or may not have a legal construct.

7. Identity documentation generally means legal name change, driver's licenses or state-issued identification cards, social security cards, passports, and birth certificates, and may also include court-ordered change of sex, military identifications, green cards, professional licenses, and pilot's licenses.
least for some documentation. But, there remain places in the United States where identity management for transgender people is either severely limited or is not possible at all.⁸ The ability to change one’s documentation or status can have a tremendous impact on all other aspects of a person’s life—including employment, marriage, and inheritance rights.⁹ Difficulty is created by the fact that each state (and, for foreign born U.S. residents and citizens, each country) and the federal government has its own rules for how to change names and gender marker¹⁰ information. Just because the person has successfully changed the information in one place, does not necessarily mean that the change will be as easily accomplished with another agency. Compounding the problem is the issue of whether the change in gender status in one jurisdiction will be given full faith and credit in another jurisdiction.¹¹

1. Name Changes

Currently name changes can be accomplished informally by using a new name in ordinary interactions.¹² This “common law name change,” however, is not preferred because it does not establish a sufficient paper trail needed to change identity documents.¹³ The common law name change process is further complicated by the

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⁸ For example, the state of Tennessee prohibits transgender people from amending or changing their birth certificates at all. Tenn. Code Ann. § 68-3-203(d) (2001). Massachusetts requires transgender people to have completed sex reassignment surgery prior to changing the gender marker on their driver’s licenses. See Gay & Lesbian Advocates & Defenders (GLAD), Transgender Legal Issues in New England (2005), available at http://www.masstpc.org/pubs/Transgender_Legal_Issues.PDF.

⁹ The ability of transgender people to change official documentation is vitally important. The ability, or lack thereof, has often become a centerpiece in litigation where courts have refused to give full faith and credit to a judicial ruling from another state or where a court refused to recognize the change of sex on vital records handled by state agencies from another state. See, e.g., Littleton v. Prange, 9 S.W.3d 223 (Tex. Ct. App. 1999).

¹⁰ A gender marker is simply the designation of “M” or “F” on the person’s records. In the case of a driver’s license, birth certificate, or passport, that information appears on the face of the document. In the case of social security records, it merely exists as information in the individual’s computer file with the agency. See, e.g., Dawn Wolfe Gutterman, Michigan Secretary of State Changes Gender Marker Policy, Pride Source.com, Apr. 6, 2005, available at http://www.pridesource.com/article.shtml?article=13314 (discussing changing one’s gender marker in Michigan).


¹³ Id.
newest provisions of the REAL ID Act. The final regulations for implementation of the REAL ID Act were published on January 29, 2008.\textsuperscript{14} It is still unclear whether common law name changes will still be viable given the heightened requirements for proving identity in the regulations. Therefore, it is advisable to effect a name change by first obtaining a court order.\textsuperscript{15}

Name changes are governed by statute in each state and each state has a varying procedure for getting a court-ordered name change.\textsuperscript{16} For example, in Washington state, the applicant files a form petition and proposed order in the district court and appears before the judge on the same day.\textsuperscript{17} In Oregon, the applicant must file the petition in superior court, post the notice publicly in three places (including the courthouse) for three to six weeks (depending on the county), and then attend a hearing.\textsuperscript{18} In Rhode Island, the applicant obtains a one-page document at the local town or city hall, which the applicant must complete and return to the municipality.\textsuperscript{19} A hearing is subsequently held in the local probate court.\textsuperscript{20}


\textsuperscript{15} See, e.g., Transgender Law Ctr., ID Please: A Guide to Changing Your California and Federal Identity Documents to Match Your Gender Identity (2006) (identifying the steps to achieving a name change in California as: (1) going to court to obtain a change of name court order; (2) updating information with the Social Security Administration (SSA); (3) changing driver’s license information; and (4) changing information on a passport and other nongovernment documents), \textit{available at} http://transgenderlawcenter.org/pdf/TL%20ID%20Guide.pdf.


\textsuperscript{19} See Transgender Legal Issues in New England, \textit{supra} note 8, at 41. Alternatively, a change of name form may be downloaded from the Rhode Island Office of the Secretary of State. R.I. Office of the Sec’y of State, Probate Forms, \url{http://www.sec.state.ri.us/library/probateforms/probate-index.html} (last visited Mar. 24, 2008).

\textsuperscript{20} See, e.g., Transsexual Road Map, Rhode Island Name Change for Transgender People, \url{http://www.tsroadmap.com/reality/name/rhode-island.html} (last visited Mar. 24, 2008) (describing some of the procedures (and pitfalls) of name change hearings in that state).
Sometimes, judges deny name changes due to their personal biases against transgender people. Often the justification is that the transgender person is attempting to perpetrate some sort of fraud. However, there are really very few reasons that anyone's name change should ever be refused unless there is actual fraud or valid countervailing public policy considerations (e.g., the person who was denied a request to change his name to Santa Claus). If the transgender person is willing to fight for the right to a name

21. See generally In re Application of Anonymous, 587 N.Y.S.2d 548 (N.Y. Civ. Ct. 1992) (denying name change). But see In re Harris, 707 A.2d 225 (Pa. Super. Ct. 1997) (allowing a name change where the petitioner held herself out to the community as a female). Recently a judge in Will County, Illinois, refused to waive the filing fee for an indigent transgender woman seeking a name change. As Professor Sara R. Benson notes, not only did the judge violate the Illinois statute by failing to file the required written order specifying why he denied the request" but he also demonstrated his "misunderstanding of transgender individuals. For most individuals, a name change is not a necessity. We might change our name just for fun . . . . But, for a transgender individual, a name like Matthew could prevent her from living as a woman. This is not merely 'something . . . she want[s]', but, rather, it is truly necessary for her to live as a woman. It is a form of liberty, if you will. The ability to decide who she is and live accordingly.

Sexual Orientation and the Law Blog, Chicago Judge Refuses to Waive Transgender Woman's Filing Fee in Name Change Petition (Jan. 22, 2008), http://lawprofessors.typepad.com/lgbtlaw/2008/01/chicago-judge-r.html; see also Lambda Legal, Transgender Woman Seeks Equal Access to Courts, http://www.lambdalegal.org/transgender-woman-seeks-equal-access-to-courts.html (last visited Mar. 24, 2008) ("Turner's case is a clear example of the need to provide access to fair courts for all. It is a stark reminder of the discrimination and hostility that transgender people face, even when seeking to do something as seemingly uncontroversial as changing their name.").

22. See In re Change of Name of DeWeese, 772 N.E.2d 692, 694 (Ohio Ct. App. 2002) (remanding the denial of a name change request of a transwoman and stating that, in weighing the factors, including fraud, to determine whether to grant the name change, the probate court must "articulate the reasons and basis for its ruling on the record and in its judgment entry"). The argument is absurd for a variety of reasons and should not be used as a pretext for denying transgender people the ability to live authentic lives with legal names and identification that match their appearance. More recently, in the post-9/11 world, the argument is lodged in the rhetoric of fear of terrorism. Some of the arguments in favor of the PATRIOT Act, REAL ID Act, and scanning at airports by Transportation Security Administration have been that we have to control identity more because male terrorists will start dressing as women to evade detection.

23. See, e.g., Whatever Became of . . . the Catasauqua Man Who Changed His Name to Santa Claus?, MORNING CALL (Pa.), Dec. 21, 2003, at B3 ("Allen petitioned Lehigh County Court to legally change his name to Santa Claus, but that action was denied."). But see, e.g., Jesus Christ Now Resides in New York City; Judge Approves Man's Name Change 2001 Utah Case of Santa Claus Cited, TORONTO STAR, Dec. 26, 2005, at A34.
change, with the assistance of counsel, the name change can usually be accomplished. 24

2. Gender Marker Changes

Gender marker changes on legal documentation, such as driver's licenses and birth certificates, are a more tricky proposition than name changes, but are incredibly vital as one's legal gender designation has the potential to impact many areas of life: the ability to marry, 25 the ability to travel, 26 the ability to inherit, 27 insurance coverage, one's enrollment in the draft, where one might be incarcerated, and more.

a. Driver's licenses

Changing driver's licenses and state-issued identification is usually the second step, after a legal name change, for many transgender people. 28 Because a driver's license or other government-issued identification is required in many situations, it is important to have photo identification that matches the current presentation of the person. Each state sets its own policies and procedures for name and gender marker changes on driver's licenses and state-issued identification. 29 Most states have taken the position that


25. See discussion infra Part I.B.


27. See discussion infra Part II.C.

28. The course of identity management and document change that I suggest to clients is to start by obtaining a court-ordered name change, then taking care of changing driver's license and social security information (the order of which is dependent on the driver's license procedures for the issuing state as some require social security records to be changed first), then their passport, and, lastly, their birth certificate.

