Bloomberg Tax

Tax Management Estates, Gifts and Trusts Journal™

Open Hearts, Open Minds, Better Plans

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It is a warm June Sunday afternoon in Chicago. The sun is shining; the sky is blue. Normally on this day, the streets of Chicago's Lakeview neighborhood would be packed with crowds of LGBTQ persons, and their families and friends, but this year, 2020, hardly anyone is out and the 51st gay pride parade has been cancelled. In fact, in cities across the United States and the globe the Pride month festivities have been cancelled due to Covid-19. What better way to honor Pride month than to learn a little about who LGBTQ persons are and how estate planners can be stronger advisors to persons within the LGBTQ community, as well as clients who may have relatives or beneficiaries who are a part of the community?

Some people wonder — what is Pride and why is there a parade? As mentioned above, this year marks the 51st anniversary of the Chicago Pride Parade and the 50th anniversary of New York's Pride march. The very first events were not the joyous events seen today. Rather, they were a response — protests and riots – to a police raid at the Stonewall Inn in New York City's Greenwich Village neighborhood that occurred on June 28, 1969. LGBTQ persons were not welcome in most bars. Sexual acts between persons of the same sex were illegal in all states in the United States prior to 1961, when Illinois became the first state (by almost a decade) to decriminalize homosexual acts by adopting the Model Penal Code.[1] And, even though Illinois decriminalized homosexual acts, the state legislature added a law altering liquor regulations to give the city of Chicago the ability to raid and close gay bars.[2]

Police raids often occurred on bars frequented by LGBTQ persons. Patrons were ticketed or jailed, and names would be printed in the paper. Because newspapers were complicit in publishing the names, LGBTQ bar patrons lost their jobs and were shunned by their families. So, the very first Pride marches and parades were a response to these raids. This grassroots organization effort in the LGBTQ community eventually culminated in the U.S. Supreme Court striking down sodomy laws in *Lawrence v. Texas,*[3] mandating that the federal government recognize marriages approved by the states between two adults regardless sex assigned at birth in *United States v. Windsor,*[4] the finding that limiting marriage only to persons of the opposite sex assigned at birth was unconstitutional in *Obergefell v. Hodges,*[5] and, most recently, that discrimination on the basis of one's sexual orientation or gender identity is discrimination based upon sex prohibited by Title VII in *Bostock v. Clayton County, Georgia*.[6] In *Obergefell,* the Supreme Court held that the Fourteenth Amendment required states to issue marriage licenses for two individuals regardless of their sex.[7] While *Obergefell* made it unlawful for states to deny marriage licenses to two individuals on the basis of sex, it did not address the disparate treatment LGBTQ persons and families struggle with on a daily basis. Acknowledging that the struggle was not over for LGBTQ couples, in celebrating the *Obergefell* decision, Vice President Joe Biden stated, "There are still 32 states where marriage is recognized in the

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The author would like to thank Lauren J. Wolven for her leadership and support, as well as her significant contribution to this article.

[1] Timothy Stewart-Winter, Queer Clout: Chicago and the Rise of Gay Politics (2016).

[2] Timothy Stewart-Winter, Queer Clout: Chicago and the Rise of Gay Politics (2016).

[3] 539 U.S. 558 (2003).

[4] 570 U.S. 744 (2013). Note, *Windsor* left the issue of marriage to the states to decide.

[5] 576 U.S. 644 (2015).

[6] 590 U.S. ___ (June 15, 2020).

[7] 590 U.S. ___.

ISSN 0886-3547

morning and you can be fired in the afternoon.''[8] Although under *Bostock* discrimination in the employment setting is now illegal, LGBTQ persons still face uncertainty with respect to healthcare,[9] family planning,[10] and other social services.

Rule 1.1 of the ABA Model Rules of Professional Conduct provides that ''A lawyer shall provide *competent representation* to a client.'' The rule goes on to provide that ''competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation.'' What exactly does it mean to maintain the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation? The comments to Rule 1.1 indicate that ''the most fundamental legal skill consists of determining what kind of legal problems a situation may involve, a skill that necessarily transcends any particular specialized knowledge.''[11] Essentially, for estate planners, this means planners must recognize that they are in the unique position of working with clients on planning at a very personal level. Rather than focusing solely on tax and death planning, planners need to think about softer family issues. Indeed, much like a family medicine physician, planners treat individuals and families from birth through death and everything in between. This model rule challenges planners to do more than just solve problems. It asks planners to foresee issues and prevent them from blossoming into larger problems.

