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## Transgender Beneficiaries: In Becoming Who You Are, Do You Lose the Benefits Attached to Who You Were

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## NOTE

### TRANSGENDER BENEFICIARIES: IN BECOMING WHO YOU ARE, DO YOU LOSE THE BENEFITS ATTACHED TO WHO YOU WERE?

#### I. INTRODUCTION

Suppose William Smith, father of Joseph Smith, executes a will to leave his estate to his children. In his will, the phrase “to my son, Joseph” is used, preceding a bequest for the property. Before William dies, Joseph embraces her transgender identity, obtains a lawful name change to Julia, obtains a lawful gender marker change, and undergoes sex confirmation surgery. William dies, and his estate is divided. Is Julia still entitled to Joseph’s portion of William’s estate? In embracing her transgender identity, is she deprived of her right to inherit?<sup>1</sup>

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† In this Note, “transgender” is used synonymously with the definition:

An umbrella term for people whose gender identity and/or expression is different from cultural expectations based on the sex they were assigned at birth. . . . Many transgender people are prescribed hormones by their doctors to bring their bodies into alignment with their gender identity. Some undergo surgery as well. But not all transgender people can or will take those steps, and a transgender identity is not dependent upon physical appearance or medical procedures.

*Glossary of Terms - Transgender*, GLAAD, <https://www.glaad.org/reference/transgender> (last visited Feb. 3, 2019); see also *Sexual Orientation and Gender Identity Definitions*, HUM. RTS. CAMPAIGN, [www.hrc.org/resources/sexual-orientation-and-gender-identity-terminology-and-definitions](http://www.hrc.org/resources/sexual-orientation-and-gender-identity-terminology-and-definitions) (last visited Feb. 3, 2019).

Transgender people have also been referred to broadly as “pre-operative, post-operative and non-operative transsexual people; cross dressers; feminine men and masculine women; intersexed persons; and more generally, anyone whose gender identity or expression differs from the conventional expectations of masculinity or femininity.” Paisley Currah & Shannon Minter, *Unprincipled Exclusions: The Struggle to Achieve Judicial and Legislative Equality for Transgender People*, 7 WM. & MARY J. WOMEN & L. 37, 37 n.1 (2000); see Dylan Vade, *Expanding Gender and Expanding the Law: Toward a Social and Legal Conceptualization of Gender that Is More Inclusive of Transgender People*, 11 MICH. J. GENDER & L. 253, 264 n.36 (2006).

1. See, e.g., *In re Estate of Araguz*, 443 S.W.3d 233, 236-37 (Tex. Ct. App. 2014); *Littleton v. Prange*, 9 S.W.3d 223, 224-25 (Tex. Ct. App. 1999). This hypothetical is discussed further *infra*

The transgender<sup>2</sup> identity and its relatives (transsexualism,<sup>3</sup> non-conforming gender identities, and the like) are often misunderstood by the general population.<sup>4</sup> As a result, transgender individuals are subject to both systemic and individual discrimination.<sup>5</sup> It is in the midst of this misunderstanding that transphobia is born.<sup>6</sup> Transphobia is “the ignorance, fear, dislike, and/or hatred of trans\*<sup>7</sup> people, which may be expressed through name-calling, disparaging jokes, exclusion, rejection, harassment, violence, and many forms of discrimination.”<sup>8</sup> Transphobic

Part III.

2. Gila M. Acker, *Transphobia Among Students Majoring in the Helping Professions*, 64 J. HOMOSEXUALITY 2011, 2012 (2017) (“Transgender is a problematic term because of its wide application and because it includes a variety of forms of identification and behaviors that contradict the traditional view of the two sex and gender divisions.”).

3. The term “transsexual” is an “older term that originated in the medical and psychological communities. [It is] still preferred by some people who have permanently changed—or seek to change—their bodies through medical interventions, including but not limited to hormones and/or surgeries.” *Glossary of Terms - Transgender*, *supra* dagger note. It is important to note that the term “transsexual” is *not* an umbrella term. Most transgender people prefer the term transgender and do not identify as transsexual. It is best to ask the person which term is preferred. *Id.*

4. M. Dru Levasseur, *Gender Identity Defines Sex: Updating the Law to Reflect Modern Medical Science Is Key to Transgender Rights*, 39 VT. L. REV. 943, 947 (2015); *see also* Katy Steinmetz, *America’s Transition*, TIME, June 9, 2014, at 40.

5. Levasseur, *supra* note 4, at 945-46; *see also* Deanna Paul, *An Ohio Judge Blocks Transgender Teens’ New Names, So They Set Out To Change the System*, WASH. POST (Aug. 14, 2018), [https://www.washingtonpost.com/news/post-nation/wp/2018/08/14/an-ohio-judge-blocked-transgender-teens-new-names-so-they-set-out-to-change-the-system/?utm&utm\\_term=.f687f08aaa51](https://www.washingtonpost.com/news/post-nation/wp/2018/08/14/an-ohio-judge-blocked-transgender-teens-new-names-so-they-set-out-to-change-the-system/?utm&utm_term=.f687f08aaa51); *Violence Against the Transgender Community in 2018*, HUM. RTS. CAMPAIGN, <https://www.hrc.org/resources/violence-against-the-transgender-community-in-2018> (last visited Feb. 3, 2019).