29. The website Driver's License Change for Transgendered Women, http://www.tsroadmap.com/reality/drivers-license.html (last visited Mar. 24, 2008), provides links to some of the state agencies. Unfortunately, most state agencies do not clearly state their procedures. An example of a state that does is Hawaii. City and County of Honolulu, Driver License Requirements, http://www.co.honolulu.hi.us/csd/vehicle/drequirements.htm (last visited Mar. 24, 2008). The impact of the REAL ID Act on driver's license change policies is still unknown, but there is some anticipation by people in the transgender community that the REAL ID could be highly detrimental to transgender people. See, e.g., Cole Krawitz, Impending "Realness": Transgender Communities Deal a
transgender people need verification, from a doctor or therapist, of the adoption of a different gender role on a full-time basis in order to have their driver's license or state identification changed to reflect the new information. Most states do not specifically require proof of medical or surgical procedures to confirm the person's gender transition.

The policies in California, Vermont, Connecticut, and the District of Columbia reflect the understanding that people must have accurate identification in order to fully participate in society. Many day-to-day activities require a person to have photo identification. These activities include retaining or obtaining employment; writing checks or using credit cards; driving; banking; voting; traveling via airplane, train, or bus; obtaining job-related security clearances; purchasing alcohol or tobacco; signing a rental lease agreement or purchasing a home; gaining entry into government and other office buildings or courthouses; and obtaining medical care. If a person does not have identification that accurately reflects his or her social gender, that person is put in a position of potential danger on a daily basis and may be forced to live on society's margins because of an inability to obtain gainful employment, credit, or bank accounts.

Blow by REAL ID, S.F. BAY TIMES, July 6, 2006, available at http://www.demos.org/pub959.cfm (follow "View the document (pdf)") hyperlink. For example, as Mr. Kra-witz notes in his article:

Not long after the REAL ID Act passed in 2005, the DMV in Missouri sent out letters to transgender people who had already successfully changed the sex designation on their driver's licenses stating that they would have to return with additional medical evidence or their licenses would be suspended in 30 days. Id. at 3.

30. These states include California, Vermont, Connecticut, and the District of Columbia. States that currently have the most restrictive policies are Georgia, Idaho, Iowa, Kansas, Mississippi, Missouri, Nebraska, Nevada, Ohio, and Tennessee. However, it should be noted that all fifty states and the District of Columbia do have some processes available for changing names and gender markers on driver's license or state-issued identification. This information is based on my personal research from contacting each state's division of motor vehicles.

31. The World Professional Association for Transgender Health promulgates the Standards of Care for the medical treatment of transsexual people who are transitioning to a gender opposite their birth-assigned gender. Part of the process of transition is the real life experience, i.e., living full-time in the new gender role. Often during this phase, a transsexual person is in the process of significantly altering his or her outward appearance, or has done so already. Having new photo identification that matches his or her outward presentation is essential to living an authentic life. HARRY BENJAMIN INTERNATIONAL GENDER DYSPHORIA ASSOCIATION'S STANDARDS OF CARE FOR GENDER IDENTITY DISORDERS 17 (6th ed. 2001), available at http://www.wpath.org/Documents2/socv6.pdf [hereinafter Standards of Care].
b. Birth certificates

Birth certificates are governed separately from driver’s licenses and state-issued identification. Currently, twenty-five states and the District of Columbia authorize an amendment to birth certificates by statute. In addition, other states without statutes will issue new or amended birth certificates. The majority of all of the states noted require that the person requesting a change submit an affidavit from the surgeon who performed the sex reassignment surgery (SRS) verifying that irreversible SRS has been completed.

Sometimes FTMs are able to get a changed birth certificate after either male chest reconstruction (or top surgery as it is more commonly known) or a hysterectomy. In those states that have a


34. SRS, also called gender affirmation surgery, is not simply a “sex change operation.” There are a multitude of surgeries that transsexual people might undergo. For a detailed list and discussion of these surgeries, see Standards of Care, supra note 31, at 18-22. It should be noted, however, that for many transsexuals, surgery is not available because of cost or other health care concerns. See Katherine Rachlin, Factors Which Influence Individual’s Decisions when Considering Female-to-Male Genital Reconstructive Surgery, 3 Int’l J. Transgenderism tbl.3 (1999), available at http://symposion.com/ijt/ijt990302.htm.


36. However, even where a birth certificate has been changed, the absence of a phalloplasty or metoidioplasty may be enough to successfully challenge the validity of a marriage. See, e.g., Kantaras v. Kantaras, 884 So. 2d 155 (Fla. Dist. Ct. App. 2004); In re Marriage of Simmons, 825 N.E.2d 303 (Ill. App. Ct. 2005). Phalloplasty is the surgical construction of a penis using tissue from other parts of the body, typically the fore-
surgical requirement, this is a rational approach because these surgeries are considered SRS under the Standards of Care and because these are the surgeries that most FTM s both desire and can afford. Many FTM s opt not to have genital surgery because of the cost or lack of aesthetic quality. It is interesting to note that the inconsistencies in identifying gender focus on genitalia as a determinant. For example, if a nontransgender man were to lose his penis through an accident or because of disease, he would not lose his status as a man.

Some states issue new birth certificates with all the old information removed, while some merely amend them by striking out the old information and writing the new information in the margins. In South Carolina, there is some uncertainty about whether a birth certificate can be amended as there are no statutes, administrative policies, or court rulings on the issue. Finally, there are a small number of states that prohibit changes to the gender designation on birth certificates, regardless of how long the person has lived in his or her new gender role and what surgery he or she has undergone. For persons born outside the United States but who are lawful residents or naturalized U.S. citizens, the ability to

arm but also from the hip, stomach area, or back. Metoidioplasty surgically elongates the existing genital tissue and may increase girth as well. In both phalloplasty and metoidioplasty, the surgeon may insert testical implants and create a scrotum by using the external labia. The surgeon may also lengthen the urethra to allow the patient to stand to urinate. For a more detailed explanation and photos of these procedures, see Dean Kotula, The Phallus Palace (2002).

For MTFs, orchidectomy (removal of the testicles) may suffice to comply with the requirement for SRS completion but breast augmentation will not. Further, the absence of a vagina may be enough to successfully challenge the validity of a marriage. See, e.g., M.T. v. J.T., 355 A.2d 204 (N.J. Super. Ct. App. Div. 1976). As Professor Andrew Sharpe quite forcefully argues, the "post-operative capacity for (heterosexual) sexual intercourse is a crucial requirement" underlying many of the judicial opinions regarding transgender people and their relationships. Andrew N. Sharpe, Transgender Jurisprudence: Dysphoric Bodies of Law 62 (2002).

37. See, e.g., Rachlin, supra note 34.

38. Id.

39. A nontransgender person is one who identifies as the gender they were assigned at birth, for example, a woman who was identified as being female at birth and who perceives herself to be female throughout her life.

40. Lambda Legal, supra note 33.

41. See In re Widener, No. A95 347 685, 2004 WL 2375065 (B.I.A. Sept. 21, 2004) ("We note that South Carolina is not among the 22 states . . . that specifically permit legal recognition of changes of sex by post-operative transsexuals.").

42. These states are Idaho, see David B. Caruso, New York to Ease Rules so Transgender Residents Can Update Birth Certificates, WASH. POST, Nov. 8, 2006, at A9 ("Ohio and Idaho also do not allow the change, because of court rulings or as a matter of administrative policy."); Ohio, see In re Ladrach, 513 N.E.2d 828 (Ohio Ct. App.
change birth certificates or other official records depends on the laws of their home country and may or may not be possible.43

c. Documentation with the Social Security Administration and other government agencies

The U.S. Passport Office44 and Social Security Administration (SSA)45 have policies for changing gender markers that are similar to states’ birth certificate change procedures—there is a requirement for SRS to have been completed prior to changing the gender marker. But the SSA, rather quietly, changed its policy a few years ago.46 Beforehand, the SSA would change a gender marker in its system when the cardholder came in to change the name after a court-ordered name change or driver’s license change. Now that policy requires the applicant to have “completed” SRS before changing the gender marker.47 However, these policies neither define what specific surgery is required nor do they define what is meant by complete.48 Presumably it means genital surgery, but the Standards of Care clearly set forth a number of surgeries that may

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43. See, e.g., British Gender Recognition Act 2004, ch. 7 (Eng.). In Sweden, where I was born, my birth record was recorded in the church in the parish in which I was born and hence, cannot be changed. However, Sweden has recognized my gender change in the official tax records. Ireland, many Asian and African countries, and Luxembourg do not recognize legal gender change. See generally Stephen Whittle, Respect and Equality: Transsexual and Transgender Rights (2002).

44. The U.S. Passport Office policy is not searchable on the official government website. However, the policy is stated by officials of the U.S. Passport Office in a letter written in 1978 by Michele E. Truitt, the Acting Chief of the Legal Division. Twenty Club, Information on Obtaining a Temporary Passport, http://www.twentyclub.org/docs/passport.html (last visited Jan. 22, 2008). The letters were reconfirmed in letters dated 1988 and 1989, and indicate that in order to issue a permanently changed passport, the applicant must show proof of completion of SRS. Id.