Consider the following hypothetical: Lawyer is referred a new client, Mom, who needs some estate planning work. While Mom has a large estate, her primary goal is ensuring that her child, Daughter, and Daughter's family are adequately provided for upon Mom's passing. In conversations with Mom, Lawyer learns that Daughter and her partner are expecting a child. Lawyer assures Mom that the estate plan will provide for Daughter and, ultimately, for Daughter's child. Lawyer prepares her usual estate documents, providing that upon Mom's passing, the assets held in trust will be distributed to Mom's descendants, *per stirpes*. In the event Mom has no descendants, the trust provides that the assets would be distributed to Mom's heirs-at-law. Mom signs all of the estate documents and is happy knowing that she has arranged her affairs.

A few years later, Lawyer receives a call that Mom has passed. The caller, who is the successor trustee of Mom's trust, informs Lawyer that tragically, Daughter predeceased Mom. Lawyer assures the trustee that Daughter's child, Granddaughter, is, of course, a beneficiary of the trust.

Over the course of the administration, Lawyer discovers that Daughter's partner is a transgender male and is actually the parent who carried Granddaughter in gestation and gave birth to her. Daughter and her partner never married. Daughter is not listed as a parent on Granddaughter's birth certificate, was not biologically related to Granddaughter, and never adopted Granddaughter. Mom's trust defines ''descendants'' according to a traditional definition that references biological relationship and adopted children only.

Knowing that Mom intended to provide for Granddaughter, Lawyer nonetheless instructs the trustee to distribute the trust assets to a descendant trust for Granddaughter under the trust. Mom's sister, who was never accepting of Daughter's relationship, brings an action contesting the trust administration, alleging that she is Mom's sole heir. The court agrees.

The result here was not consistent with Mom's intent, and, sadly, clients routinely do not share their whole, authentic selves with their planner. The fault does not rest solely on the client, however. Planners need to think about how they can create an open and trusting environment so that they can minimize the risk of missing planning opportunities. Beyond that, planners should also think about modernizing their documents.

CREATING AN OPEN ENVIRONMENT

Creating an open environment takes work. A lawyer may be the best planner in the world (on paper), know the ins and outs of the estate and gift tax regulations and state law, but still miss certain issues. If a planner is not familiar with the LGBTQ community, then that planner may not be able to foresee the necessary issues for clients who are part of the LGBTQ community or have potential beneficiaries of their plans who are part of the LGBTQ community.

The first step in learning about any community is to become familiar with the terminology used by or preferred by the community. The LGBTQ community is no different. Understanding the terms used within the community helps to create that open environment. Discussing concepts like sexual orientation and gender expression is something that will be less intimidating if the planner takes the time to become familiar with common terms. There are full semester classes at universities dealing with these concepts, so the discussion below is just an overview.[12]

Sex, Gender, and Orientation

Sex, gender, and orientation, while typically discussed together, are all different concepts. Each en-

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[8] *Biden Celebrates Same-Sex Marriage Says More to Be Done,* CBS News (July 10, 2015), available at: https://www.cbsnews.com/news/biden-celebrates-same-sex-marriage-says-more-to-be-done/.

[9] The Trump administration rolled back a rule by the previous administration that banned doctors, hospitals and other health care works from denying care to someone based upon sexual orientation or gender identity. *See* Department of Health and Human Services, Rule 2020-11758 (June 19, 2020).

[10] The Trump administration submitted an *amicus curiae* brief arguing that taxpayer-funded organization can refuse to place adoptive and foster children with same-sex couples in a case currently before the Supreme Court on appeal from the Third Circuit Court of Appeals. *See Brief for the United States as Amicus Curiae Supporting Petitioners*, *Sharonell Fulton, et. al. v. City of Philadelphia, et. al,* No. 19-123, *available at* https://www.supremecourt.gov/DocketPDF/19/19-123/144793/20200603145511974_19-123tsacUnitedStates.pdf .

[11] Comment to Rule 1.1 of the ABA Model Rules of Professional Conduct.