6. Talia Mae Bettcher, *Transphobia*, 1 TRANSGENDER STUD. Q. 249, 249 (2014) (“Provisionally, the term can be defined to mean any negative attitudes (hate, contempt, disapproval) directed toward trans people because of their being trans. When taken literally, the word means a kind of fear. But like *homophobia* (on which the word is modeled), it is used more broadly. And while *transphobia* suggests an analogy with terms like *agoraphobia*, and therefore implies irrationality . . . this implication ought to be rejected. Transphobia occurs in a broader social context that systematically disadvantages trans people and promotes and rewards antitrans sentiment. It therefore has a kind of rationality to it, grounded in a larger cisgenderist social context.” (citation omitted)).

7. On April 3, 2018, the Oxford English Dictionary added “trans\*,” which is defined as “originally used to include explicitly both transsexual and transgender, or (now usually) to indicate the inclusion of gender identities such as gender-fluid, agender, etc. alongside transsexual and transgender.” Katy Steinmetz, *The Oxford English Dictionary Added ‘Trans\*.’ Here’s What the Label Means*, TIME (Apr. 3, 2018), <http://www.time.com/5211799/what-does-trans-asterisk-star-mean-dictionary>. Some trans individuals feel that the asterisk is a way to be “free” of expectations and a way to symbolize that gender is “always morphing and changing.” *Id.* However, it is important to note that other trans individuals feel as though the term is transphobic. *See Why We Used Trans\* and Why We Don’t Anymore*, TRANS STUDENT EDUC. RESOURCES, [www.transstudent.org/asterisk](http://www.transstudent.org/asterisk) (last visited Feb. 3, 2019).

8. *Transgender Health Information Program (“THiP”)*, PROVINCIAL HEALTH SERV. AUTHORITY, [www.phsa.ca/transgender/Documents/Glossary%20of%20Terms%20-%203%20sources.pdf](http://www.phsa.ca/transgender/Documents/Glossary%20of%20Terms%20-%203%20sources.pdf) (last visited Feb. 3, 2019).

behaviors also include refusing to use a person's preferred noun/pronoun and the denial of services, employment, housing, and other essentials.<sup>9</sup> M. Dru Levasseur states that "the source of much transphobia is a fear of difference."<sup>10</sup> Cisgender<sup>11</sup> individuals often maintain the lurking notion that transgender individuals are trying to be someone they biologically are not,<sup>12</sup> and thus have difficulty accepting transgender individuals for who they identify as.<sup>13</sup> As a community, we must recognize and respect the self-identities that transgender individuals put forth in order to break down these walls that isolate and marginalize the transgender community.<sup>14</sup> Contrary to some conservative beliefs, transgender individuals do not violate the social order, nor is gender confined within the boundaries of binary sex that society recognizes.<sup>15</sup> In order "for transgender people to be recognized as full human beings under the law, the legal system must make room for the existence of transgender people—not as boundary-crossers, but as people claiming their birthright as a part of the natural variation of human sexual development."<sup>16</sup>

This Note explores the implications of not only a name change but also a change in gender for a beneficiary named in a will using their

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9. *Id.*

10. Levasseur, *supra* note 4, at 946; *see also* Acker, *supra* note 2, at 2011-12 ("The deficiency in both knowledge and exposure of most people transgender individuals and their issues not uncommonly leads to bias and, consequently, discrimination against members of the transgender community.").

11. Also known as "cissexual," cisgender refers to having a gender identity that matches one's assigned sex (non-trans\*). *See Transgender Health Information Program ("THiP"), supra* note 8.

12. Levasseur, *supra* note 4, at 946.

13. *Id.*

14. Alexandra Caggiano, Comment, *Transgender Inopportunity and Inequality: Evaluating the Crossroads Between Immigration and Transgender Individuals*, 37 SEATTLE U. L. REV. 813, 818-21 (2014) ("[T]he medical model—which has largely defined transgender in society—juxtaposed with the concept of self-identity. These two models are important because they provide the backdrop for how trans individuals are treated in the law and in society, and how trans individuals *should* ideally be treated.").

15. *Id.* at 818 ("The biological model presumes that there are only two biological categories and that the social and cultural attributes associated with gender are the natural result of a person's biological sex. Anyone who did not strictly adhere to this system was considered 'unnatural' and deemed 'unworthy of legal protection.'" (citation omitted)).

16. Levasseur, *supra* note 4, at 947; *see also* Frances B. v. Mark B., 355 N.Y.S.2d 712, 717 (Sup. Ct. 1974) (stating that the public policy purpose for marriage is "begetting offspring" and that the defendant's sex reaffirmation surgery therefore did not make him a man (citing *Mirizio v. Mirizio*, 150 N.E. 605, 607 (N.Y. 1926))).

Assuming, as urged, that defendant was a male entrapped in the body of a female, the record does not show that the entrapped male successfully escaped to enable defendant to perform male functions in a marriage. Attempted sex reassignment by mastectomy, hysterectomy, and androgenous [sic] hormonal therapy, has not achieved that result. *Frances B.*, 355 N.Y.S.2d at 717.

previous identity. Raising a question, may a transgender individual accept their bequest under the will when a decedent names a transgender individual as a beneficiary and uses that individual's birth name and gender?<sup>17</sup> This Note will first talk about being transgender<sup>18</sup> and the social and legal obstacles that transgender individuals face on a regular basis.<sup>19</sup> It will then explore the obstacles presented if their transition occurred after a will was written using their previous identity.<sup>20</sup>

## II. BACKGROUND

For some, navigating the terms used to describe different aspects of one's sexuality or gender can be confusing.<sup>21</sup> This Part explores, defines, and distinguishes the differences between terms, explores the obstacles and complexities of the transitioning process, and discusses and defines the differences between gender identity and sexual orientation, as well as how gender identity ties into one's "brain sex."<sup>22</sup>

### A. Gender Identity vs. Sexual Orientation

The Gay & Lesbian Alliance Against Defamation ("GLAAD") has defined "gender identity" as "[a] person's internal, deeply held sense of their gender."<sup>23</sup> For most transgender people, their gender identity does not match the sex that they were assigned at birth.<sup>24</sup> Gender identity, which has also been referred to as "brain sex,"<sup>25</sup> for some, does not fit

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17. Levasseur, *supra* note 4, at 947.