45. The SSA requires a person (a “Name Holder” (NH) in SSA language) to provide a letter from “[t]he surgeon or attending physician ... verifying the sex change surgery has been completed. All documents must clearly identify the NH.” U.S. Soc. Sec. Admin., Program Operations Manual System: RM 00203.215(B) Changing Numident Data—Other than Name Change, https://secure.ssa.gov/apps10/poms.nsf/lnx/0100203215 (last visited Mar. 29, 2008). The previous policy required documents that showed sex change surgery has either been started or completed. See id.


48. See supra notes 34-36.
be considered to be SRS, thus leaving the requirement ambiguous.49

There are numerous problems with requiring SRS in order to obtain a change in documentation. First, it creates a financial gate through which many transgender people cannot enter. SRS is expensive. Genital surgery for MTFs runs between $10,000 and $20,000.50 For FTMs, surgery is even more expensive—a hysterectomy can run up to $25,000, a metoidioplasty about $12,000, and a phalloplasty can cost up to $150,000.51 Since these costs are rarely covered by medical insurance in the United States, the cost is often prohibitively high. In addition, there are a limited number of surgeons who perform these surgeries and often the transgender person does not live near a qualified surgeon.52 Therefore, travel and the inherent costs involved may deter a person from having any surgery at all.

Second, SRS can be risky due to the individual’s personal physical characteristics, such as weight, overall health, high blood press-

49. See Standards of Care, supra note 31, at 18-22.
52. See generally Transgender Zone, The Practitioner Guide, http://www.transgenderzone.com/practitionerguide/WORLD.htm (last visited Mar. 10, 2008) (listing surgeons that perform SRS). A review on March 10, 2008, of the list of surgeons performing FTM surgery at Transgender Zone included the following surgeons and locations in the United States: Dr. Gary Alter of California; Dr. Marci Bowers of Colorado; Dr. Michael Brownstein of California; Dr. Peggy Ching of California; Dr. Beverly Fischer of Maryland; Dr. J.W. Futrell of Pennsylvania; Dr. Donald Laub of California; Dr. Toby Meltzer of Arizona; Dr. Harold Reed of Florida; and Dr. Neal Wilson of Michigan. Id.

Other surgeons are available in Europe and Asia. For example, Dr. Paul Daverio of Germany; Dr. Stan Monstre of Belgium; Dr. David Ralph of the United Kingdom; and Dr. Mihail Sokholsk of Moscow, Russia. International Doctors & Surgeons + NHS Listings! Listings for Europe, The UK & Asia! Mastectomy, Nipple Reconstruction, Hysterectomy, Phalloplasty, http://www.thetransitionalmale.com/int-listings.html (last visited Mar. 24, 2008).
sure, inability to clot blood, or allergies to anesthetics.\textsuperscript{53} Third, SRS options, particularly for FTMs, are both expensive and not very advanced. They are neither functional nor aesthetically pleasing and many leave the transman with life-long post-surgical complications.\textsuperscript{54} Any genital surgery may leave the transman or transwoman without any erotic sensation whatsoever.\textsuperscript{55} Fourth, many transgender people are satisfied with their genital configuration and balk at the notion that their genitals need to comport with someone else’s notion of what is appropriate.\textsuperscript{56} Arguably, the whole requirement of SRS should be removed.\textsuperscript{57}

For many transgender people, the primary identification they use on a daily basis is their driver’s licenses or state-issued identifications. Thus, there is little need for a gender marker change in the SSA computer database.\textsuperscript{58} However, the fact that most of the states will issue new driver’s licenses with a corrected gender marker without the requirement of surgical procedures has led to a conundrum in the matching of databases. A transgender person’s state-issued identification may have that individual’s correct name and gender but the SSA may have a different gender marker be-


\textsuperscript{55} Taylor Flynn, \textit{The Ties that (Don’t) Bind: Transgender Family Law and the Unmaking of Families}, in \textit{Transgender Rights} 32, 35 (Paisley Currah et al. eds., 2006).


\textsuperscript{58} Although, the SSA database also links to the Internal Revenue Service and the inability to change the gender marker with the SSA may negatively impact the transgender person and his or her spouse in filing joint tax returns and from qualifying for death benefits. See, for example, an old SSA ruling which held that because a marriage between an FTM and a nontransgender woman was a same-sex marriage and therefore invalid, no benefits would be available to the surviving spouse. Validity of Marriage Between Members of the Same Sex, S.S.R. 78-11 (1978) (to be codified at 20 C.F.R. pt. 404.1101), available at http://www.ssa.gov/OP_Home/rulings/oasi/53/SSR78-11-oasi-53.html.
cause of the surgical requirement. This results in "no-match" letters being sent to employers or to the state-licensing office, which, in turn, can then prevent the transperson from obtaining accurate identification or can create difficulty with an employer.60

3. Effect of the REAL ID Act

Effectuating a change to identity documentation is a more arduous process for the transgendered person in the post-9/11 world. With the implementation of the REAL ID Act61 looming on the horizon, common law name changes will likely become obsolete.62 One of the major reasons is that, under the REAL ID Act, states are directed to develop state identifications and policies for issuance of those documents that meet the requirements set forth by

59. A "no-match" letter is one in which the SSA notifies the state or an employer of a mismatch in information maintained by the SSA with regard to an individual. Soc. Sec. Online, Overview of Social Security Employer No-Match Letter Process, http://www.ssa.gov/legislation/nomatch2.htm (last visited Mar. 2, 2008). The primary purpose of no-match letters is to uncover undocumented workers in the United States. See Safe-Harbor Procedures for Employers Who Receive a No-Match Letter, 72 Fed. Reg. 45,611-12 (Aug. 15, 2007) (to be codified at 8 C.F.R. pt. 274a) ("Such a letter may be one indicator to an employer that one of its employees may be an unauthorized alien."). Some of my recent research indicates that twenty-four states plus the District of Columbia currently accept no-match information as it relates to gender markers (all states require that the person's name match with the SSA). These letters are issued to the state issuing the license and to employers. This forces transgender people to out themselves to employers who might not otherwise have known about their gender history and may lead some employers to terminate the employee or not hire a particular applicant because of the perceived false information provided by the employee.

60. Transgender individuals risk facing adverse employment actions by their employers, including being outed, discriminated against, and termination. E.g., Etsitty v. Utah Transit Auth., 502 F.3d 1215 (10th Cir. 2007). In Etsitty, an MTF employee was terminated after a female co-worker raised concerns about the employee’s usage of the women’s restrooms. Id. at 1219. The Court of Appeals for the Tenth Circuit affirmed the lower court’s granting of summary judgment for the employer. Id. at 1228. In doing so, the court rejected the employee’s claim to protection under Title VII of the Civil Rights Act of 1964 and, alternatively, under Price Waterhouse v. Hopkins. Id. at 1220-27 (citing Price Waterhouse v. Hopkins, 490 U.S. 28 (1989)); see also, e.g., National Lesbian Gay, Bisexual Rights Organizations Condemn Outing of Largo, FL, City Manager (National Lesbian Gay, Bisexual and Transgender Project, New York, N.Y.), Mar. 23, 2007, available at http://www.aclu.org/lgbt/transgender/29182prs20070323.html (condemning the outing and termination of successful and long-time City Manager, Steve Stanton, after learning that Stanton was transgender).


62. See id. § 202(b), 119 Stat. at 302.
the Department of Homeland Security. The Act seeks to standardize state driver's licenses so that they become, in essence, a national identification card. Initially, it seemed likely that the most stringent requirements for gender marker changes would be imposed on all states, including those who currently make altering gender markers relatively easy. However, the final regulations leave the issue of gender change to the states.

The Act also requires that electronic copies of documents used to obtain the license be verified by the state and made available in a federal database. Under the legislation, those applying for driver's licenses will have to provide state or local governments with verifiable proof of their identity, date of birth, and citizenship or immigration status. The legislation also requires that counties retain electronic verification of birth certificates. Many states have stated their objections to the implementation of the REAL ID Act. Since the only way then to ensure the veracity of a name


Homeland Security regulations . . . allow states to determine gender on their identification documents, like they do presently.

The reason for this, says a comment in the new regulations, is: “Two states raised issues about how gender is determined for transgender individuals and whether gender will be included as a verifiable identifier.”

The new rules also limit the electronic information stored on an ID card to a two-dimensional bar code instead of a magnetic strip that could hold name change, marriage and medical information of post-operative transsexuals.

That, however, could change as future phases of the law take effect . . . .

Id.
67. Id. § 202(b), 119 Stat. at 312.
68. Id. § 202(d)(2), 119 Stat. at 314.
69. These states include Maine, Washington, Arkansas, and Idaho. K.C. Jones, More States Rebel Against Real ID Act, INFORMATIONWEEK, Apr. 10, 2007, http://www.informationweek.com/news/showArticle.jhtml?articleID=198900558. In addition, according to the American Civil Liberties Union, over 600 groups are opposed to the law, including the National Governors Association, the American Bar Association, the American Conservative Union, the Council of State Governments, Gun Owners of America, the National Coalition Against Domestic Violence, and the National Conference of State Legislatures. Id.
change will be by court order, it is indeed likely that only court ordered name changes will be recognized.

