FEDERAL BENEFITS PANEL
LAVENDER LAW 2020, WASHINGTON, D.C.

ESTATE PLANNING

I. GOVERNMENT SERVICE

Clients who work in a government job, at any level, will have acquired retirement benefits that need to be addressed when drafting a comprehensive estate plan.

A. State/local government service

Retirement and survivor benefits for clients who are working for or retired from government service will be determined by state law and, occasionally, a collective bargaining agreement. Therefore, it is necessary to become familiar with the law, regulations and provisions that apply.

There is no "one-size" for these provisions. Too often, there is a byzantine system that needs to be navigated to understand how retirees and spouses/partners are treated. This will include the rights of an employee to provide for a surviving spouse/partner or, in some cases, a person of the employee's choosing who does not fit into the former categories.

Clients need to understand the ramifications of any decision they make because it is possible that once made the decision can never be changed.

For example, under Ohio's Public Employee Retirement System (PERS), an employee may name anyone to receive a portion of their retirement benefits. Once made, however, the designated person can be changed only if the employee marries. A client named her partner and then the women went their separate ways. The client permanently lost a significant portion of her retirement benefits when the couple ended their relationship. This was a pre-*Obergefell* decision and, unfortunately, the client had not consulted a lawyer before making the decision.

B. Federal government service

From August 1, 1920 to December 31, 1986, federal employees were covered by the Civil Service Retirement Act (CSRS). This provided a retirement program for federal employees. Those employees covered by CSRS **did not** pay into Social Security and, unless they accrued work quarters from other non-government employment, do not qualify for SSA retirement benefits. CSRS was replaced by the Federal Employee Retirement System (FERS) in 1987.

There are thousands of retirement federal employees and surviving spouses, who continue to receive benefits under CSRS.

Federal employees are currently covered by the **Federal Employee Retirement System** (FERS). FERS is a three-part retirement plan providing benefits to retirement employees from the **Basic Benefit Plan, Social Security** and the **Thrift Savings Plan (TSP).** The Office of Personnel Management (OPM) administers federal retirement programs. The FERS program became effective January 1, 1987. All federal employees hired since then are under this program.

TSP is the federal government's version of a 401(k). The government contributes 5% of the

employee's base salary to the account. The maximum amount an employee may contribute changes annually. For 2019, a employee may contribute a maximum of $19,000.

Under FERS, employees must meet a combination of age and service requirements. Employees are entitled to an immediate retirement benefit at 60 with 5 years of service; age 60 with 20 years of service and age 55 with 30 years of service. Employees who are 55 with 10 years of service may receive reduced benefits.

Employees who retire early (under 62) may avoid the 5% annual penalty in three ways: the "early out," delayed annuity or a deferred annuity.

1. Early Out: this comes from an agencies need for a "reduction in force" (RIF). Agencies will give employees an opportunity to retire early (age 50 with 20 years of service; any age with 25 years of service). The age reduction penalty is waived if the employee elects to leave or is force out when the agency if making retirement offers. These employees who have been covered by the Federal Employee Health Benefit (FEHB) or Federal Employee Group Life Insurance (FELGI) program will be allowed to continue that coverage after leaving the government.

2. Delayed Annuity: FERS employees may retire at their minimum retirement age (MRA) after 10 years. However, retiring before 30 years of service results in an age reduction penalty. Delaying the annuity until age 62 allows the employee to avoid the 35% reduction. In addition, as with the early out option, employees who were covered by FEHB or FELGI for at least 5 years will be allowed to reenroll in both programs when they start receiving the annuity.

3. Deferred Annuity: employees must be at least 62 with 5 years of service, age 60 with 20 years of service or have reached their MRA with 30 years. Unlike the other options, deferred annuitants are not eligible to reenroll in either the FEHB or FELGI programs.

The Basic Benefit will reduce an employee's Social Security Retirement benefit unless they fall into certain categories: retired at the MRA with 30 years; 60 with 20 years or on voluntary early retirement or involuntary retirement beginning at the employee's MRA.