18. *See infra* Part II.

19. *See infra* Part III.

20. *See infra* Part IV.

21. *See* Dylan Vade, *Expanding Gender and Expanding the Law: Toward a Social and Legal Conceptualization of Gender that Is More Inclusive of Transgender People*, 11 MICH. J. GENDER & L. 253, 273-74 (2006) ("Often when people get past the myth of two genders and attempt to describe gender diversity, they paint a line and see a spectrum running from female to male . . . . Gender is much bigger than a line. It is at least a three-dimensional space, but not a Cartesian one, not a space created by three lines. There are no lines, no ordering. There is just space—an infinite space, a space that allows for motion.").

22. *See infra* note 25 and accompanying text.

23. *Glossary of Terms - Transgender*, *supra* dagger note; *see also* *Sexual Orientation and Identity Definitions*, *supra* dagger note ("[T]he innermost concept of self as male, female, a blend of both or neither—how individuals perceive themselves and what they call themselves.").

24. *Glossary of Terms - Transgender*, *supra* dagger note; *see* 18 U.S.C. § 249(c)(4) (2012) ("[T]he term 'gender identity' means actual or perceived gender-related characteristics.").

25. *See, e.g.*, William Reiner, *To be Male or Female—That is the Question*, 151 ARCHIVES PEDIATRIC & ADOLESCENT MED. 224, 225 (1997) ("[T]he organ that appears to be critical to psychosexual development and adaptation is not the external genitalia, but the brain."); Rachel Wallbank, *Re Kevin in Perspective*, 9 DEAKIN L. REV. 461, 461-62, 467, 493 (2004) (explaining that "brain sex" is an individual's "innate sexual identity" and discussing another expert opinion that concludes that "biological sex is multi-dimensional" and "ultimately determined by the sexual

neatly into the binary categories of either male or female.<sup>26</sup> This is not to be confused with gender expression, which refers to how a person externally presents themselves.<sup>27</sup> Gender expression can include a person's pronouns, haircut, and/or clothing.<sup>28</sup> Typically, but not always, a transgender person seeks to match their gender expression to their gender identity.<sup>29</sup> Nor is gender identity related to sexual orientation, which refers to an inherent or immutable attraction to other people—whether it be emotional, romantic, or of a sexual nature.<sup>30</sup> It is a popular misconception that gender identity and sexual orientation are the same or that they intersect in some way.<sup>31</sup> A recent CBS News piece provides a succinct way to distinguish between the two: “Sexuality is who you go to bed with, and gender identity is who you go to bed *as*.”<sup>32</sup>

### B. Brain Sex and Gender Identity

Gender identity is a “deeply felt, core component of a person's identity.”<sup>33</sup> It is hardwired in an individual's brain, “ha[ving] a strong biological and genetic component”<sup>34</sup> and “is the most important determinant of a person's sex,”<sup>35</sup> giving rise to the term “brain sex.”<sup>36</sup> Gender identities may be congruent or incongruent with a doctor's determination of sex made at the time of birth.<sup>37</sup>

In his article, *Our Body Project: From Mourning to Creating the Transgender Body*, S.J. Langer speaks on a feeling of discomfort when gender identity and the physical body clash, writing:

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differentiation of the human body part rather than by body parts”).

26. *Glossary of Terms - Transgender*, *supra* dagger note.

27. *Id.*

28. *Id.*

29. *Id.*

30. AM. PSYCHOL. ASS'N, ANSWERS TO YOUR QUESTIONS ABOUT TRANSGENDER PEOPLE, GENDER IDENTITY, AND GENDER EXPRESSION 2 (2014), <http://www.apa.org/topics/lgbt/transgender.pdf>.

31. “Some can be transgender, but also be gay, straight, bisexual, asexual, or a whole host of other sexual identities that exist.” Cydney Adams, *The Difference Between Sexual Orientation and Gender Identity*, CBS NEWS (Mar. 24, 2017, 10:23 AM), <https://www.cbsnews.com/news/the-difference-between-sexual-orientation-and-gender-identity>.

32. *Id.*

33. See Brief for Me. Chapter of the Am. Acad. of Pediatrics et al. as Amici Curiae Supporting Appellants at 6, *Doe v. Reg'l Sch. Unit 26*, 86 A.3d 600 (Me. 2014) (citing AM. PSYCHOL. ASS'N, *supra* note 30).

34. *Id.* at 6.

35. *Id.* at 8.