The National Center for Transgender Equality has pointed out that relying on birth certificates to verify identifications will display the sexual origins of people who have undergone sex change operations and established new lives, and that this disclosure may be harmful to them. An additional layer of difficulty exists for legal immigrants whose country of origin may not recognize legal gender change but whose state of residence does. For example, a foreign national, who has become a naturalized U.S. citizen but was born in a country that does not amend birth certificates, would have considerable difficulty changing a birth certificate and, therefore, a driver's license.

Under the new regulations, the minimal issuance standards for a driver's license require that the state demands presentation and verification of the following information before issuing a driver's license: a photo identification document (nonphoto identification is acceptable if it includes both the person's full name and his or her date of birth); documentation showing the person's date of birth; proof of the person's social security number (SSN) or verification that the person is not eligible for an SSN; and documentation of the person's name and address of principal residence. "States shall not accept any foreign document, other than an official passport," as proof of identification and date of birth.

For an immigrant, the person must also provide proof that he or she: (1) is a U.S. citizen; (2) is lawfully admitted for permanent or temporary residence; (3) is a conditional permanent resident; (4) has a pending or approved application for asylum; (5) is a refugee; (6) is a nonimmigrant with a valid, unexpired visa; (7) has a pending or approved application for temporary protected status; (8) has ap-

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73. Id. § 202(c)(3)(B), 119 Stat. at 314.
proved deferred action status; or (9) has a pending application for permanent residence or conditional permanent residence.\textsuperscript{74}

States are also required to consult with the SSA to ensure that applicants are not providing fraudulent social security numbers.\textsuperscript{75} This is an area that can prove potentially challenging for a transgender person who may live in a state that grants gender marker changes on driver’s licenses regardless of surgical status but who cannot alter the gender listed with SSA because of its requirement for completed SRS.

A failure to legally recognize a gender change can create many problems for transgender people, particularly in the areas of marriage, divorce, child custody, and inheritance. This failure is often the result of policies that require certain documents to be submitted that the person cannot alter, even though the person has done everything medically necessary to comply with the standard medical treatment protocols in order to be considered transitioned into a “new” gender.

B. Marital Status

1. Defense of Marriage Act

The federal Defense of Marriage Act (DOMA) was passed and signed into law in 1996.\textsuperscript{76} The stated purpose of DOMA is “to define and protect the institution of marriage.”\textsuperscript{77} The law defines marriage, at the federal level, as a “legal union between one man and one woman as husband and wife” and states that “the word ‘spouse’ refers only to a person of the opposite sex who is a husband or a wife.”\textsuperscript{78} The passage of DOMA was largely a reaction to the decision by a Hawaii court that suggested that there is a right to same-sex “marriage” in the Hawaii Constitution.\textsuperscript{79} The legislative history of DOMA reflects a stated concern about what affect legalizing same-sex marriage in Hawaii would have on other states, via the Full Faith and Credit Clause;\textsuperscript{80} the application of federal laws

\begin{itemize}
\item \textsuperscript{74} Id. § 202(c)(2)(B), 119 Stat. at 313.
\item \textsuperscript{75} Id. § 202(d)(5), 119 Stat. at 314.
\item \textsuperscript{77} Id. at preamble.
\item \textsuperscript{78} Id.
\item \textsuperscript{80} The Full Faith and Credit Clause, found at Article IV, section 1, of the U.S. Constitution, reads “Full Faith and Credit shall be given in each State to the public
such as taxation and immigration; the institution of marriage itself for opposite-sex couples; and state sovereignty.\textsuperscript{81}

Since Congress enacted DOMA in 1996, a majority of states have enacted their own versions of the statute.\textsuperscript{82} For example, Washington state’s DOMA reads, “Marriage is a civil contract between a male and a female who have each attained the age of eighteen years, and who are otherwise capable.”\textsuperscript{83} Florida’s DOMA goes even further, decreeing as follows:

(1) Marriages between persons of the same sex entered into in any jurisdiction, whether within or outside the State of Florida, the United States, or any other jurisdiction, whether domestic or foreign, or any other place or location, or relationships between persons of the same sex which are treated as marriages in any jurisdiction, whether within or outside the State of Florida, the United States, or any other jurisdiction, whether domestic or foreign, or any other place or location, are not recognized for any purpose in this state.

(2) The state, its agencies, and its political subdivisions may not give effect to any public act, record, or judicial proceeding of any state, territory, possession, or tribe of the United States or of any other jurisdiction, whether domestic or foreign, or any other place or location respecting either a marriage or relationship not recognized under subsection (1) or a claim arising from such a marriage or relationship.

(3) For purposes of interpreting any state statute or rule, the term “marriage” means only a legal union between one man and one woman as husband and wife, and the term “spouse” applies only to a member of such a union.\textsuperscript{84}

One of the major flaws with DOMA and the forty state DOMAs\textsuperscript{85} is that no statute defines what makes someone a man or

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\textsuperscript{83} WASH. REV. CODE ANN. § 26.04.010 (West 2006).

\textsuperscript{84} FLA. STAT. ANN. § 741.212 (West 2005).

\textsuperscript{85} Nat’l Conference of State Legislatures, Same Sex Marriage, Civil Unions and Domestic Partnerships, http://www.ncsl.org/programs/cyf/samesex.htm (last visited Mar. 24, 2008) (stating that forty-one states have enacted similar DOMA provisions; however, Maryland’s has been held unconstitutional, but has an appeal pending). For a
woman, male or female. Nor do any of the laws provide any hints about how to determine who is a man or who is a woman for the purposes of the legislation. It must be noted that determining sex is a highly inaccurate process in which the majority of physicians rely predominantly on external genitalia as it appears at birth. As Professor Taylor Flynn explains, “While a person’s anatomical sex is usually aligned with gender identities and thus appears to be determinative, . . . when the two are discordant, ‘the facts of one’s anatomy are really secondary.’” In addition, there are numerous genetic and chromosomal anomalies, as well as genital differentiations, that occur in one to five percent of the population, making determinations of sex at birth somewhat suspect.

None of the DOMA legislation—federal or state—takes into account transgender people or makes a provision for the validity of marriages between a transgender person and a nontransgender person or the marriage between two transgender people. Neither do the federal or state DOMAs make any reference to the continuing validity of marriages where some time after marriage, one spouse transitions from one sex to another. This fundamental problem of failing to account for transgender and intersexed people alike leaves them in a legal limbo as to who they may marry, if anyone. The inadequate definition of what makes a man and what makes a woman creates an atmosphere of extreme uncertainty for transsex-

...
uals in forming intimate familial relationships, in dissolving them, and upon the death of one spouse.  

2. Same-Sex Marriage, Domestic Partnerships, and Civil Unions  

Currently, Massachusetts is the only state that offers full marriage rights to same-sex couples. In 2003, the Massachusetts Supreme Judicial Court ruled in Goodridge v. Department of Public Health that the ban against same-sex marriage was unconstitutional under the Massachusetts Constitution. Beginning in May of 2004, same-sex couples are able to obtain marriage licenses in Massachusetts. Ostensibly, transgender people in Massachusetts are free to marry whomever they wish and have their marriages legally recognized. 

There are six states with broadly based family recognition laws called civil unions or domestic partnerships, and four more states with limited relationship recognition laws. In the states that recognize civil unions, domestic partnerships, or reciprocal beneficiaries, the types of rights granted to same-sex partners range from essentially the same rights as married couples (e.g., Connecti- 

91. Not that making that definition would be easy as any definition would be rife with exceptions. See supra note 87. 


93. Goodridge, 798 N.E.2d at 948 (majority opinion). 


95. Assuming that the marriage is otherwise not prohibited due to consanguinity, polygamy, bigamy, minority, incapacity, or insanity. See Mass. Gen. Laws ch. 207 §§ 1, 2, 4, 6, 7, 16, 17 (2006). 


99. Nat'l Conference of State Legislatures, supra note 94.
cut,¹⁰⁰ Vermont,¹⁰¹ New Hampshire,¹⁰² and New Jersey¹⁰³) to very limited rights largely related to health care decision making and post-mortem rights (e.g., Washington).¹⁰⁴ In all cases, whether it is a marriage, civil union, domestic partnership, or reciprocal beneficiary relationship, none of these state-recognized relationships afford any protections or rights on a federal level, such as with regard to taxation, social security benefits, Medicaid, Medicare, or immigration. In addition, there is a serious issue concerning whether these relationships will be recognized and honored by courts in another state if the couple moves or if, while traveling through another state, one partner falls ill, is injured, or dies.

None of the same-sex marriage, civil union, domestic partnership, or reciprocal beneficiary laws discussed above specifically address transgender people and whether or not they can take advantage of the laws. Further, to date, there has been no litigation involving a couple where one partner is transgender and the other is not in the context of these new laws. Unfortunately, transgender people are left, yet again, with the uncertainty of whether they may participate in these legal forms of relationship.