A federal employee becomes vested in retirement benefits from the Basic Benefit plan after 5 years of employment. They are eligible for survivor and disability benefits after 18 months of **civilian service.**

OPM provides extensive resources on its website: OPM Retirement Services

II. LGBTQ+ COUPLES/FAMILIES

In addition to understanding retirement issues, especially for government employees, lawyers need to address the sometimes unique situations presented by LGBTQ+ clients.

LGBTQ+ clients may require life-planning documents that include unrelated individuals or organizations. LGBTQ+ clients may have families of choice rather than birth families and identifying the people who can serve as executors or administrators can be a challenge. Helping clients identify possible candidates is a challenge.

Not all LGBTQ+ clients will be married. Some lesbian and gay couples will decide that marriage does not meet their needs or creates more problems than they want to handle. Low-income people

may not see marriage as beneficial to them. It may be helpful to discuss whether marriage can help protect a family or establish parental rights.

It is also important to investigate whether the client can name a someone who is neither a spouse or a child as a beneficiary. Discussing this possibility with the client will help avoid a situation where the designated beneficiary is determined to be ineligible and the employee cannot make changes because of death or incapacity.

Clarifying the couple's relationship is important. LGBTQ+ individuals will benefit from stating the relationship between the testator and the person being named as executor or administrator. Clearly establishing the testator's intention to name a non-family member in those positions may help avoid a contest later. Including information about the length of the relationship or whether the couple entered into some type of formal relationship before *Obergefell*.

Naming Beneficiaries

Discuss the importance of naming primary and alternate beneficiaries for retirement accounts, insurance policies, and bank accounts.

Naming beneficiaries does not interfere with the client retaining control over the assets. Absent an allegation of fraud, duress or incompetency when the designation is made no one can challenge those decisions. The beneficiary designation determines who receives the assets and that designation supersedes any will clause concerning the disposition of assets.

Twenty-four jurisdictions[1] allow "transfer on death" designations for real estate. In those states, clients may want to execute the TOD document. Naming a beneficiary through a TOD document may allow title to pass by operation of law rather than through the probate process. The grantor retains full control over the property during her lifetime because the beneficiary receives no present interest.

Some 401(k) plans restrict beneficiary designations to "spouse." The U.S. Department of Labor[2] issued instructions that "spouses" and "marriage" includes same-sex spouses. Review the retirement plan's provisions to determine how it works and make sure the client understands them.

Knowing the plan specifics now means there will be no surprises later and will help determine the steps a client needs to take. Under ERISA, the plan administrator pays the proceeds to the named beneficiary. State law does not apply. If the plan participant failed to name a beneficiary, the "spouse" is considered first. When there is no spouse the asset is paid to the decedent's estate. Without a will, the asset will pass according to the state's intestate succession law.

Executor

Most lesbians and gay men in a committed relationship (married or not) name each other as executor. An alternate executor should also be named. If there is no named alternate, the probate court will name an administrator and that person may not be one the testator wants.

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[1] AK, AZ, AR, CO, DC, HI, IL, IN, KS, MN, MO, MT, NE, MV, NM, ND, OH, OK, OR, SD, VA, WA, WV, WI and WY

[2] *Guidance to Employee Benefit Plans on the Definition of "Spouse" and "Marriage" under ERISA and the Supreme Court's Decision in United States v. Windsor,* Technical Release No. 2013-04: 4

Some clients may need to name someone who is a legal stranger because they are single or have no family members available to serve in that capacity. Low income and elderly LGBTQ+ clients may have difficulty identifying someone to serve as their executor because they have "families of choice" and those people may be in the same age-group. A social worker or an agency providing services to the client may be able to help find someone. The local probate court may have a list of people that volunteer to serve as executors.

Guardians for Minor Children

Generally, when a parent dies, the surviving biological parent has superior rights to all others. In cases involving lesbian or gay parents, there is often only one parent legally recognized by the state. For this reason, appointing a guardian for a child is important. The other partner may also have a strong parent-child relationship but state law does not recognize it. Without some type of court order, the non-biological surviving partner has no legal rights. A **guardian clause** in a will is particularly important for lesbian and gay couples raising minor children.