36. Wallbank, *supra* note 25, at 461-62; see Levasseur, *supra* note 4, at 955.

37. See *M.A.B. v. Bd. of Educ. of Talbot Cty.*, 286 F. Supp. 3d 704, 708 (D. Md. 2018).

It is misleading to describe trans\* experience as a desire for the opposite sex genitals and secondary sex characteristics. In the author's clinical experience, this relates more to the sensation of the phantom and the expectation of sensation effect. The person feels what is missing or what feels like a superfluous and distressing addition. There is an experience of something that was lost, be it genitals or chest or hips or a clumsy addition that does not belong. The physical presence is missing and the necessity of that part of the body is mourned, which has also been characterized by dysphoria.<sup>38</sup>

S.J. Langer's experience is not out of the ordinary, in fact, it is shared by the community as a whole. Thus, in order to make progress and give transgender individuals recognition and acceptance, a distinction between an individual's predominant natal sex<sup>39</sup> and legal sex<sup>40</sup> must be drawn.

### C. A Consistently Marginalized Minority

It is not (and will not be) an easy task for transgender individuals to gain acceptance and recognition as they align their physical sex<sup>41</sup> with their brain sex.<sup>42</sup> In the most recent report issued by the Federal Bureau of Investigation's ("FBI") Uniform Crime Reporting ("UCR") Program on hate crimes, there were 5818 single-bias incidents involving 7121 victims.<sup>43</sup> Of those crimes, 17.7% were because of a sexual orientation bias, 1.7% were because of gender identity bias, and 0.4% were because of gender bias.<sup>44</sup> While the reported crime rate is low for crimes fueled by gender identity and gender bias, there is a common misconception that gender identity and sexual orientation are connected, or that they

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38. S.J. Langer, *Our Body Project: From Mourning to Creating the Transgender Body*, 15 INT'L J. TRANSGENDERISM 66, 68 (2014).

39. "Natal sex" is a term used to replace "biological sex" which served as a tool to oversimplify a complex subject. *Glossary of Terms - Transgender*, *supra* dagger note. The term "biological sex" is no longer preferred and should be substituted with terms like "natal sex" or "assigned male/female at birth." *Id.*

40. See *infra* notes 82-85 and accompanying text; see also Wallbank, *supra* note 25, at 493. Common law sex is used to refer to the sex declarable by a court. Wallbank, *supra* note 25, at 493.

41. See *Frequently Asked Questions About Transgender People*, NAT'L CTR. FOR TRANSGENDER EQUALITY, [https://transequality.org/sites/default/files/docs/resources/Understanding-Trans-Full-July-2016\\_0.pdf](https://transequality.org/sites/default/files/docs/resources/Understanding-Trans-Full-July-2016_0.pdf) (last visited Feb. 3, 2019) ("Being transgender means different things to different people. Like a lot of other aspects of who people are, like race or religion, there's no one way for transgender people to look or feel about themselves."); see also *infra* Part III.C.

42. Wallbank, *supra* note 25, at 461-62, 467, 493.

43. *Latest Hate Crime Statistics Released*, FBI (Nov. 14, 2016), [www.fbi.gov/news/stories/2015-hate-crime-statistics-released](http://www.fbi.gov/news/stories/2015-hate-crime-statistics-released).

44. *Id.*

intersect in some way.<sup>45</sup> When asked about this misconception, sj Miller, the Deputy Director at NYU's Metropolitan Center for Research on Equity and the Transformation of Schools, stated: "They've been conflated for so long, and they're completely different."<sup>46</sup> This may mean that those reporting hate crimes operate under the same common misconception.<sup>47</sup> It is important to note that it is not mandatory for agencies across the nation to report their hate crimes to the FBI, so these numbers only represent a fraction of crimes. In fact, only 11.6% or 1776 of the participating 15,254 agencies in the country reported hate crime data to the FBI for the UCR program.<sup>48</sup> Of the approximate 18,000 law enforcement agencies in the United States, this leaves about 3000 agencies that are unaccounted for.<sup>49</sup>

In the most recent survey on transgender discrimination, out of the 6450 transgender participants, "a staggering 41% of respondents reported attempting suicide compared to 1.6% of the general population, with rates rising for those who lost a job due to bias (55%), were harassed/bullied in school (51%), had low household income, or were the victim of physical assault (61%) or sexual assault (64%)."<sup>50</sup> These alarming statistics echo as a desperate call to legislators to take action, for better laws to protect the transgender community.<sup>51</sup>

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45. See *id.*; Adams, *supra* note 31.

46. Adams, *supra* note 31.

47. In some cases, law enforcement agencies do not classify heinous crimes against transgendered individuals as hate crimes. Each agency has different qualifications for what classifies as a "hate crime." *Murdered Trans Teen Had Eyes Gouged Out, but Sheriff Says It's Not a Hate Crime*, N.Y. POST (Sept. 27, 2017, 12:22 PM), <https://nypost.com/2017/09/27/sheriff-insists-murder-of-transgender-teen-not-a-hate-crime>.

48. *Hate Crime by Jurisdiction*, FBI, <https://ucr.fbi.gov/hate-crime/2016/topic-pages/jurisdiction.pdf> (last visited Feb. 3, 2019) ("The UCR Program's Hate Crime Statistics Program included 15,254 participating law enforcement agencies in 2016. These agencies provided 1 to 12 months of data about bias-motivated crime, and of those agencies, 1,776 (11.6 percent) reported 6,121 incidents."). In the United States, there are approximately 18,000 law enforcement agencies, which leaves approximately 3000 law enforcement agencies that did not participate in the UCR Program.

