



# Estate Planning for **LGBTQIA+** Clients

# Issues

## **We will discuss...**

- Inclusive intake, counseling, and drafting
- Marriage vs Domestic Partnership
- Planning for threats to marriage equality
- Legal name and gender marker
- Second-Parent
- Medical proxies and HIPAA waivers
- ART
- Disposition of remains



# Safety First

Your first priority needs to be the creation of a safe, inclusive, and affirming environment. LGBTQ+ clients are justifiably anxious about whether people are "safe." Before demonstrating legal expertise, demonstrate safety.

# Inclusive Processes

Your legal knowledge and expertise in this area won't matter if your internal processes do not help people feel safe and comfortable.

**How do LGBTQ+ Clients know if you are safe?**

Does your advertising, marketing, or website contain any indication that LGBTQ+ clients should feel safe with you?

**Does your intake process work for LGBTQ+ Clients?**

Does your client onboarding documentation use inclusive language and categories?

**Are you comfortable using the Client's pronouns?**

Are you comfortable asking for and using the Client's pronouns?

**Are you willing and able to draft appropriately?**

Will you ensure your documents include appropriate references to your Client and their relationships?

**Are you comfortable discussing LGBTQ+ issues and concerns?**

Are you aware of and comfortable discussing the central issues LGBTQ+ Clients need to address?





# Marriage Status

## **Obergefell v. Hodges, 576 U.S. 644 (2015)**

- SCOTUS ruled (5-4) that a fundamental right to marry is guaranteed to same-sex couples by the Due Process Clause and the Equal Protection Clause of the Fourteenth Amendment.
- Ruling requires all states, District of Columbia, and insular areas to recognize same-sex marriages on the same terms and conditions as opposite-sex marriages.
- Prior to Obergefell, same-sex marriages had already been established by state statutes, court rulings, and voter initiatives in 36 states, DC, and Guam.



# Marriage Status

## Domestic Partnership

- Many same-sex couples choose not to marry and instead maintain domestic partnerships.
- Subject to state law or corporate policies, couples in a domestic partnership cannot claim one another as “family.”
- Affects government and employment benefits, character of property acquired during partnership, financial support when partnership ends, income tax filings, social security, etc.
- No portability for estate taxes.
- Oklahoma confers no rights, automatically, to domestic partners.



# Threats to Marriage Equality

## **Dobbs v. Jackson Women's Health Organization**

- SCOTUS ruling overturned federal constitutional abortion protections established in Roe v. Wade
- Shared constitutional basis of Roe and Obergefell open the door for SCOTUS to consider whether same-sex marriage and even same-sex intimacy are protected
- Several governors and state legislators are hinting intentions to bring challenges to Obergefell, with some seeking to invalidate past same-sex marriages



# Threats to Marriage Equality

## Protecting Client's Intention

- 84 OS § 114 addresses how divorce or annulment affects a testator's will
- Treats a former spouse as having predeceased the testator
- Some fear that state invalidation of a marriage would have similar effect on a testator's will or a grantor's trust
- In light of potential threats to marriage equality, include language that makes the client's intentions to benefit their husband or wife clear, even if the marriage is dissolved or invalidated by state action



# Transgender Clients

## Changes to Legal Name and Gender Marker

- 12 OS § 1631 et seq addresses a person's right to change their name
- There is no prohibition on changing a name to conform to one's own gender identity
- No such statute exists giving a court guidance about a change to gender marker
- In the absence of such statutory guidance, judges have both legal and equitable authority to grant the requested relief



# Transgender Clients

## Changes to Gender Marker

- Okla. Admin. Code § 595:10-1-27(c)(4) recognizes Psychological Sex Change due to Gender Dysphoria and grants that a person may receive a gender marker change on identification with a court order
- Oklahoma Executive Order 2021-24 prohibits amending gender marker on Oklahoma birth certificates, so petitions and orders for changes to gender marker should be carefully drafted with this in mind





# Second Parent Adoption

## Threats to Nonbiological Parental Rights

- Important for nonbiological parents or nongestational mothers to quickly and clearly establish parental rights in a same-sex marriage
- Recent case from Oklahoma County (FD-2021,3681 Wilson v. Williams; FP-2022-44 Vaughn v. Wilson) found that a nonbiological mother's failure to adopt her son had forfeited her parenting rights to the child's sperm donor
- Advise clients to seek a second-parent adoption

# Medical Proxies

- Name domestic partners in powers of attorney, medical directives, and HIPAA waivers
- When naming a same-sex spouse, include language protecting intent if and when the state invalidates a marriage
- If using clauses that revoke appointments in case of divorce or separation, clarify that this does not pertain to dissolution of marriage due to state action





# Other Issues

## **ART**

- Assisted Reproductive Technology
- If couple has frozen embryos or gametes, how should they be handled?

## **Disposition of Remains**

- 21 OS § 1151
- Who has authority to take disposition of remains?
- Should next of kin or domestic partner have rights to remains and to make memorial arrangements?

# Conclusion

Planning for LGBTQ+ individuals necessitates creating inclusive intake processes, clarification of the nature of the relationship, potential tax and benefit issues, adoption and custody, name and gender marker, and other potential issues.

Stay open. Stay informed.

# Questions & Answers