The guardian clause needs to include:

- Primary guardian nominee
- Alternate nominee
- Bridge guardian nominee

Second parent and joint adoptions are not permitted in all states. States cannot refuse to recognize out-of-state adoptions. The Full Faith and Credit clause of the U.S. Constitution applies in those situations. State laws that sought to prevent recognition have been successfully challenged in federal court.[3]

The court will consider the child's best interests in making its placement decision. Without guidance or in spite of guidance, the child may be placed with a member of the decedent's biological family. This may include someone the child does not know.

Nominating a guardian for the child in a will presents a rebuttable presumption of the deceased parent's preference. This may enhance the surviving partner's claim to be named the child's guardian.

Include the parent's reasons for selecting the nominee. Incorporate language explaining why the parent decided to not name family members.

The guardian clause can include language that reflects the testator's consent for the surviving partner/spouse to adopt the children. This rebuts an argument that the deceased parent would oppose such an adoption.

SAMPLE LANGUAGE:

"I name my partner, Elizabeth R. Anderson, as guardian of our children, Robert and Emily. I appoint her guardian of their person and estate.

[3] *Finstuen v. Edmondson*, 496 F.3d 1139 (10th Cir. 2007)

We have raised these children together from their birth. I consider her their parent. When I executed this will a second parent adoption was unavailable to us or we would have pursued that avenue. I waived my constitutional rights to the full care, custody and control of our children in favor of Elizabeth during my lifetime. I want her to continue to raise our children. I consent to Elizabeth adopting Robert and Emily. I ask that any probate court recognize this declaration as my consent to the adoption. It is in our children's best interest that they continue to be raised by their other parent, Elizabeth R. Anderson.

We executed a Shared Custody Agreement on December 10, 2003 after Robert was born. We amended the Agreement after Emily's birth. That Agreement was adopted by the Cuyahoga County Juvenile Court on August 7, 2009."

A trust is an excellent alternative in situations where there is a fear the non-biological/adoptive parent will not be appointed as guardian. Placing the children's inheritance into a trust will allow the surviving parent to continue having contact with the children. Think of this as the "Auntie Mame" clause--Mame got her nephew but the bank controlled the money and maintained access to the kid.
Ensuring that the surviving partner remains a part of the child's life is in the child's best interests. Children need continuity and that gives them security.

An additional clause to consider names a **"bridge guardian."** This person takes the children until the court names a guardian. For lesbian and gay couples, this clause could prevent the children being removed from their home when their "legal" parent dies and placed in foster care or with relatives they do not know.

Naming a bridge guardian reflects the testator's intent about who will have custody of the child before a permanent guardian is named. It protects the child and provides additional evidence of the surviving partner's relationship with the child. Losing a parent is traumatic enough for a child. A child's best interests are not served by placing her in an unsettled home situation. A bridge guardian is one tool to accomplish that purpose.

Birth Certificates

This is an administrative procedure and the document does **not**, necessarily, confer parental rights simply because a person's name is listed as a parent. Same-sex parents need to take additional affirmative action to establish parental rights for both parties. Even if the couple is married and the child is born during the marriage, reliance on a birth certificate is not enough.

Prevalidation of Will/Trust

Ohio[4], Alaska[5], Arkansas, Nevada and North Dakota allow you to prevalidate a will. Delaware[6] allows prevalidation of trusts. Alaska permits non-residents to take advantage of the law. However, that may create problems in the testator's home state because a probate court may not recognize the actions taken in another state as controlling.

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[4] Ohio Rev. Code § 2107.081-085

[5] A.S. 13.16

[6] Del. Code tit. 12

This proceeding, allows the testator, during his lifetime, to ask the court to determine the validity of his will. All parties entitled to notice under the intestate succession statute are notified of the hearing and permitted an opportunity to appear and contest the will. A finding by the court that the will is valid precludes any contest after the testator dies. If the testator changes his will, another validation hearing is required.

This process gives the testator peace of mind if she fears a will contest because the family must contest the will with the testator present. A validated will cannot be contested after the testator dies. When the client fears a will challenge, this process provides excellent protection.

If the court finds that there is evidence of duress, fraud, incompetence or undue influence, the will presented for validation is declared invalid. The testator can then take the necessary steps to draft a new will. The testator can then return to court to seek validation of the new will. Challenging a will under these circumstances is difficult because it is an affirmative action by the testator. Generally, that will preclude a finding of fraud, duress, incompetence or undue influence.