3. Judicial Interpretation of Marriage Laws

To make matters worse, these poorly conceived laws have provided a basis for even more bad law via the judicial interpretation

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¹⁰¹. In Baker v. State, the Vermont Supreme Court held that same-sex couples are entitled to the same benefits and protections as opposite-sex couples; but, it was up to the legislature to determine how those benefits and protections should be granted. Baker v. State, 744 A.2d 864, 886 (Vt. 1999).


¹⁰⁴. The various state domestic partnership, civil union, and reciprocal beneficiary laws are all broad acts that vary in their protection of rights. See CAL. FAM. CODE § 297.5 (West 2004 & Supp. 2008) (stating that registered domestic partners have legal status and post-mortem rights as spouses); CONN. GEN. STAT. § 46b-38nn-pp (2007) (providing parties to a civil union with benefits, protections, and responsibilities equivalent to parties to a marriage, including tax treatment); HAW. REV. STAT. ANN. § 560-2-804 (LexisNexis 2005) (governing the revocation of probate and nonprobate transfers in reciprocal beneficiary relationships); id. § 572C-6 (recognizing that reciprocal beneficiaries are not entitled to the same rights as spouses); WASH. REV. CODE ANN. § 26.60.070 (West 2005 & Supp. 2008) (providing a registered domestic partner with hospital visitation rights); WASH. REV. CODE ANN. § 41.05.066 (West Supp. 2008) (providing that the registered domestic partner of an employee is entitled to receive benefits).
of these statutes to either invalidate relationships involving transgender people because of a failure to recognize the new gender of a transgender person, or to refuse to address the issue at all by citing the lack of legislative intent on which to base a decision. A good example of courts' unwillingness to recognize the new gender of transgender persons is In re Marriage of Simmons. In Simmons, the Illinois Appellate Court determined that, despite Illinois's administrative system for establishing a new legal gender on birth certificates and its statewide antidiscrimination law, a marriage between an FTM (Mr. Simmons) and a woman was invalid. The court reasoned that, as an FTM, Mr. Simmons was not a man, but a woman, and the marriage was invalid because Illinois law did not recognize same-sex marriages.

Additionally, since the court concluded that the marriage was invalid, Mr. Simmons was not entitled to benefit from the marital presumption of paternity and, therefore, could not be the father of the children born during the relationship. Thus, according to the court's reasoning, Mr. Simmons had no claim to custody. Shannon Minter, the Legal Director for the National Center for Lesbian Rights, assisted Mr. Simmons's attorney. Mr. Minter pinpointed the problems with the court's holding: First, Illinois has a two-year statute of limitations for challenging a person's parentage. The wife, Mrs. Simmons, waited more than a decade after the birth of the child to challenge the parentage of the child. However, simply ignored the statute of limitations. Second, Mr. Minter challenged the court's interpretation of Mr. Simmons's gender as female. The court determined that Mr. Simmons was female due to the fact that he had not undergone complete genital reconstructive surgery. Therefore, the court's failure to recognize Mr. Simmons's gender as male because he had not undergone

107. Id. at 308.
108. Id. at 312.
109. Id.
110. Id. at 313.
111. Id. at 307.
112. Id. at 313.
113. Id. at 308.
114. Id.
complete reconstructive surgery had the effect of nullifying his mar­riage and depriving him of parentage.

A decision by the trial court judge in a divorce and custody case in Florida offers an excellent and comprehensive analysis of these issues. In the case of *Kantaras v. Kantaras*, the marriage between an FTM, Michael Kantaras, and his wife, Linda, of more than ten years was contested. Linda argued that the marriage should be deemed invalid because Michael was "really" a woman despite his many years of living as a man and the length of their relationship. The trial court's eight-hundred-plus-page decision discussed case law as well as the medical testimony given at trial and concluded that Michael was a man, that the marriage was valid, and that Michael should be awarded custody of their children. Sadly, the decision was later overturned by the appellate court. The District Court of Appeal of Florida ruled that the marriage was invalid because a postoperative transsexual person could not legally marry in the reassigned sex. However, the issue of whether Michael would be stripped of his parental rights and lose custody of the children was remanded back to the trial court.

*Kantaras* and *Simmons* are examples of the types of cases that have found transgender people not to be legal parents to their children. Other cases have resulted in the termination of parental rights of transgender people or in the imposition of restrictions on their visitation with their children solely because of their trans­gender status. As a result, it is vital for transgender parents to

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116. *Id.*


118. *Id.*

119. The argument raised by Linda Kantaras was essentially that Michael could not legally adopt the children because adoption by homosexuals is banned in Florida. Linda argued that, since Michael wasn't a man, she and Michael were in a same-sex relationship and Michael was not eligible to adopt in Florida as a lesbian. Ultimately a settlement agreement was reached by the parties after they, and their attorneys, appeared on the *Dr. Phil* television show. Press Release, Nat'l Ctr. for Lesbian Rights, NCLR Announces Historic Settlement Agreement: Transsexual Father Retains Parental Rights (June 10, 2005), available at http://www.nclrights.org/site/PageServer?page name=press_pr_kantaras_061005; *Dr. Phil* (CBS television broadcast May 17, 2005).

120. See, e.g., *J.L.S. v. D.K.S.*, 943 S.W.2d 766, 773-74 (Mo. Ct. App. 1997) (prohibiting a transwoman, who transitioned post-divorce, from seeing her children and, on appeal, only allowing her visitation with stringent conditions); *Daly v. Daly*, 715 P.2d 56, 59-60 (Nev. 1986) (terminating a father's parental rights because of her transition to a woman).
consider whether formal adoption or parentage proceedings should be undertaken to do as much as possible to create a legal parent-child relationship.\textsuperscript{121} It is also important to have estate plans that establish the parents' wishes as to guardianship of minor children in the event of death and to consider other types of written agreements during the course of the relationship with the other parent, such as coparenting agreements.

There are some cases where the marriage between a transgender person and a nontransgender person has been held to be legally valid. In these cases, the courts have focused on (1) the legal status of the transgender person at the time of the marriage as being opposite to that of the person they are marrying, (2) whether the nontransgender spouse knew of the other's transsexuality, (3) whether or not the couple could engage in "normal" sexual relations (i.e., vaginal intercourse),\textsuperscript{122} (4) fertility or lack thereof on the part of the transgender person,\textsuperscript{123} and (5) the transgender person having "appropriate" genital appearance.\textsuperscript{124} In other cases, regardless of the above factors, the courts have found the marriage to be invalid or even refused to issue a marriage license.\textsuperscript{125}

A further wrinkle in the inquiry is the existence of de facto same-sex marriages throughout the country, as there are couples who marry while they are opposite-sex couples and later one partner transitions gender, but the couple remains married.\textsuperscript{126} The consensus among those attorneys whose work is centered around assisting transgender people is that these marriages do not autom-

\textsuperscript{121} The custody cases have all occurred in the context of dissolution of marriage. However, it is conceivable that the same arguments might be made by family members seeking to prevent a transgender parent from retaining custody of minor children upon the intestate death of a spouse.


\textsuperscript{123} Some countries, for example, Sweden, Finland, Germany, Japan, the Netherlands, Portugal, and Switzerland, require transgender people to be sterile in order to change their sex. Tobin, \textit{supra} note 57, at 422.

\textsuperscript{124} In re Heilig, 816 A.2d 68, 73 (Md. 2003).

\textsuperscript{125} In re Application for a Marriage License for Nash, Nos. 2002-T-0149, 2002-T-0179, 2003 WL 23097095, at *9 (Ohio Ct. App. Dec. 31, 2003) (denying an FTM and his fiancée a marriage license by reasoning that they were a same-sex couple).

\textsuperscript{126} See generally Phyllis Randolph Frye & Alyson Dodi Meiselman, Same-Sex Marriages Have Existed Legally in the United States for a Long Time Now, 64 Alb. L. Rev. 1031 (2001).
ically dissolve just because one spouse transitions. But the issue of whether these marriages remain valid, at least in an estate planning context, has not been directly litigated or legislated.