49. Duren Banks et al., Bureau of Justice Statistics, U.S. Dep't of Justice, NCJ 249681, National Sources of Law Enforcement Employment Data 2 (2016), <https://www.bjs.gov/content/pub/pdf/nslead.pdf> ("Law enforcement in the United States is made up of about 18,000 federal, state, county, and local agencies. Each agency has varying legal and geographical jurisdictions, ranging from single-officer police departments to those with more than 30,000 officers.").

50. JAIME M. GRANT ET AL., NAT'L CTR. FOR TRANSGENDER EQUAL. & NAT'L GAY & LESBIAN TASK FORCE, INJUSTICE AT EVERY TURN: A REPORT OF THE NATIONAL TRANSGENDER DISCRIMINATION SURVEY 2 (2011), <https://transequality.org/sites/default/files/docs/resources/NTDSReport.pdf>.

51. See Levasseur, *supra* note 4, at 989 n.269 ("[T]he right to 'define one's own existence'— is an interest that speaks directly . . . to the efforts of transgender people to define their gender identity and expression. . . . [The state has an obligation] to provide intersex and transgender people



### D. The Transition

Before discussing the physical transitions that transgender individuals undergo, it is important to outline a few keywords that will help cisgender individuals better understand and respect those who identify as transgender.<sup>52</sup>

*Gender Dysphoria*<sup>53</sup>—Gender Dysphoria is defined as distress resulting from a difference between a person’s gender identity and the person’s assigned sex, associated with a gender role, and/or primary and secondary sex characteristics.<sup>54</sup> The necessity of a psychiatric diagnosis is still controversial as many medical professionals recommend individualized treatment through hormones or surgeries.<sup>55</sup> However, some transgender advocates believe that the inclusion of Gender Dysphoria in the DSM-V<sup>56</sup> is necessary to get transgender individuals the treatment that they need through their health insurance.<sup>57</sup> In 2018, the World Health Organization officially no longer considers gender dysphoria as a mental illness.<sup>58</sup> Instead, “gender incongruence” will now be classified as a sexual health condition.<sup>59</sup> With a better understanding of gender incongruence, it was moved to a different chapter to reduce

with the affirmative protection and social structures necessary for them to realize their efforts towards self-definition.” (citing Chai R. Feldblum, *The Right to Define One’s Own Concept of Existence: What Lawrence Can Mean for Intersex Transgender People*, 7 GEO. J. GENDER & L. 115, 116 (2006)); cf. Memorandum from Attorney Gen. Jeff Sessions to U.S. Attorneys and Heads of Dep’t Components, Revised Treatment of Transgender Emp’t Discrimination Claims Under Title VII of the Civil Rights Act of 1964 2 (Oct. 4, 2017) (“Title VII’s prohibition on sex discrimination encompasses discrimination between men and women but does not encompass discrimination based on gender identity *per se*, including transgender status.”).

52. See *Sexual Orientation and Identity Definitions*, *supra* note 23.

53. *The APA Removes “Gender Identity Disorder” from Updated Mental Health Guide*, GLAAD (Dec. 3, 2012) [www.glaad.org/blog/apa-removes-gender-identity-disorder-updated-mental-health-guide](http://www.glaad.org/blog/apa-removes-gender-identity-disorder-updated-mental-health-guide). With the removal of the term “Gender Identity Disorder,” the term “Gender Dysphoria” is used to describe emotional distress over “a marked incongruence between one’s experienced/expressed gender and assigned gender.” *Id.*

54. *Transgender Health Services Authority*, *supra* note 8.

55. *Glossary of Terms - Transgender*, *supra* dagger note.

56. *About DSM—5*, AM. PSYCHIATRIC ASS’N [www.psychiatry.org/psychiatrists/practice/dsm/about-dsm](http://www.psychiatry.org/psychiatrists/practice/dsm/about-dsm) (last visited Feb. 3, 2019) (“The new edition of *Diagnostic and Statistical Manual of Mental Disorders* (DSM-5) is the product of more than 10 years of effort by hundreds of international experts in all aspects of mental health. Their dedication and hard work have yielded an authoritative volume that defines and classifies mental disorders in order to improve diagnoses, treatment, and research.”).

57. *Glossary of Terms - Transgender*, *supra* dagger note.

58. Caroline Simon, *Being Transgender Is No Longer Considered a Mental Illness. Here’s Why*, USA TODAY (June 20, 2018, 7:46 PM), <https://www.usatoday.com/story/news/2018/06/20/transgender-not-mental-illness-world-health-organization/717758002>.

59. *Id.*

and eliminate stigma, while also ensuring that individuals get access to the health interventions they might need.<sup>60</sup>

*Intersex*—Intersex is defined as “[a]n umbrella term describing people born with reproductive or sexual anatomy and/or a chromosome pattern that can’t be classified as typically male or female . . . . While some people can have an intersex condition and also identify as transgender, the two are separate and should not be conflated.” It can also refer to “anyone with a congenital condition whose sex chromosomes, gonads, or internal or external anatomy do not fit clearly into the binary male/female norm.”<sup>61</sup>

*Transition*—Transition refers to the process during which trans\*<sup>62</sup> people may change their gender expression and/or bodies to reflect their gender identity, including changes in physical appearance (hairstyle, clothing), behavior (mannerisms, voice, gender roles), identification (name, pronoun, legal details), and/or medical interventions (hormone therapy, gender-affirming surgery).<sup>63</sup> The term “sex change” should be avoided and substituted for terms like “gender affirmation surgery” or “gender confirmation surgery,” as the purpose is to harmonize the transgender person’s sex and gender, not to “change” or “reassign” one or the other.<sup>64</sup>