It may be possible to seek prevalidation even if your state does not have a specific statute. A petition to prevalidate a will is a pre-emptive move on the part of the testator. Will contests take place after death and prevalidation is a request to move up the contest to a time when the testator can provide evidence of his state of mind. This is a creative move to assist clients and alleviate their concerns.

ART & Estate Planning

The ongoing developments in Assisted Reproductive Technology procedures present challenges to courts when interpreting trusts, wills and other estate plan documents decades after they were drafted.

There are issues of standing, intestate inheritances, definitions of "child," "descendant," "beneficiary," and "heir." Pre-existing trust provisions must be examined to determine whether the trustor intended to include posthumous children born in the beneficiary class when the trust has already been paying out proceeds. Are those children entitled to receive retroactive as well as future payments? What about children that are not genetically related to the trustor?

This is another aspect of estate planning - **dealing with a client who already has an extensive estate plan in place.** Review those documents to ensure they reflect recent and ongoing developments in estate and family planning.

Clients who participate in ART need to remember that the stored genetic material and the embryos are part of their estate and is considered property. The testators may bequeath it to whomever they please, unless there is an existing contract that addresses the issues.

It is important to properly document the client's wishes concerning the disposition of that stored material. Without such documentation, a court will impose its opinion and that may impact the estate in ways the testator did not intend or envision.
Since clinic forms may include provisions that addresses the disposition question at death or divorce, there may be conflicts between the signed agreement and the testator's intent. In those situations, any conflict may be resolved in favor of the contract language. Also consider that family members may be subject to the post-death disposition provisions of the clinic agreement. **Reading the clinic donor contract or storage contract is important.**

Who is a descendant, an heir or issue?

Some trusts were created long before ART was anything more than a plot point in a science fiction movie. This raises new questions: Do posthumous children, or their parent, have standing to bring legal action for a share in the trust? Do the other beneficiaries have a cause of action to object to including those children? To whom does the fiduciary owe a duty?

In 2007, the New York County Surrogacy Court considered this matter in *Matter of Martin B.*, NYLG 8/6/2007 (NY Co. Surr. Ct. 2007). The grantor created several trusts in 1969 to benefit his children and grandchildren. The grantor's son died in 2001 but left cryopreserved sperm. His widow used the sperm and delivered two children in 2004 and 2006. She sought to have her sons included as trust beneficiaries. The trustees filed an action in Surrogacy Court requesting a determination of the sons' qualifications as descendants or issue. The court decided the children were descendants of the grantor and should be included because the Grantor would have included them had he considered that ART would be possible.

A second New York case involved a trust created in 1959. The beneficiaries were the grantor's "issue" or "descendants" and their spouses. The trust provisions specifically excluded anyone who was adopted. The grantor's daughter and her husband engaged a gestational surrogate using a donated egg and the husband's sperm. The pregnancy resulted in the birth of twins in California. A California court declared the daughter and her husband the twins' legal parents. The trustees petitioned the court for an opinion concerning whether the twins were included since they were not genetically related to the grantor. The New York court decided the children were included because they were not adopted. Even though New York law declares surrogacy agreements to violate public policy, there is no prohibition against recognizing the California parentage decision. See, *In re Doe*, 793 N.Y.S.2d 878 (Sur. Ct. 2005).

Virginia, for example, does not recognize any child born more than 10 months after the parent's death. Georgia requires the child to be born within 10 months of death and survive at least 120 hours after birth. New York prohibits any posthumous child from claim a share of the estate through its omitted child statute (N.Y. Estate Powers & Trusts L. Sec. 5-3.2(b)).

Family members providing for heirs

There are testators who may disapprove or reject a LGBTQ family member and exclude such members from inheriting. If a client wishes to do so, generic language will be insufficient. Specific language addressing a specific scenario will be necessary. The definition clause in the estate planning documents will also be essential to establish the testator or grantor's intentions concerning the LGBTQ family member.

Restricting an heir's right to marry may be problematic. Stating that only those who marry a person of the opposite gender may violate public policy. But, this particular scenario has not yet resulted in a published court decision.

Still, it behooves lawyers to carefully draft any documents to accurately reflect the client's wishes. This includes the intention to include an heir even if that person identifies as transgender and transitions after the document is drafted.