[12] If you would like to learn more, the Human Rights Campaign

ISSN 0886-3547

compasses a broad spectrum. Sex is merely the physical trait that a person had at birth. While we think of sex typically as male or female, some people are born "*intersex,*" which is the spectrum between male and female. Sometimes the physical appearance of intersex is apparent at birth, sometimes not until puberty, and sometimes it never becomes apparent at all. About 1-2% of the population is born intersex (which is about the same chance that a person is born with red hair), so statistically it is a significant portion of the population.[13]

While sex is a physical trait, gender is more of an identity someone has as it relates to societal norms and relations. When a person identifies as a different gender than their sex assigned at birth, then the person might describe themselves as *"transgender."*

Similarly, when discussing orientation, if a person assigned male at birth is attracted to women, then the person might describe themselves as *"straight;"* if the same person is attracted to men, then that person might describe themselves as *"gay:"* and, if the same person is attracted to both women and men (though not necessarily simultaneously or to the same degree), then that person might describe themselves as *"bisexual."*

There are certain words and phrases that may be perceived as offensive, even if they are not intended by the user to be anything other than descriptive. To create an open and trusting environment, it is important to understand how members of the LGBTQ community may feel about certain charged words or phrases.

First and foremost, people should jettison the phrase *"sexual preference"* from their vocabulary. Suggesting that a person's sexual orientation is a choice is offensive to most of the LGBTQ community. *"Sexual orientation"* is the appropriate phrase, or simply *"orientation."*

Another word to avoid is *"homosexual."* Instead, use *"gay," "gay man," "lesbian,"* or *"gay person/people."* Similarly, it is not necessary to identify a lifestyle as a *"gay lifestyle"* or *"transgender lifestyle."* No two married or unmarried couples have an identical lifestyle, whether they are LGBTQ persons or not.

Marriage between consenting adults is legal in the United States, regardless of gender or sexual orientation of the two individuals choosing marriage. It is no longer necessary to use modifiers such as "*"same-sex"* when referencing marriage or *"gay"* when referencing a couple.

Another thing to keep in mind is that not all people use the typical *he* or *she* pronouns. Other people may use pronouns that more accurately describe their gender. For example, the pronoun *they* used as a singular pronoun may be more accurate because a non-binary person does not necessarily express or identify themselves as a male or a female.[14]

This all may seem overwhelming. To be sure, it is perfectly alright for the planner to admit that they care about their client's feelings. If a planner is just not sure what words to use, they should just ask. Placing questions about a person's pronouns in a client questionnaire and sharing the planner's pronouns in an email signature are also ways to demonstrate openness to a client. Besides, many people may have more gender-neutral names (or names people may not necessarily be familiar with) so sharing pronouns just makes the conversations more comfortable for everyone. In any event, showing care and compassion and awareness of the issues LGBTQ clients face is likely to increase the trust and openness of the relationship with the client.

PLANNING AND DRAFTING CONSIDERATIONS

When working with any client, it is important to draft documents that are clear, accurate, and precise. Estate planners are human, though, and it can be hard to know exactly what to change without fully understanding the client's culture. With marriage laws being gender blind, drafting documents for LGBTQ clients is now largely the same as drafting for cisgender (identifies as sex born at birth) straight clients. But the law has not caught up to social reality in all aspects of planning, and even if a client is not part of the LGTBQ community, there may be beneficiaries down the line who are LGBTQ. Being adaptive requires planners to revisit old boilerplate language to avoid the impact of stale law and language. With the rule against perpetuities being virtually non-applicable in most jurisdictions and the high federal tax exemptions relating to estate and generation-skipping transfers, it is simply a reality that even if your clients are not part of the LGBTQ community, there is likely to be an LGBTQ beneficiary of most long-lived trusts at some point in time. Thoughtful tweaks to boilerplate language can avoid ambiguities and litigation by recognizing issues before they arise and plugging gaps in the law or its application.

Gender-Inclusive Pronouns

One of the first boilerplate provisions to change is the pronoun provision. Many documents contain provisions that state any reference to a pronoun is intended to cover the masculine, feminine, and *neuter* forms of pronouns. Recall the discussion above surrounding pronouns. Adding that pronouns are inclusive of singular and plural forms is an easy change. Additionally, many LGBTQ persons find the term

provides a good resource for people wishing to learn more.