C. Summary

As a result of these uncertainties created by the failure of the law to adequately address issues of the legal identity and status of transgender people and the legal validity of their relationships, concerns for transgender people and their spouses or partners are many. In the context of this Article, those concerns include the right to inherit, standing to sue (for wrongful death or medical malpractice), the right to demand an autopsy, and the right to make medical or financial decisions for a spouse or partner if he or she becomes incompetent or incapacitated.127

The cases reviewed above suggest several things about estate planning for transgender people: First, transgender people must plan ahead if they wish to marry or register as domestic partners. Disclosure of transgender status to future spouses or partners is essential. Being out to a number of people is helpful. Second, the courts need more education to understand that gender should not be predicated upon genital configuration or even chromosomal configuration.128 Court decisions predicated on whether or not someone has had genital surgery and can have “normal” sexual relations129 reinforce and further an artificial hierarchy between transgender people who have the surgery and those who have not. Such decisions fly in the face of existing medical technology. The

127. Some items are beyond the scope of what will be discussed in this Article, such as rights to social security benefits, pensions, and insurance proceeds.
128. See Intersex Soc’y of N. Am., How Common Is Intersex?, www.isna.org/faq/frequency (last visited Mar. 24, 2008). “Intersex” refers to “a variety of conditions in which a person is born with a reproductive or sexual anatomy that doesn’t seem to fit the typical definitions of female or male.” Id. Intersex conditions include the following: not XX and not XY, Klinefelter (XXY), androgen insensitivity syndrome, partial androgen insensitivity syndrome, classical congenital adrenal hyperplasia, late onset adrenal hyperplasia, vaginal agenesis, ovotestes, idiopathic (no discernable medical cause), iatrogenic (caused by medical treatment, for instance progestin administered to pregnant mother), 5 alpha reductase deficiency, mixed gonadal dysgenesis, complete gonadal dysgenesis, hypospadias (urethral opening in perineum or along penile shaft), and hypospadias (urethral opening between corona and tip of glans penis). Id. While this Article has not discussed in detail the legal and political issues related to intersexed persons, the discussion about marriage requires it. Approximately one in two thousand persons is born intersexed. Id.
medical determination of sex—i.e., male or female—is difficult to discover using any of the methods commonly used by physicians. Legal decisions predicated on the presence of surgery also reinforce a singular medical model of gender reassignment and put the ability to marry into a tenuous place. This is especially true for those transgender people who elect not to have genital surgery due to financial constraints, lack of satisfaction with current medical results, lack of desire to have surgery, lack of ability to have surgery, or any other reason.

Third, because they certainly cannot rely on courts to recognize their identities and status or the legitimacy of their relationships, transgender people should execute basic estate planning documents. These documents would ensure, to the best of their abilities, that legal ties are created as strongly and clearly as possible via available methods such as wills, powers of attorney, advance directives, prenuptial, and cohabitation agreements.

II. ESTATE PLANNING AND THE TRANSGENDER CLIENT

A. Why the Client and the Spouse or Partner Need Estate Planning Documents

The legal identity and status of a transgender person can be in some degree of flux. As a result, the legal status of transgender persons' relationships can be questionable, the parental status of transgender people to minor children can be challenged, and there is an issue of whether any of these relationships will be recognized outside of the person's home state. This means that estate planning is essential for transgender people and their partners.

At its most basic level, this is an issue concerning an individual's identity; specifically, that individual's own perception of his or her own gender, how he or she lived in the world, and the impact illness and death may have upon gender identity. Will that individual's identity be respected when the person becomes incapacitated or incompetent due to an accident or illness? Will the person be able to inherit from family members or loved ones if that person's current name or appearance fails to match the name in a will? Is the person able to inherit from a spouse via intestacy? May the person obtain an autopsy and autopsy report of a spouse? What name will be placed on that person's headstone? What kind of obituary will be written?

130. See generally Dreger, supra note 89, at 36-40.
Regardless of whether the transgender person is single, married, in a registered civil union or domestic partnership, or in a long-term relationship without benefit of legal sanction, it is vital that transgender people and their partners or spouses have adequate estate plans that take into account these unique concerns. An important part of estate plans for transgender people is the power of attorney document.

B. Power of Attorney

The right to make medical and financial decisions during a time of incapacity or incompetence, absent a power of attorney, is often governed by state statutes. In most cases, a spouse or registered domestic partner may make financial and medical decisions for a person who is incapacitated or incompetent. This again raises the specter of a question of relationship status: if a transgender person has a family of origin who opposes her transition and does not recognize her relationship, then the family could potentially seek to exclude the spouse or partner. Or, the hospital might try to exclude the spouse or partner, or take legal action to determine the validity of the relationship, because of concerns about violating the Health Insurance Accountability and Portability Act of 1996 (HIPAA) or concerns about family members obtaining restraining orders.

If the person is single, then the list of people

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133. Health Insurance Accountability and Portability Act of 1996, Pub. L. No. 104-191, 110 Stat. 1936 (1996) (effective Apr. 14, 2003); Health & Human Serv., Office for Civil Rights, HIPAA, http://www.hhs.gov/ocr/hipaa (last visited Mar. 24, 2008). Even though the law allows for disclosure to family members and friends, in practical application, many health care providers have ceased providing information out of fear of being penalized. Improper disclosure can result in financial penalties that can be quite onerous. Penalties up to $100 per violation, up to $25,000 per year, can be imposed for civil violations. Criminal penalties may also apply and can range from $50,000 to $250,000 and from one to ten years in prison. U.S. Dep't of Health and Human Servs., Office for Civil Rights, Summary of the HIPAA Privacy Rule 17-18 (2003), http://www.hhs.gov/ocr/privacysummary.pdf.
134. For example, if a hospital is not familiar with the provisions of a domestic partnership law that provides a registered domestic partner with hospital visitation rights, the hospital may initially be reluctant to allow a person access. Or, if one partner is transgender, the hospital might act on a bias because that person doesn't look "male" or "female" enough to be the spouse of the ill or injured patient. See, e.g., Wash. Rev. Code Ann. § 26.60.070 (West 2007). Early in 2008, a lesbian woman was denied access...
authorized by statute to make financial and medical decisions might include parents or siblings.\textsuperscript{135} This could be particularly troubling for a transgender person who has a difficult relationship with his or her parents or siblings or has been shunned by his or her family altogether. It is easy to see that where a transgender person is incompetent and there is no power of attorney, and family refuses to step in, the state may have to intervene and appoint a guardian. In such an instance, the identity of the transgender person might be ridiculed or erased altogether.\textsuperscript{136}

Powers of attorney are of great importance to transgender people and their spouses or partners.\textsuperscript{137} These documents allow principals to designate the person or persons whom they wish to have making essential decisions for them.\textsuperscript{138} The power of attorney sets forth what kinds of decisions the attorney-in-fact can make and what, if any, limitations are imposed. They may designate that the attorney-in-fact has the absolute right to visit with the person in hospital, regardless of any other determination of their relationship status.\textsuperscript{139}

Principals can make statements about their identity to help prevent erasure during a period of incapacity or incompetence. Erasure might occur where transgender persons are using particular names and pronouns consistent with their gender identity, but have
to her partner who was hospitalized in Miami. The partner later died in that hospital. According to the woman, hospital staff informed her that Miami was not a gay-friendly place and that she would receive no information about her partner. \textit{365Gay.com, Dying Lesbian's Partner Denied Access to Her}, \url{http://www.365gay.com/Newscom08/02/022208 fla.htm} (last visited Mar. 24, 2008). See also \textit{Davina Kotulski, Creating the Right Kind of Global Warming: A Marriage Equality Sermon for the UU Church}, \url{http://www.whygaymarriage.com} (last visited Mar. 24, 2008), for another heartbreaking story about a partner denied access to a dying loved one.

\textsuperscript{135} \textit{See, e.g.}, \textsc{D.C. Code Ann.} § 21-2210 (LexisNexis 2001).

\textsuperscript{136} \textit{See generally} \textsc{Viviane K. Namaste, Invisible Lives: The Erasure of Transsexual and Transgendered People} (2000). Another example of the ways that transgender people are erased or ridiculed, especially by public agencies, can be found in \textit{The Gender Ctr. Inc., Reporting Transgender Violence}, \url{http://www.gendercentre.org.au/39article2.htm} (last visited Mar. 24, 2008).

\textsuperscript{137} There are a variety of different names for financial and health care powers of attorney. Common names include: power of attorney, power of attorney for health care, power of attorney for finances, durable power of attorney, springing power of attorney, future durable power of attorney, health care proxy, health care directive, medical power of attorney, advance health care directive, directive to physicians, and more.


\textsuperscript{139} \textit{See, e.g.}, \textsc{Wash. Rev. Code Ann.} § 11.94.010(3)(a) (West 2006 & Supp. 2008) (granting the right to spouses and registered domestic partners).
not yet legally changed their names or have not or cannot change their identification (e.g., driver's license, passport, or birth certificate). In a medical power of attorney the principal can designate whether or not certain medical procedures are acceptable treatment or necessary (such as the ongoing administration of hormone replacement therapy). Principals can set forth their wishes with regard to mental health treatment—which can be particularly important to transgender people who are often diagnosed with mental health conditions throughout their lives in order to qualify for medical treatment to transition.

C. Inheritance Rights

The right to inherit is often taken for granted. They think, "we're married, certainly I'll be able to inherit from my spouse's estate even without a will." Or they think, "Dad left me something in his will, I'll be able to inherit without difficulty." That may or may not be true. While intestacy statutes in each state set forth the order of descent and distribution, the assumption that a surviving spouse will inherit does not always hold true when one of the parties to the marriage is or was transgender.