Drafting Considerations

Careful drafting of estate plan documents can help avoid future problems. The testator or grantor's intent, and the expression of that intent, can be included in any will or trust. Generic provisions serve no purpose other than to create confusion. Religious and moral objections to a LGBTQ heir are more likely to be upheld than not. Specificity is the best way to establish intent.

The modern family structure does not fit neatly into most intestate and inheritance rules and statutes. The imprecise nature of language can create ambiguity and that lack of clarity will allow a court to determine the meaning.

Questions: How do today's definitions address changes in tomorrow's statutory changes? What is the best way to reflect the testator or trustor's intent concerning descendants and heirs? What do the words used mean?

Drafting specific provisions to deal with potential posthumously conceived children can be helpful even if there is an applicable state law. The client can modify any statutory default language that does not conform to his wishes. Creative drafting that allows clients to realize their goals concerning stored genetic material will help avoid expensive litigation.

Consider the long-term effect of any language used in the estate plan documents. Identifiable heirs and descendants may not be using ART but that does not mean future generations will do the same. Consider further advances in reproductive technology that cannot be ascertained now. Drafting language that addresses those future developments allows the client to about how to provide for those future, unborn descendants.

The Restatement (Third) of the Law of Property concerning wills and trusts provides:

> "Unless the language or circumstances indicate the transferor had a different intention, a child of assisted reproduction is treated for class gift purposes as a child of a person who consented to function as a parent to the child and who functioned in that capacity or was prevented from doing so by an event such as death or incapacity.
>
> Unless the language or circumstances indicate that a transferor had a different intention, a class gift that has not yet closed physiologically closes to future entrants in the distribution dates if a beneficiary of the class gift is then entitled to distribution."

The Restatement disregards marital status and does not require written consent or a specification of post-mortem conception. Consent is dispensed with altogether in cases of death or disability. It also postpones closing the class to future entrants until the distribution date.

But, the **Restatement does not resolve the issue of whether a beneficiary is sufficiently "in being" to be entitled to receive a share**. The Restatement only provides that a child is "in being" if it is born **within a "reasonable time" after the decedent's death**. **Should the dispositive document define "reasonable time?"**

Wills can be easier to change than trusts but trusts are written to provide for future generations and it may be prudent to take greater care when drafting the pertinent documents because ART issues have the potential to disrupt even the most carefully drawn estate plan's dispositive sections.

Public policy is often cited to preserve or prevent certain outcomes but public policy changes over time. What is generally accepted public policy now may be much different at the time a clause is reviewed and analyzed.

Posthumous children, postmortem extraction of genetic material and cryopreserved genetic material create opportunities for subsequent heirs present issues just as illegitimacy and adopted children did in the 20th century.

State legislatures appear to be ignoring the legal issues raised by these scientific developments, most likely because legislators do not understand the science or medicine or because of the potential for religious objections. The courts are trying to resolve these difficult matters through creative interpretations of existing statutes.

As a practical matter, lawyers draft for various contingency scenarios in estate plans including unforeseen and possible bizarre outcomes. Drafting documents that include provisions for future born and possible genetically unrelated heirs and descendants, defining terms with this in mind and discussing possible outcomes with clients is becoming an essential part of the process.

The language used in drafting these provisions must be as clear and unambiguous as possible. And failure to fully consider these matters leaves any decision to the law of intestacy. It also leaves open the possibility of a conflict with future laws and ambiguity about whether a future statute would control.

The provisions in wills and trusts that address posthumous children, postmortem extraction and ART in general can range from simple to complex. Some clients will not want to include these potential heirs. In those cases, the client's documents must specifically exclude them from the beneficiary class.

A client may want to provide for grandchildren or more remote descendants but not include those born via ART techniques. Silence in a definition provision may be deemed intent to include such descendants. Remember, however, that a testator's words and actions during life may also be used to assist a court in defining intent.

The testator and grantor have broad authority to define descendants and the general rules of construction defer to consideration of a testator's intention when interpreting any given clause.