[13] Jenny Kleeman, *'We don't know if your baby's a boy or a girl': growing up intersex*, The Guardian (July 2, 2016), *available at* https://www.theguardian.com/world/2016/jul/02/male-and-female-what-is-it-like-to-be-intersex.

[14] Examples of non-binary pronouns are: they/them/theirs; ne/nem/nirs/nemself; ve/ver/vis/vis/verself; xe/xem/xyr/xyrs/xemself (pronounced like "ze"); ze/hir/hir/hirs/hirself; zie/hir/hir/hirs/hirself; ze/zir/zir/zirs/zirself; zie/zir/zir/zirs/zirself (pronounced like "zee" and "here").

ISSN 0886-3547

neuter to have a negative connotation. While the term *neuter* is probably the correct term, using *gender neutral* is just as descriptive and far less objectionable.

Healthcare

Another quick area that could use changing is the definition of health care. Adoption, surrogacy, and gender confirmation surgery are all very expensive and many trustees have faced the dilemma of having to try to fit the square peg into the round hole on this topic. Trustees often would like to help beneficiaries where they can, but sometimes the governing documents just do not allow for certain distributions.

Consider the following common situation: Sandy's grandfather made a gift to him years ago in an irrevocable trust for Sandy's benefit. The trust agreement provides for the classic standard of distributions to Sandy for health, education, maintenance, and support. None of those terms contains further definition in the document. Mark and Sandy are hoping to adopt. Given that the adoption fees are $40,000, Sandy asks the trustee if the trustee can make distributions to Sandy to cover the cost of adoption.

Many trustees have stretched the definition of ''health'' to be able to authorize such a distribution. While ''health'' may be interpreted fairly broadly, adoption probably is not clearly within its borders. To allow for flexibility, consider clarifying the definition of the health standard to include the cost of family planning, such as adoption, infertility treatment, and surrogacy.

The term ''health'' has also been used as the basis for allowing a distribution to cover the costs of gender confirmation surgery and related procedures, counseling, and medications. The costs of the gender confirmation process can be high, and so it is easy to imagine another beneficiary of the trust objecting to the expenditure. If ''health'' is specifically designed in estate planning documents to include gender confirmation procedures, an objecting beneficiary can be shut down quickly.

A definition that would allow the trustee to make distributions for adoption and gender confirmation procedures might look something like this:

> *The terms 'health' and 'medical care' of a beneficiary shall be construed liberally by the trustee to provide any mental or physical care that the trustee shall determine to be in the interests of the beneficiary's well-being. Such terms specifically shall include distributions for all expenses (including legal fees and travel costs) related to (a) gender confirmation surgery and related procedures, including cosmetic or reconstructive surgery, counseling, and medications; and (b) family planning, such as fertility treatments, adoption, and surrogacy.*

Note that the Tax Court has included gender confirmation surgery as an allowable deduction under §213(d),[15] so clients could make an unlimited gift to a loved one for gender confirmation surgery under §2503(e).[16] Gender confirmation surgery does not necessarily include everything that one might think of as being part and parcel with the gender confirmation surgery. Breast augmentation surgery for the same taxpayer was not allowed as a deductible medical expense since the Tax Court takes the position that breast augmentation surgery is *cosmetic.*[17] For clients thinking about making a gift to couples of the same sex for adoption and surrogacy, unfortunately such gifts are not included in the definition of health care under §213.

Name Changes

If a client (or their loved one) has not legally made a name change yet but is in the process of pursuing a name change or uses another name, the preferred name or pending new legal name should be referenced. For example, Sarah's legal name is ''Sean,'' but she only ever introduces herself as Sarah. Two possible ways to reference the difference between a common name and a legal name are: (1) Sarah Smith (legal name: Sean Smith); or (2) Sarah Smith a/k/a Sean Smith.

The name change issue arises even with cisgender clients, and so modifying planning document forms to include a provision that identifies key people such as family members provides a place for such name alternatives to be noted. With transgender clients, referencing their legal name may be preferable to using the ''a/k/a'' identifier because the individual has intentionally ceased using the prior name. Therefore, it is more accurate to say they have a different legal name than to say they are ''also known as'' the gendered name they have shed in order to embrace who they truly are.