*Transsexual*—The term “transsexual”<sup>65</sup> is an older term that is still preferred by some people who have permanently changed—or seek to change—their bodies through medical interventions, including but not

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60. *Id.*

61. *Glossary of Terms - Lesbian/Gay/Bisexual/Queer*, GLAAD, <https://www.glaad.org/reference/lgbtq> (last visited Feb. 3, 2019); see JULIE A. GREENBERG, INTERSEXUALITY AND THE LAW: WHY SEX MATTERS 1 (2012); see also Ellen Friedrichs, *What Does Transsexual Mean?*, LIVE ABOUT (July 14, 2017), <https://www.liveabout.com/what-does-transsexual-mean-1415329> (“The term transsexual has some negative connotations. It’s more body-focused in many ways, and for many people, their bodies are just one part of their gender identities, which also include the feeling or conviction that we’re male, female, transgender, non-binary or agender.”).

62. *Why We Used Trans\* and Why We Don’t Anymore*, *supra* note 7.

63. *Transgender Health Information Program (“THiP”)*, *supra* note 8.

64. *Glossary of Terms - Transgender*, *supra* dagger note (“Avoid the phrase ‘sex change operation.’ Do not refer to someone as being ‘pre-op’ or ‘post-op.’”); see also Levasseur, *supra* note 4, at 955 (“The need for *sex affirmation* and *sex affirmation treatment* by a person with transsexualism are not instances of desire or predilection, but rather are so compelling that the need to bring harmony between the life of sexual experience and the person’s brain sex means that people who experience transsexualism are prepared to risk everything, including their livelihood, their family connections and their health, by undergoing *sex affirmation treatment* in order to bring that harmony about . . . .” (citing Wallbank, *supra* note 25, at 482)).

65. It is important to note that courts have not previously been kind to transsexuals. See *Anonymous v. Weiner*, 270 N.Y.S.2d 319, 320-21 (Sup. Ct. 1966) (“In its determination of Ms. Weiner’s gender, the definition that guides this inquiry is: a transsexual is someone who has a ‘striking disturbance of gender role and gender orientation . . . a split between the psychological and the morphological sex.’”).

limited to hormones and/or surgeries.<sup>66</sup> The term “transsexual” is not an umbrella term and many transgender individuals do not identify as transsexual.<sup>67</sup>

### 1. Gender Confirmation or Gender-Affirming Surgery

Formally known as gender reassignment surgery, gender confirmation or affirmation surgery is perhaps the largest obstacle to overcome.<sup>68</sup> The World Professional Association for Transgender Health (“WPATH”) has taken the stance that gender confirmation surgery is a necessity for transgender individuals, as it has been proven to be beneficial and effective for those suffering from gender dysphoria.<sup>69</sup> Treatments included in gender confirmation surgery are: hormone treatment, counseling, psychotherapy, and other medical procedures to treat an individual’s gender dysphoria.<sup>70</sup> Other procedures include: complete hysterectomies, bilateral mastectomy, chest reconstruction or augmentation, nipple resizing or placement of breast prostheses, genital reconstruction, facial hair removal, facial plastic reconstruction, voice therapy and/or surgery, as well as gender-affirming counseling or psychotherapeutic treatment.<sup>71</sup> Not all patients who undergo sex confirmation surgery need the above-named procedures; the needs of each patient vary from person to person.<sup>72</sup> However, as S.J. Langer notes, these procedures are not cosmetic, or for convenience, writing:

In the trans\* phenomenon, it is the loss of what one never had but should have had, that is mourned. There is such a phenomenon in neuroscience, called the expectation of sensation effect. This effect creates sensation where external stimuli have not occurred, it comes from within the brain, not the brain responding to external stimuli. A trans\* person’s sense of their body is analogous to this phenomenon.<sup>73</sup>

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66. *Transgender Health Information Program (“THiP”), supra* note 8.

67. *Glossary of Terms - Transgender, supra* dagger note.

68. *See* Vade, *supra* note 21, at 269 (“Some transgender people do want surgical intervention, genital or otherwise, but cannot afford it, since there is virtually no insurance coverage for transgender surgeries. Many transgender people are excluded categorically from having health insurance and many are unemployed or underemployed.” (citations omitted)).

69. *Position Statement on Medical Necessity of Treatment, Sex Reassignment, and Insurance Coverage in the U.S.A.*, WPATH (Dec. 21, 2016), <https://www.wpath.org/newsroom/medical-necessity-statement>.

70. *Id.*

71. *Id.*

72. *Id.*

73. Langer, *supra* note 38, at 68.

These surgeries are considered medically necessary to successfully treat gender dysphoria or gender incongruence.<sup>74</sup> In some cases, it is not only effective but life-saving.<sup>75</sup>

## 2. Challenges Surrounding Identity Documents: Name Changes and Gender Marker Changes

Identification documents (“IDs”) that accurately reflect a transperson’s identity can be crucial to their safety and well-being.<sup>76</sup> Accurate IDs also provide official recognition in social and legal settings and can reduce violence, harassment, and discrimination.<sup>77</sup> For many transgender people, changing their name and gender markers on their IDs is the first step toward being legally validated as their correct gender.<sup>78</sup>