Discussing the matter with clients affords them the opportunity to clarify their intent. Documenting the file concerning such a discussion and the client's response will be helpful should the lawyer be faced with a need to defend her actions in the matter. Estate planning lawyers may also consider adopting a default provision and inserting it in every estate plan as a matter of course. The terms of such a clause may include a time limit either in terms of the number of birth attempts or an actual live birth.

On a basic level, the documents need to address parentage issues including when a parent-child relationship exists between a person and child. Clients can limit descendants to those created within the context of a traditional marriage or provide an expanded class that includes children born to an unmarried individual, a couple in an unmarried relationship, a nontraditional marriages including those between lesbian and gay couples or a legally recognized relationship such as a civil union or registered domestic partnership.

The estate plan documents allow clients to override existing law to suit their personal or family beliefs. Customizing the documents to address unique situations such as same-sex married couples living in a non-recognition state that does not permit second parent adoption provides an opportunity for creative and robust estate planning.

A testator may decide not to include children born to a same-sex couple or limit inclusion to only children who are genetically related to a direct descendant. That would preclude children born via ART techniques that include donor genetic material and a gestational surrogate. Such an exclusion is not limited to same-sex couples since heterosexual couples may find themselves in a similar situation.

The estate documents can also place time restrictions on the birth of a posthumous child in order to provide for the orderly termination of the estate. This is not as important in trusts that distribute income to beneficiaries and can accommodate descendants as they are born. Provisions that are more complicated are necessary to define the parameters of the class when distribution is to occur at a specific time and on the happening of a clearly defined event. Posthumous children may be born after the event occurs that triggers distribution and that eventuality needs to be included in the definitions.

Excluding ART children also means deleting references to anyone "conceived" after the triggering event. Language will be very important and using other terms such as "in utero," "placed in gestation" or "implanted embryos" may serve to define the medical event that occurred. In any event, careful drafting is required to meet the client's expectations and avoid a protracted court battle down the line.

Proposed Definition Language

Some basic criteria in defining posthumous issue may involve the donor's consent, the parents' marital or relationship status, whether there were time limits and notices to the fiduciary of a pregnancy or pending birth.

i. **Parental status of a deceased individual**

An individual will be considered the parent of a child conceived and born after the individual's death if she or he (1) dies before placement of his or her sperm, ova or a resulting embryo and (2) designates another individual who is living at the time of placement as the other intended parent of any resulting child.

ii. **Child born by posthumous conception or implantation**

For purposes of any distribution, an individual will be considered the child of his or her biological parents, even if placement of that parent's sperm, ova or a resulting embryo occurs after that parent's death, so long as the other parent is the deceased parent's surviving spouse or an individual designated by the deceased parent and the child is born alive not more tha 300 days after the date of the distribution.

iii. **Suggested provision for defining "child"**

"Child" includes those conceived by a genetic parent through assisted reproductive technology techniques. The parents of that child must be in a marriage, civil union, domestic partnership, registered domestic partnership

or a similar legal relationship. The U.S. government or the state in which the parents live must recognize the relationship. The other parent includes one who is not a genetic parent to the child. The other parent must have executed a written document acknowledging his or her intent to become a parent. That document shall not have been revoked before the pregnancy began and implantation of the embryo occurred.

"Child" shall also include those conceived by my child, grandchild or similar heir or descendant where there is no genetic connection between the child and the parents. This includes children conceived using assisted reproductive technology techniques that use donated genetic material and a gestational surrogate.

iv. "It is my intention to include the children, grandchildren and subsequent descendants of those named in this document, including those who are adopted or born via assisted reproductive technology and surrogacy."

v. **Suggested provision defining "intended parent"** [this clause can be used when the surrogate is not an intended parent and is not married to or in an intimate relationship with the intended parent.]

A child born to gestational surrogate is not considered the surrogate's child. The child born to such surrogate shall be considered the child of the intended parents. The intended parents are those who caused the surrogacy to occur.

vi. The term **"descendants"** includes those children whose parent/child status arose by virtue of one or more of the following events:

(a) natural child birth, regardless of whether woman giving birth contributed genetic material, unless woman giving birth was a gestational surrogate under a written contract;
(b) legal adoption, including second parent, joint and post-mortem adoption;
(c) court declaratory judgment of parentage including pre-birth order;
(d) parent/child status granted by state law to children born during a same-sex domestic partnership, a civil union or marriage; and
(e) birth of a child from decedent's gamete where either:
(i) the embryo is in utero not later than 36 months after the individual's death or
(ii) the child is born not later than 45 months after the individual's death.