If a client (or their loved one) has in fact legally changed their name, then it is best practice to fully restate the document wherever practicable. Transgender persons face even more discrimination and violence than others in the LGBTQ community.[18] Using a person's birth name rather than their preferred name (also called *dead naming*) can unnecessarily out the person and subject that person violence or discrimination by others, so whenever possible opt for a full restatement of the documents.

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[15] All section references herein are to the Internal Revenue Code of 1986, as amended (the ''Code''), or the Treasury regulations promulgated thereunder, unless otherwise indicated.

[16] *O'Donnabhain v. Commissioner*, 134 T.C. 34 (2010).

[17] *O'Donnabhain*, 134 T.C. 34.

[18] For example, a recent survey found that 46% of respondents were verbally harassed in the past year because of being transgender and nine percent of respondents were physically attacked in the past year because of being transgender. James, S. E., Herman, J. L., Rankin, S., Keisling, M., Mottet, L., & Anafi, M, The Report of the 2015 U.S. Transgender Survey, Washington, D.C.: National Center for Transgender Equality (2016).

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ADDRESSING CHANGE OF GENDER

Perhaps as many as 12% of millennials identify as transgender or gender non-conforming.[19] Just like practitioners ask clients about the scope of powers of appointment, planners may need to explore and plan for potential changes in gender. Providing in the boilerplate language that gender change or legal name change are not designed to write a person out of the document (assuming that is the case) may be important to avoid estate and trust disputes if a client does not update the operative document before death.

For example, if a document provides for a gift of ''$100,000 to my son, Brian, if he survives me,'' is Brian considered to not survive because Brian is now ''Judy'' and the settlor's daughter? As drafters, we provide for successor corporations when we make charitable gifts or name corporate fiduciaries in order to avoid confusion. Why not do the same for individuals.

An example of a provision to address gender and name changes follows:

> *Any reference to an individual named in this document shall continue to be a reference to that person even if such person has a reassignment of gender or a change of name. Gender references and legal names are used in this instrument for ease of identification, and a person shall not be deemed deceased or to be a different person due to a change of name or gender.*

Similarly, when a client (or their loved one) changes gender, even if the person does not legally change their name[20] the best practice is to restate the document so that the persons correct gender and pronouns are referenced. The point is to be accurate, avoid confusion, and, again, avoid inadvertently outing a client or beneficiary.

TIMING ISSUES WITH GENDER-SPECIFIC GIFTS

Clients sometimes want to leave specific gifts to a person or class that, at the time of drafting, may not be born yet. For example, a young client comes to you wanting to leave her engagement ring to her first-born daughter. The client does not have a daughter yet but plans to have children soon. The client subsequently has two children, both assigned female at birth. The first child transitions to male later in life, before the death of the grantor. The client dies not having updated the provision. The second child claims the ring belongs to her. That may have been the client's wish, but perhaps not.

Clients sometimes also like to leave a gift to a broad class of individuals, sometimes defined by gender. For example, a conflict that could arise by a gender-specific gift is a bequest of ''$1,000 to each of my then living grandsons.'' If a grandson confirms their legal gender to female before the death of the grantor, is that individual still included in the class?

Rather than referring to gender without more, because of the fluidity of gender in modern times, consider options that are more specific about the client's intent. Such a provision might address the time at which gender is determined for purposes of qualifying for the gift. For example, if the gift should be tied to gender identified at birth, the provision might read: ''To my oldest living child assigned a female at birth.'' In the alternative, if it is the client's intent that the gift is made where the beneficiary's legally assigned gender at birth remains unchanged at the time the gift vests, then the provision might instead say: ''To my oldest living cisgender daughter.''

Just as advances in reproductive medical technology have necessitated careful consideration of who exactly is a descendant and when that status is determined, the progress in the medical community in gender confirmation procedures requires learning to think about gender as fluid. If a gift relates to gender identity, then specifying the timing for determination of gender can help to avoid unnecessary ambiguities and trust controversies.