The United States has recognized the social and economic difficulties faced by transgender people when their expression of gender and their IDs do not match.<sup>79</sup> For instance, Jacob Tobia, an author for *Time Magazine*, writes:

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74. *Position Statement on Medical Necessity of Treatment, Sex Reassignment and Insurance Coverage in the U.S.A.*, *supra* note 69 (“The medical procedures attendant to gender affirming/confirming surgeries are not ‘cosmetic’ or ‘elective’ or ‘for the mere convenience of the patient.’ These reconstructive procedures are not optional in any meaningful sense, but are understood to be medically necessary for the treatment of the diagnosed condition. In some cases, such surgery is the only effective treatment for the condition, and for some people genital surgery is essential and life-saving.”); *see also* Emanuella Grinberg, *What is Medically Necessary Treatment for Gender-affirming Health Care?*, CNN (June 20, 2018, 2:38 PM), <https://www.cnn.com/2018/05/31/health/transgender-medically-necessary-procedures/index.html>.

75. There are a few instances where gender confirmation surgeries can be life-saving to a transgender individual; however, the one most prominent is tied to hate crimes. *See Man Sentenced for Stabbing Date 119 Times After Learning She Was Trans*, N.Y. POST (July 24, 2017, 8:17 PM), [nypost.com/2017/07/24/man-sentenced-for-stabbing-date-119-times-after-learning-shes-trans](http://nypost.com/2017/07/24/man-sentenced-for-stabbing-date-119-times-after-learning-shes-trans). If a female transgender individual is denied gender confirmation surgery, and finds a partner to be intimate with, her partner may grow violent upon finding her male genitalia, growing violent because he was “tricked.” *See id.* In some extreme cases, the male partner may beat the transgender woman to death. *See id.*

76. *See Know Your Rights: FAQ About Identity Documents*, LAMBDA LEGAL, <http://www.lambdalegal.org/know-your-rights/transgender/identity-document-faq> (last visited Feb. 3, 2019) (“Opting not to change a name also puts some people at risk of violence because it reveals that they are transgender when they show their ID. Having more than one name can also raise suspicions among employers, landlords or police officers.”).

77. *See Levasseur, supra* note 4, at 959 (citing Lisa Mottet, *Modernizing State Vital Statistics Statutes and Policies to Ensure Accurate Gender Markers on Birth Certificates: A Good Government Approach to Recognizing the Lives of Transgender People*, 19 MICH. J. GENDER & L. 373, 393-99 (2012)).

78. *Know Your Rights: FAQ About Identity Documents, supra* note 76.

79. Dean Spade, *Documenting Gender*, 59 HASTINGS L.J. 731, 734 (2008) (“Recognizing the social and economic difficulties faced by those whose lived expression of gender does not match their identity gender marker change on document commonly used to verify identity.”).

I travel at least once a month to make appearances at events or perform at colleges and universities. Each time I go through TSA, I take a deep breath and say a prayer that the officer at the podium won't take one look at my dress, then the "M" on my driver's license, and decide that I need to be held for more thorough questioning.<sup>80</sup>

However, these issues are not limited to travel or TSA—having an ID that has a different gender marker than the gender expression of the individual could mean different treatment at bars, traffic stops, applying for jobs, and other situations that require presentation of an ID.<sup>81</sup>

The rules to change one's gender marker are complex and vary across different jurisdictions.<sup>82</sup> This makes it challenging and sometimes impossible for transgender individuals to have an updated and consistent ID.<sup>83</sup> For example, a majority of the states have surgical requirements in order to make a birth certificate correction or amendment.<sup>84</sup> In June 2010, the Department of State updated its policy with regard to gender marker changes on passports and required only medical certification of gender transition from a licensed physician to have the gender marker changed.<sup>85</sup> No other medical records may be requested by the Agency and "sex reassignment surgery is not a prerequisite for passport issuance based on gender change."<sup>86</sup> These changes were made to align with the

80. Jacob Tobia, *Why Transgender People Suffer from 'ID Anxiety'*, TIME (June 19, 2017), <http://time.com/4817285/transgender-id-anxiety>.

81. See Bethany Squires, *For Trans People, Changing your ID to Match Your Gender Is a Nightmare*, BROADLY (Aug. 21, 2017, 12:22 PM), [https://broadly.vice.com/en\\_us/article/yww3yj/for-trans-people-changing-your-id-to-match-your-gender-is-a-nightmare](https://broadly.vice.com/en_us/article/yww3yj/for-trans-people-changing-your-id-to-match-your-gender-is-a-nightmare) ("Every time you pull out your ID you're in physical danger," says Jasper Wirtshafter of the Trans Assistance Project (TAP). "If you get pulled over by a transphobic cop, or you're walking into a bar and there's a transphobic bouncer. If you're applying for a job. It outs you." Being outed poses the risk of verbal harassment, discrimination, and even violence. "One third of individuals who [used] documents that didn't match their gender experienced some sort of negative effect from that experience," says Arli Christian, the state policy counsel for NCTE.").

82. See *Identity Document Laws and Policies*, MOVEMENT ADVANCEMENT PROJECT, [http://www.lgbtmap.org/equality-maps/identity\\_document\\_laws](http://www.lgbtmap.org/equality-maps/identity_document_laws) (last visited Feb. 3, 2019).

83. For instance, Tennessee has a state statute that does not allow for gender markers to be changed. TENN. CODE ANN. § 68-3-203(d) (2010). Ohio and Idaho state statutes pertaining to birth certificate amendments make no mention of a change in sex. IDAHO CODE § 39-250 (2016); OHIO REV. CODE § 3705.15 (2014).