All children or descendants deemed children or descendants of the person indicated by any of the above methods are children or descendants for the purpose of this instrument.

vii. **Child by surrogacy**

An individual will be considered to be the parent of a child if the individual or his or her spouse or domestic partner contributed a gamete or embryo and such contribution resulted in the birth of the child to an adult woman who, under the terms of a surrogacy or similar agreement agreed to bear but not parent the child, whether or not implantation of the gamete or embryo occurred before the individual's death.

viii. **Suggested provision defining "posthumous child"**

A child that was in utero at the time of my death and born alive after my death shall be included within the class of beneficiaries designated in this document. This provision refers only to a child of a person included in the definition of "child" in this document or to a person who is specifically named in this document.

- **Alternate provision #1:** A child that was not in utero at the time of my death shall not be considered my heir or descendant for any purpose.

- **Alternate provision #2:** I acknowledge any child born to any child, grandchild or descendant of mine who came into being by means of assisted reproductive technology, including surrogacy, or who is adopted and include such child as my heir and entitled to be included in any class of beneficiaries named in my [will or trust].

A more complex provision of the foregoing can include the following:

- Include specific requirements for when the child must be born. This would be similar to the requirements established by Virginia--in utero within 36 months or born within 45 months after the decedent's death.

- Include children born after the 45-month period if in utero during that time. This permits inclusion of a younger sibling born if at least one child is born during the 45-month period. The period can be extended to 90 months.

- Require compliance with specific and detailed notice requirements to extend a trust for posthumous children. This requires the eligible beneficiary to notify the trustee of an intention to become a parent using ART techniques. If notice is not given or a child is not born during the 45-month period, the trust can terminate.

III. LGBTQ+ SENIORS

By 2050 the number of people over the age of 65 will be approximately 83.7 million. It is estimated that 2.7 million of those people will identify as LGBTQ. Approximately one-third of those seniors live at or below the federal poverty level. There is a misconception that all LGBTQ people are wealthy. The reality is quite different.

Transgender elders face specific medical needs that include transition-related medical care. Too often, transgender elders are forced back into the closet when they enter long-term care (LTC) facilities because of discrimination or abuse by family, staff, or other residents.
Finding affordable senior housing is very difficult. In Cleveland, Ohio, the only housing specifically designed for LGBTQ seniors is A Place for Us on the city's west side. There are 54 units available and, while the facility does not discriminate, it is intended as a safe housing space for LGBTQ seniors.

There is insufficient data regarding elder abuse of LGBTQ seniors primarily because they are not designated an "underserved population" by the U.S. Department of Health and Human Services. Such a designation results in more federal funding for research.

Many LGBTQ seniors are estranged from their birth families and their "family of choice" is often in the same age group. That means these seniors are less likely to have a robust support system to assist them as they age. If the LGBTQ senior is unable to remain in her home, she will be forced into a LTC facility and be faced with the decision to either go back into the closed and hide her identity or be subjected to discrimination and abuse by residents and staff.

A senior lesbian couple in Missouri faced discrimination when the retirement village they found refused to let them buy a unit because of their sexual orientation. The Friendship Village Sunset Hills, located near St. Louis, told them they could not move in because it had a policy that "defined marriage as between a man and a woman" and "as marriage is understood in the Bible."

The women sued claiming discrimination and violation of the Fair Housing Act (FHA). The FHA prohibits discrimination due to "race, color, religion, sex, familial status, or national origin." The federal judge dismissed the case, "[T]he Court finds the claims boil down to those of discrimination based on sexual orientation rather than sex alone." Missouri does not prohibit discrimination based on sexual orientation or gender identity.

Federal law does not prohibit discrimination based on sexual orientation and gender identity in senior housing.

HOWEVER, in 2018, the 7th Circuit Court of Appeals held that a landlord may be liable under the FHA for failing to protect a tenant from known discriminatory harassment by other tenants. The court reinstated a lawsuit[7] filed by Marsha Wetzel. She claims the facility failed to protect her from abuse, including harassment, discrimination, and violent attacks, by the other residents because of her sex and sexual orientation. In addition to the FHA, the suit also includes claims under the Illinois Human Rights Act that prohibits discrimination based on sex or sexual orientation.