DEFINING DESCENDANTS

When children or grandchildren become a part of a family through adoption or surrogacy, standard boilerplate language may not adequately address how those descendants are to be treated. Particularly where one or both parents are not the biological parents of the child, or where a formal legal proceeding has not taken place, a classic definition of descendants (or a lack of definition in the documents that leaves the determination to statutory and common law) may exclude adopted children that the settlor would want to include. Even though all states have laws that an adopted child is a descendant of an adopting parent for purposes of inheritance, it is good practice to be sure that your documentation is clear that legally adopted descendants are descendants for purposes of the instrument.

Where a couple does not actually go through a re-adoption process for the non-biological parent (such as in the first hypothetical), most boilerplate language will not include that child in the non-biological parent's document as a descendant. Consider modifying old boilerplate language to provide the trustee discretion to determine that a non-biological, non-adoptive child is treated as a person's ''child'' for purposes of the document where there was an acknowledgment of parent-child relationship and/or where the non-biological, non-adopting parent held the child out as his or hers to the public.

Powers of Attorney

A final part of a holistic plan for LGBTQ clients is powers of attorney. In most states, a spouse may make

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[19] GLAAD, *New GLAAD Study Reveals Twenty Percent of Millennials Identify As LGBTQ* (Mar. 30, 2017), *available at* https://www.glaad.org/blog/new-glaad-study-reveals-twenty-percent-millennials-identify-lgbtq.

[20] Although many transgender individuals change their names, not all choose to do so.

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health care decisions for a person in the absence of an advance health care directive without a court order, but *some states* include a broad category of persons who can act other than the spouse. Though it could appear to some that a power of attorney for health care may be unnecessary among spouses, even today, LGBTQ persons may have parents or other immediate family members who do not support them.

To avoid conflicts in carrying out the client's wishes, rather than relying on state statutes to fill in a decision-maker regarding health care decisions and access to the client when he or she is ill, it is best practice to have a health care agency document. This advice really applies whether the client is a member of the LGBTQ community or not, but it is almost imperative when planning for a member of the LGBTQ community to avoid any misunderstandings at emotionally charged moments. Medical providers *generally* will respect a valid health care agency document and will honor the wishes expressed by the client.

Sometimes, estate planning attorneys are asked to prepare powers of attorneys for health care and property for the college-aged children of clients. While most practitioners would agree that having a legal adult designate decision-maker in the event of incapacity generally is a good idea for several reasons, it is important to consider and be upfront about the ethical rules applicable to assisting the client's child.

Consider a situation where a child is a member of the LGBTQ community, but not ''out'' yet. Here, the planner has represented Sarah and Tom for several years. Sarah has called their planner asking for help because their son, Ben, is headed to college soon. Sarah is anxious and would like the planner to prepare powers of attorney for health care and property for Ben, naming her as his agent. Ben signs the document and goes off to school. A year later, the planner receives a frantic call from Ben. His mother found out on Facebook that he was dating another male student and emptied his bank account. Obviously, this was a breach of her fiduciary duty, but could the planner have done anything differently to avoid this situation in the first place?

When preparing powers of attorney for anyone — including children of current clients — the planner should consider who the client is. Understand that the client is a separate party from the party paying the legal bill. The client is the person for whom the document is being drafted. In the example above, Ben is the client. To avoid a result like the one above, the planner should have considered having direct communication with the child to advise the child of what exactly the document provided and the role of the fiduciary. If the child does not want the parents to know their ultimate decisions as to fiduciaries, the planner will need consider how they will handle that predicament and related billing.

CONCLUSION

As society shifts toward greater tolerance and understanding of the LGBTQ community, it is inevitable that a planner will at some point, and probably sooner than later, need to address planning for a member of the LGBTQ community. Planners need to create an open environment so clients feel that they are able to bring their whole selves to the conversation. If the client is not comfortable being open with the planner, the client will not reveal information that might be important in drafting clear documents that reflect the client's intent. Whether the client or a beneficiary (or beneficiaries, for that matter) is a member of the LGBTQ community, planners need to be aware of the potential drafting issues that may arise so that they can draft documents that will still be relevant long into the future. Planners should also review their boilerplate provisions to be sure their estate planning provisions are up-to-date. By taking these steps to learn about the LGBTQ community and creating an open environment when speaking with clients, planners will draft better plans that fit more closely to the client's wishes and the beneficiaries' needs.

ISSN 0886-3547