

## Considerations for LGBTQ Estate Planning

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### Introduction

While a preliminary step for any estate planner is to determine the marital and parental status of their client, it is important to recognize the difference in family structures one might encounter when assisting LGBTQ clients. Not only do these differences impact the type of estate planning that a practitioner might suggest, it should also serve as a reminder of the importance of fully informing clients of the differences in legal rights that they and their partner will experience as common-law spouses. Given the prevalence of common-law relationships and more unique parenting situations, particular issues are more pressing for LGBTQ individuals. There are important planning considerations for such individuals during their lifetimes, including potential incapacity and end of life planning.

### Incapacity of LGBTQ Individuals

The laws providing who will be given priority in making financial and health care decisions for an incapable person vary jurisdiction by jurisdiction. Legal and biological family, such as spouses (sometimes including common-law partners), children and parents, will generally be favoured over other persons who may have a close, but legally unrecognized, relationship with the incapable person. For LGBTQ individuals who have dealt with difficult or non-accepting family members, having these people take over their finances and health care when they are at their most vulnerable is likely the last outcome that they would wish for. Even where an LGBTQ individual has a common-law (or even married) partner who may have first priority, other family members who refuse to accept the relationship may potentially seek court intervention to have themselves instead appointed to manage such decisions. Appointing persons by power of attorney for health care and power of attorney for finance can never fully reduce the risk of other family members disputing the attorney's appointment. However, such documents provide clear guidance to outsiders, including courts, as to whom an individual wished to have appointed to manage their affairs.

### Particular Concerns for Transgender Individuals

Transgender individuals will likely wish to designate an attorney for their health care, not only to ensure that someone who is supportive of their gender identity manages these decisions, but to ensure that they will have a strong advocate for them when receiving medical care. In the United States, a survey by the National Centre for Transgender Equality and the National Gay and Lesbian Task Force of over 7,000 transgender individuals provided statistics as to the degree

of discrimination faced by transgender individuals in obtaining medical care.<sup>1</sup> These statistics showed that 19% of respondents were refused medical care due to their transgender status, 28% of respondents experienced verbal harassment in medical settings, and 50% reported having to educate their medical care providers about transgender care. Given the ongoing barriers faced by transgender individuals in medical care settings, it is important for these individuals to choose the right people to take on the mantle of ensuring they receive proper and respectful medical care in the event of incapacity.

### Providing for Children After Death

Ensuring that someone's children will be properly cared for after death is often a primary concern in that person's estate planning. For LGBTQ individuals, this planning can be complicated by the lack of recognition of unique family structures in the law. Many same-sex couples rely on assisted human reproduction in order to have families. This may include the use of egg donors, sperm donors, and surrogates with one of the members of the same-sex couple being the biological parent of the child and one not being biologically related. When relying on assisted reproduction, some parents may intend for the person who provided genetic material or acted as surrogate to also be a parent of the child.

In order to ensure that any children are properly provided for after death, wills that set out the property or share of the estate that each child is to receive should be created. As the family expands, individuals will need to revisit their wills in order to ensure that all children of the family are accounted for. For grandparents (or other relatives) of such children, care should also be taken as to how gifts are made in order to ensure that any gifts for grandchildren will encompass the children who may otherwise not fit the legal definition of "grandchild". Bequests to a person's "grandchildren" may still encompass persons treated like grandchildren, but not legally recognized as such as courts will look to the intention of the person at the time of the drafting of their will.<sup>2</sup> However, any uncertainty that may arise is better dealt with by additional precision in the drafting of the will. Where any uncertainty is not dealt with, undesired applications for a court's interpretation of the will may be required. A simple way of ensuring that a child is provided for, regardless of whether such a person may be legally recognized as a child, is to name the individual children being benefited in the will. Thus, rather than leaving an equal share of the estate to "my children" or "my grandchildren", names of the children being benefited would be provided.

Naming each individual child in a will may be problematic, however, where the family is expected to grow. This is particularly true for grandparents who may have many children and

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<sup>1</sup> Jamie M. Grant et al, "National Transgender Discrimination Survey Report on Health and Health Care: Findings of a Study by the National Centre for Transgender Equality and the National Gay and Lesbian Task Force", Report, (National Center for Transgender Equality and National Gay and Lesbian Task Force: 2010), online: <[http://www.thetaskforce.org/static\\_html/downloads/resources\\_and\\_tools/ntds\\_report\\_on\\_health.pdf](http://www.thetaskforce.org/static_html/downloads/resources_and_tools/ntds_report_on_health.pdf)>.

<sup>2</sup> See, for example, *Hickey v Greig*, [1987] WDFL 1544, 27 ETR 17 (ONSC (HCJ)), where the court found one step-child of a child to be a "grandchild" for the purpose of a bequest to "my grandchildren", while holding that the other step-child of the child was not a "grandchild" based on the testator's treatment of one of the step-children as his grandchild.

even more grandchildren. Regardless of the governing law as to when parent-child relationships are established, consideration should be given to providing a definition of “child” or “grandchild” where such terms are used in the will. By crafting the will with a definition of child or grandchild specific to the circumstances of the family, the testator can ensure that they benefit their children and grandchildren on their death.

While jurisdictions across Canada have grappled more and more with the changing views of family and the different ways in which children may be brought into a family, even provinces with the most progressive expansion of recognition of parentage do not fully encapsulate all parent-child relationships. For this reason, LGBT individuals should not rely on intestacy laws in providing for their children. Careful will planning should be undertaken which takes into account the unique needs and structure of the family.

### **Funeral and Memorial Planning**

For transgender individuals, the potential for the erasure of their identity can be a grave concern. The potential for such erasure continues after death. Careful estate planning can mitigate such risks. At common law, the right to determine the manner and burial of a deceased lies with the executor of the deceased person’s estate.<sup>3</sup> In order to ensure that unsupportive family members do not control the manner of burial after death, transgender individuals should carefully choose an executor for their estate. In addition to giving careful consideration to choosing the executor of an estate, transgender individuals should consider including provisions in their wills setting out their wishes as to the disposition of their remains and memorial planning.

### **Conclusion**

There are important considerations for LGBTQ individuals to consider in their estate planning. Careful estate planning should be undertaken which takes into account the unique needs and structure of the family. By ensuring the proper safeguards are in place, LGBTQ individuals can rest easy knowing their wishes, and their loved ones, will be protected.

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<sup>3</sup> Carmen S Theriault, ed, *Widdifield on Executor’s and Trustees*, 6<sup>th</sup> ed, (Toronto: Carswell 2017), ch 1 at 1.1.