IV. END-OF-LIFE ISSUES

Many LGBTQ seniors do not trust health-care providers and that makes it difficult to discuss end-of-life plans. Most senior LGBTQ elders have no one to call in a crisis. They also may have no one to name as an executor, trustee, agent under a general durable power of attorney or an advance directive.

Failure to plan for the end of life places the LGBTQ senior in a position of having someone else make the decisions. Palliative care may not be arranged. Hospice care may be avoided.

There are few community resources available for LGBTQ seniors who have no one to assist them. Unfortunately, the LGBTQ community at large seems to concentrate on the needs of young people at the expense of the community's elders. For several years, the community has promised young LGBTQ people that "it gets better." For LGBTQ seniors "it gets better" until it doesn't.

Lawyers representing LGBTQ seniors need to be creative when addressing these client needs. It may also be necessary to follow-up with the seniors, especially if they are in LTC facilities, to ensure they are being properly treated. This population with the LGBTQ community cannot be viewed as a "one and done" situation.

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[7] *Wetzel v. Glen St. Andrew Living Community, LLC, et al.,* 2019 WL 4057365 (7th Cir. Aug. 27, 2018)

V. MULTI-PARENT FAMILIES

Multi-parent families include the following:

- Multiple adults involved in a consensual intimate relationship with each other, and who are raising children;
- Married same-sex lesbian couples with one spouse giving birth, her spouse claiming parentage and the biological father retaining parental rights;
- Platonic partnering where two or more adults, who are not in a romantic relationship come together as a family;
- Friends opting to co-parent with the child's parents

Mention the topic of polyamory families make most people cringe usually because they do not understand the concept.

"Polyamory" involves intimate relationships with more than one adult and with the consent of all the partner. It is synonymous with "non-monogamy." And, it is more prevalent than commonly thought.

The legal issues that polyamorous families need to contend with may be difficult to adequately resolve depending on where they live. Careful and creative estate planning will benefit these clients by offering them long-term solutions. The law has not caught up with the changing face of the family in the United States.

Third parent adoptions are available in California, Oregon, Washington, Massachusetts, and Alaska. Delaware, California, and the District of Columbia have statutory provisions that allow for third parents.

VI. ADVANCE DIRECTIVES

Each state has its own form that is recognized by health care providers[8]. These forms should also be honored outside the client's home state. Federal Medicare regulations require every medical or health care facility that receives federal funds to honor the directives.

Even though these documents are included in an estate plan, the client needs to discuss the choices with her doctor, especially if the client has a terminal illness or other significant medical condition.

The client should include as much information as possible in the advance directives to be sure her wishes are carried out and everyone knows what she wants done. Clients must understand this is no time for secrecy or confidentiality. It is a time for absolute candor with the family, friends and their healthcare providers. The client should also provide copies to their healthcare providers and any agencies that provide services.

Lawyers that work with low-income or elderly clients may keep a copy if the client has challenges finding or maintaining a regular home address. The client may not have a safe place to store the documents. Clients may not have a fireproof box or bank safe deposit box available.

[8] www.americanbar.org/groups/law_aging/resources/health_care_decision_making/Stateforms

VII. HIPAA AUTHORIZATION

The Health Insurance Portability and Accessibility Act is a federal law that prohibits medical personnel from discussing a patient's condition with anyone other than those authorized by the patient. Clients should execute this type of authorization as part of their Advance Directives. The client can limit the authorization to a partner, family member or other person.

Medical and hospital personnel continue to exhibit a cavalier attitude toward this law and the consent requirement. This seems especially true when "blood relatives" are present and the patient identifies as gay or lesbian. Doctors will discuss the patient with a "blood relative" while refusing to speak with the authorized representatives, including the patient's partner or spouse.

There is no individual cause of action for HIPAA violations. A complaint may be filed when the law is violated. There are no provisions in the law for damages or costs. However, a creative lawyer can find a way to make life difficult for a hospital or doctor that refuses to follow the law.

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