At least one court has dealt a blow to the notion that a surviving spouse should inherit via the intestacy statute. In In re Estate of Gardiner the surviving spouse, J'Noel Gardiner, was a transwoman. The decedent husband died intestate. There was evidence to support the fact that the decedent knew that his wife was transsexual. However, the decedent's adult son challenged the validity of the marriage in an attempt to prevent her from inheriting. The Kansas Supreme Court deemed the marriage void, relying largely on the fact that Ms. Gardiner was not born a woman.

140. PRICE & DONALDSON, supra note 138, § 4.37 (discussing surrogate medical decision makers).
142. See, e.g., ARK. CODE ANN. § 28-9-214 (1987) (allowing children to take priority over surviving spouses); MICH. COMP. LAWS ANN. § 700.2102 (West 2002) (stating that the surviving spouse gets a particular amount depending on whether the decedent died with descendants, the number of descendants, and whether the surviving spouse is also the parent of the descendants).
143. See In re Estate of Gardiner, 42 P.3d 120 (Kan. 2002) (holding that a marriage between a man and a transwoman is void).
144. Id. at 121-22.
145. Id. at 123.
146. Id. at 122.
147. Id.
148. Id. at 135.
Consequently, Ms. Gardiner received nothing from her husband’s estate.\footnote{149} 

\section*{D. Wrongful Death and Medical Malpractice Claims}

Before \textit{Gardiner} invalidated a marriage following the death of one spouse, the Texas Court of Appeals similarly invalidated a marriage between a transwoman and her husband; this time, in the context of a wrongful death suit.\footnote{150} In \textit{Littleton v. Prange}, Christie Lee Littleton was an aggrieved widow seeking justice in a wrongful death claim against the doctor and hospitals that she believed had caused her husband’s death.\footnote{151} Ms. Littleton and her husband had been married for approximately seven years prior to his death.\footnote{152} During the course of the lawsuit, the hospital discovered that Ms. Littleton was an MTF and, on the basis of that information, sought to have the lawsuit dismissed.\footnote{153} It argued that since Ms. Littleton was really a man, she and her husband could not have been legally married, and, hence, she had no standing to sue as a widow under the Texas wrongful death statute.\footnote{154} The court agreed with the defendants and ruled that Ms. Littleton—despite the fact that her birth certificate had been changed in her state of birth, despite having lived for more than twenty years as a woman, despite appearing socially to be a woman and being regarded as such by her family and friends—was a man.\footnote{155} The court ruled that, as a man, her marriage was invalid because of Texas’s ban on same-sex marriages.\footnote{156} 

The interesting thing about both \textit{Gardiner} and \textit{Littleton} is the lack of estate planning done by the parties. It is likely that the results would have been very different had the transwomen’s husbands executed wills prior to their deaths. Certainly, in a will, the decedents could have named their spouses as personal representatives, which would then confer to them the right to sue on behalf of

\footnotetext[149]{See \textit{id.} at 137. The court, in holding that Ms. Gardiner was male for purposes of the statute defining marriage, effectively denied Ms. Gardiner the right to inherit under the intestacy laws of Kansas.}

\footnotetext[150]{\textit{Littleton v. Prange}, 9 S.W.3d 223 (Tex. App. 1999).}

\footnotetext[151]{\textit{Id.} at 225.}

\footnotetext[152]{\textit{Id.}}

\footnotetext[153]{\textit{Id.}}

\footnotetext[154]{\textit{Id.}}

\footnotetext[155]{See \textit{id.} at 231-32.}

\footnotetext[156]{\textit{Id.} at 231.}
the estate and as beneficiaries. In addition, a properly drafted and executed will would have been able to withstand any legal assaults by family members contesting the validity of the will.

E. Avoiding or Withstanding Challenges to Validity and Testamentary Capacity

Special care should be taken to ensure, to the greatest degree possible, that estate planning documents will withstand any challenges to validity (based on claims of undue influence or fraud) or testamentary capacity of the transgender person or his or her spouse or partner. Inquiry should be made into the nature of family relations and whether or not the person anticipates challenges from family members. If the person has a history of mental health issues, a consultation with a physician or therapist to assist in ascertaining testamentary capacity may be in order.

If there is a question of competence, the attorney should take special care to ask questions designed to elicit specific information required to establish testamentary capacity. This could include a review with the client, in front of witnesses, of the main provisions of the will; eliciting client confirmation; and an explanation of the specific provisions in the will. There should be confirmation that the disposition reflects the client's wishes. There should be identification of the client's family, spouse or partner, and other significant persons, the property owned by the client (the nature and size of the estate), the nature of the client's nonprobate assets, the manner in which they are held, and the client's intent as to such nonprobate assets. The attorney should prepare a file note reflecting the questions and responses, and have the witnesses sign, date, and confirm the truth of the notes. Furthermore, it is a common practice and sometimes advisable, in circumstances where a will contest is expected, to have the client sign the same will at two separate times a few months apart.


158. Another way to document the capacity of the testator is to either videotape the signing ceremony or have the testator prepare a video wherein the will is read or make a statement which otherwise verifies the contents of the will. A video will is not a substitute for the written will, but rather, a complimentary format that allows viewers to see for themselves that the testator was competent and not under any duress in executing the will. See Price & Donaldson, supra note 138, § 4.32.
Other property transfer devices, such as trusts, are alternative methods of disposing of property upon death.\textsuperscript{159} A trust is a written document, wherein property is given to a trustee\textsuperscript{160} to manage for the benefit of another, the beneficiary.\textsuperscript{161} Generally, the beneficiary receives interest and dividends of the trust assets for a set number of years or for life.\textsuperscript{162}

There are many different kinds of trusts available. One such trust is a revocable trust. This type of trust may be altered or terminated during the grantor's lifetime.\textsuperscript{163} Since the trust may be altered at any time until the grantor's death, it is considered part of the grantor's estate and is subject to taxation.\textsuperscript{164} The property is passed to the beneficiaries only after the grantor's death, at which time the trust becomes irrevocable. Other types of trusts include irrevocable trusts,\textsuperscript{165} special needs trusts,\textsuperscript{166} and credit shelter trusts.\textsuperscript{167} While trusts may also be subject to some of the same challenges (e.g., undue influence, fraud) that might be made against a will, trusts are better insulated from such attacks because they avoid the probate requirement of giving notice to heirs and are, therefore, a more private matter.

If a challenge is likely and undue influence could be alleged or has been threatened, an attorney should consider separate representation of the couple. At the very least, if both spouses or partners are represented by the same attorney, the attorney should have a clear, written fee agreement and a consent to joint represen-

\textsuperscript{159} See id. § 10.12.

\textsuperscript{160} See Amy Morris Hess, George Gleason Bogert & George Taylor Bogert, The Law of Trusts and Trustees § 1 (3d ed. 2007). A trustee may also be the grantor of the trust.

\textsuperscript{161} See id. The beneficiary may also be the grantor and spouse or partner, children, or anyone else.

\textsuperscript{162} Id.

\textsuperscript{163} See Price & Donaldson, supra note 138, §§ 10.7-.8.

\textsuperscript{164} See id. § 10.17 (citing 26 U.S.C. §§ 2036(a)(2), 2038(a)(1)).

\textsuperscript{165} An irrevocable trust cannot be amended, revoked, terminated, or changed by the grantor or anyone else once it becomes effective. Id. § 10.8; Black's Law Dictionary 1549 (8th ed. 2004).

\textsuperscript{166} A "special needs trust" (also called a "supplemental needs trust" or "SNT") is a trust that is established for a person who is receiving government benefits. The intent of a special needs trust is to provide a source of funds for such person without disqualifying such person from such government benefits. Price & Donaldson, supra note 138, § 4.21.3.

\textsuperscript{167} A credit shelter trust is a type of trust that is used by married couples with large estates in order to avoid federal estate taxes upon the death of the first spouse to die. Id. § 5.32.
tation agreement signed by the clients in order to indicate that they understand the risks of joint representation.168

Encouraging clients to utilize nontestamentary dispositions is also good practice for transgender clients. Any type of account or benefit that allows a direct beneficiary designation is less subject to a challenge.169 Examples of these types of property transfers include life insurance designations, beneficiary designations on pension or retirement accounts, and banking or investment accounts held as joint tenants with rights of survivorship.

III. DRAFTING CONSIDERATIONS

A. Make a Clear Statement of Identity of the Principal or Maker

All too often the identity of transgender people is erased upon their death.170 The media is filled with examples of this erasure; for example, the rape and subsequent murder of Brandon Teena in Nebraska in 1993, which was a tremendous turning point for transgender activism.171 Brandon Teena was born female bodied and, at a young age, began to live with masculine gender expression and a male persona.172 During his short life, he had not been treated by either mental or medical health professionals knowledgeable about transgender people, nor had he legally changed his name or any of his identity documentation to reflect his gender identity.173 Even so, it is quite clear that Brandon self-identified as a man and was clear in communicating that fact to others in his life.174 In late 1993, his birth sex became known to people in his circle of friends and


169. These designations are less frequently challenged because law is generally well-settled that where there is a direct beneficiary designation on an account, benefit, or life insurance policy, that such designation is a matter of contract and are not included in a decedent's probate estate. See, e.g., In re Estate of Perry, No. 2007-03-061, 2008 WL 282067, slip. op. ¶ 26 (Ohio Ct. App. Feb. 4, 2008).

170. See, e.g., DIANE WOOD MIDDLEBROOK, SUITS ME: THE DOUBLE LIFE OF BILLY TIPTON (1998) (discussing stories about people like Alan Hart and Billy Tipton who lived their lives as men but were “discovered” to “really be women” upon their deaths).


172. Brandon Teena is how he has come to be known. It is unclear whether this name is one that he himself used. Remembering Our Dead, supra note 171.


174. Id.; Remembering Our Dead, supra note 171.
acquaintances. Two men, who were previously Brandon's friends, raped him to send a message about the inappropriateness of his gender identity and expression.\footnote{175} After Brandon reported the rape to authorities—who treated him no better than his rapists—he, along with two friends, were murdered by his rapists on New Year's Eve, 1993.\footnote{176} Unfortunately, Brandon's life, and those of other transgender people who have been murdered, have been obscured by media that are unable to decide which pronouns to use and how to describe the victim.\footnote{177}

The threat of being erased is as real today as it was in 1993. In 2004, an MTF teenager, Gwen Arujo, was brutally murdered after her birth sex was "discovered" by a group of young men at a party.\footnote{178} Some of the men had been sexually intimate with Gwen prior to her murder.\footnote{179} Upon finding out that she was MTF, they beat her over the head with a skillet and buried her in a shallow grave.\footnote{180} Adding insult to injury, Gwen's identity was, for a time, erased by the media who referred to her by her birth name and birth gender.\footnote{181}

Over and over again, in history books and obituaries of the famous and the mundane, the identities of transgender people are often erased, excused, or avoided—whether by media or uncomfortable family members.\footnote{182} Given the all too common occurrence of identity erasure upon death, it is imperative that transgender people include in their estate planning documents directives to preserve their identities postmortem.

\footnote{175}{Summers, supra note 173.}
\footnote{176}{Id.}
\footnote{177}{Gwen Smith's excellent website Remembering our Dead, which is, unfortunately, updated all too regularly, chronicles those transmen and transwomen who have been murdered in the past few years. Remembering Our Dead, supra note 171.}
\footnote{179}{Id.}
\footnote{180}{Id.}
\footnote{182}{See, e.g., Jeremy Quittner, Hemingway's Son Gloria, ADVOCATE.COM, Nov. 20, 2001 (stating that when Ernest Hemingway's son died in prison, the world learned he had been a troubled man who found the strength to live his life as he saw best—as a woman), available at http://findarticles.com/p/articles/mi_m1589/is_2001_Nov_20/ai_80116739?tag=artBody;coll1.
B. Postmortem Instructions

Wills should include clauses related to postmortem instructions including organ and body donation, burial or cremation instructions, and designation of the person who is to make postmortem decisions. Additional clauses can direct what is to be placed on headstones, the type of services are to be held, and more. In the absence of enforceable written provisions, the client’s spouse or partner might not have legal standing to make such arrangements. For example, the Littleton case resulted from the lack of a will and postmortem instructions.\(^{183}\) The decedent’s family buried his body in a location that has never been disclosed to his widow.\(^{184}\) If the couple is unmarried or does not have a registered domestic partnership, then the surviving partner’s rights do not exist unless they are set forth in a will or postmortem instructions. If the couple has minor children, the surviving spouse or partner should be designated as the primary custodian of any minor children with provisions for a second, or possibly even a third choice, in the event that both parents die.

In addition to the will, if the state allows the use of a postmortem letter or a postmortem instruction sheet, that should be used as well. For example, Washington law specifically states that a postmortem instruction form is sufficient to set forth the decedent’s wishes.\(^{185}\) The document must be signed and witnessed to be valid.\(^ {186}\) A postmortem instruction form can cover a broad variety of information regarding the decedent’s wishes. Choices about burial, cremation, and location of interment can be specified. The person can describe his or her wishes for memorial or funeral services. Lists of people to contact about the death and whom to invite to any services can be included. The contents of an obituary can be drafted. Designation of the officiant, music, flowers, and more can also be included.

No-contest clauses are also an excellent tool to discourage over-zealous family members from challenging the validity of a

\(^{183}\) Littleton v. Prange, 9 S.W.3d 223 (Tex. App. 1999).
\(^{184}\) Id.
\(^{185}\) WASH. REV. CODE ANN. § 68.50.160(1) (West 2007) (“A valid written document expressing the decedent’s wishes regarding the place or method of disposition of his or her remains, signed by the decedent in the presence of a witness, is sufficient legal authorization for the procedures to be accomplished.”).
\(^{186}\) Id.
will. Such a clause states that if any beneficiary objects to the probate of the will or contests or aids in the contesting of the will, then that person is treated as though he or she has disclaimed his or her share of the estate, and is deemed to have predeceased the decedent. Furthermore, disinheritance clauses can be used if the client has a particularly poor relationship with his or her family members who would stand to inherit under intestacy statutes. Moreover, the right to autopsy and report should be specifically granted in the will to bolster or circumvent the application of any state statute that grants that right.

C. Inter Vivos Considerations

1. Additional Documents for All Clients

There are several documents and drafting tools that are of value to transgender persons during their lifetimes. First, as previously discussed, powers of attorney should be drafted to cover financial, medical, and mental health care decisions. The practitioner should take care to ensure that the client's wishes regarding particular medical or mental health treatments are clearly delineated.

Second, living wills, otherwise known as health care directives or directives to physicians, should also be part of a comprehensive estate plan for a transgender person. Such documents allow the transgender person to designate the person that he or she wishes to have consulted in the event that a decision must be made to remove life support.

Third, hospital visitation authorizations can be a useful tool in ensuring that a spouse, partner, or friend be allowed to visit in a hospital. It can also be used to exclude blood relatives with whom the maker has lost contact or has a difficult relationship.

Fourth, prenuptial or preregistration acknowledgement of transgender status can be used in a similar way to a prenuptial agreement, to evidence that the transgender partner's status has been disclosed and that the nontransgender partner is aware of that
status. As case law demonstrates, the knowledge of the nontransgender spouse has been used as one of the factors in determining the validity of marriages.192

Fifth, many of the concerns regarding inheritance can be avoided altogether through the use of other property transfer methods such as jointly titling property.193

2. Aging Clients

Planning for financial needs as the individual ages should be considered. For example, there may be a concern with regard to Medicaid benefits and how that may impact the assets of a couple. To qualify for Medicaid as a medically needy person, a person must have low income and low assets, and the person must “spend down” any resources so they do not exceed the statutory limits.194

Under the older system, these “spend down” requirements posed an obvious hardship to spouses of Medicaid recipients. Spouses were left with the prospect of having little left to live on once the couple’s income and resources are reduced to qualifying levels. Some of that hardship was reduced by passage of the Medicare Catastrophic Coverage Act of 1988 (MCCA). The MCCA includes provisions to financially protect the spouse who was not receiving medical assistance. These provisions allow a spouse to maintain a certain level of assets and income to prevent the spouse from having to use his or her assets to pay for medical care.195

An additional protection exists by limiting the circumstances in which a state may seek post-death reimbursement for payments made for the recipient. The Medicaid Act, as amended by the Omnibus Budget Reconciliation Act of 1993, provides that “[n]o adjustment or recovery of any medical assistance correctly paid on behalf of an individual under the State plan may be made,” except in certain specified circumstances.196 Further, any adjustment or recovery “may be made only after the death” of the recipient’s surviving spouse.197 Individual states may further restrict how much of a

192. See supra Part I.B.3.
195. See id. § 1396r-5.
196. Id. § 1396p(b)(1)(A) (“[T]he State shall seek adjustment or recovery from the individual’s estate or upon sale of the property subject to a lien imposed on account of medical assistance paid on behalf of the individual.”).
197. Id. § 1396p(b)(2) (emphasis added).
recipients' estate is at risk for reimbursement of Medicaid liens.\textsuperscript{198} Finally, beneficiary-designated accounts, such as pensions, retirement accounts, IRAs, and certain banking and investment accounts should be updated to state the current name of the beneficiary. Clients should be advised not to identify the beneficiary solely as their spouse, but rather to provide the beneficiary's name to prevent a challenge to the distribution based on a challenge to the validity of the marriage.

**Conclusion**

The legal status of transgender people and the legal status of their relationships are currently unclear. The interplay of state and federal jurisdictions, each with its own methods of determining status, and the failure of states to apply full faith and credit to determinations from other states, can leave transgender people, and their families, in limbo.

Until the courts and legislatures take a more reasoned approach to addressing the legal gender status of transgender people and take that status into account in the application of marriage and domestic partnership laws, attorneys must take precautionary steps in assisting transgender people and their spouses or partners to maintain their identity and to ensure that their estates pass to one another unfettered.