84. See generally *Changing Birth Certificate Sex Designations: State-by-State Guidelines*, LAMBDA LEGAL, [www.lambdalegal.org/know-your-rights/transgender/changing-birth-certificate-sex-designations](http://www.lambdalegal.org/know-your-rights/transgender/changing-birth-certificate-sex-designations) (last updated Sept. 17, 2018).

85. U.S. DEP'T OF STATE, 7 FAM 1300 APPENDIX M, GENDER CHANGE (2016), <https://web.archive.org/web/20180718004325/https://fam.state.gov/fam/07fam/07fam1300apM.html>. Medical certifications from psychologists, physician assistants, nurse practitioners, health practitioners, licensed vocational nurses, registered nurses, chiropractors, or pharmacists will not be accepted. Licensed physicians include Doctors of Osteopathy ("D.O.") and Medical Doctors ("M.D."). *Id.*

86. *Id.* at (d)–(e).

standards and recommendations of the World Profession Association for Transgender Health (“WPATH”).<sup>87</sup>

In 2015, Dana Zzyym (preferred gender pronouns: “they;” “them”), who identifies as intersex,<sup>88</sup> brought a case in Colorado after they requested “X” as a gender marker on a passport application, and the application was denied.<sup>89</sup> Zzyym was born with ambiguous sexual characteristics, and both Zzyym’s parents and the doctor decided to raise them as a boy.<sup>90</sup> They underwent “several irreversible, painful and medically necessary surgeries that didn’t work, traumatized [Zzyym] and left them with severe scarring.”<sup>91</sup> The passport application requires first-time applicants to submit a birth certificate and to select a gender marker—either female or male.<sup>92</sup> Instead of checking off either box, Zzyym wrote “intersex” below the “sex” category.<sup>93</sup> The passport application was denied, and the Department of State explained that it would issue a passport listing the gender as “female”—which was the sex listed on Zzyym’s driver’s license.<sup>94</sup> The Department also explained that it could issue Zzyym a “male” passport if Zzyym provided “a signed original statement on official letterhead from [Dana’s] attending medical physician,” where the doctor attests to Zzyym’s gender.<sup>95</sup> On appeal, the United States District Court of Colorado discussed the history of the gender requirement, noting that the information was requested from applicants “because experts thought ‘[that with] the rise in the early 1970s of unisex attire and hairstyles, photographs had become a less reliable means for ascertaining a traveler’s sex.’”<sup>96</sup> The court upheld the precedent that “the authority to issue passports and prescribe rules for the issuance of passports under 22 U.S.C. Section 211a does not include the authority to deny an applicant on grounds pertinent to basic identity, unrelated to any good cause.”<sup>97</sup>

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87. *Id.* at (b).

88. Intersex is defined as “[a]n umbrella term describing people born with reproductive or sexual anatomy and/or a chromosome pattern that can’t be classified as typically male or female. . . . While some people can have an intersex condition and also identify as transgender, the two are separate and should not be conflated.” *Glossary of Terms - Lesbian/Gay/Bisexual/Queer*, *supra* note 61.

89. *Zzyym v. Pompeo*, 341 F. Supp. 3d 1248, 1251 (D. Colo. 2018); *see also Zzyym v. Pompeo (Formerly Zzyym v. Tillerson & Zzyym v. Kerry)*, LAMBDA LEGAL, [https://www.lambdalegal.org/in-court/cases/co\\_zzyym-v-pompeo](https://www.lambdalegal.org/in-court/cases/co_zzyym-v-pompeo) (last visited Feb. 3, 2019).

90. *Zzyym*, 341 F. Supp. 3d at 1251.

91. *Zzyym v. Pompeo (formerly Zzyym v. Tillerson & Zzyym v. Kerry)*, *supra* note 89.

92. *Zzyym*, 341 F. Supp. 3d at 1251.

93. *Id.*

94. *Id.*

95. *Id.* (citation omitted).

96. *Id.* at 1257.

97. *Id.* at 1260 (citing *Haig v. Agee*, 453 U.S. 280, 290 (1981) and *Kent v. Dulles*, 357 U.S.

Although Zzyym identifies as intersex, which should not be conflated with identifying as transgender,<sup>98</sup> this demonstrates the willingness of the law to adopt changes in light of new facts, especially for those who fall outside of the gender normative paradigm.<sup>99</sup>

In the United States, Oregon has been the first state to issue gender-neutral IDs.<sup>100</sup> Washington D.C. followed shortly thereafter, implementing a comparable policy.<sup>101</sup> In Oregon, anyone can simply opt out of gender by choosing “X” without submitting any additional paperwork.<sup>102</sup> A third sex marker has been added in countries such as Australia, Canada, India, Bangladesh, Germany, and a few others as another approach to transgender and intersex inclusion is offered.<sup>103</sup> These policies not only alleviate the legal hurdles of establishing or changing one’s gender identity on state and federal documents, but they also provide recognition, affirmation, and safety to transgender and non-binary people while the issue of “legal sex” is still debated.<sup>104</sup>

In order to obtain rights and privileges in the eyes of the law, Dr. Jamison Green notes that transgender people must fall into one of the two categories of the legal gender binary system:

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116 (1958)).

98. See *supra* notes 61, 85-86 and accompanying text.

99. Zzyym, 341 F. Supp. 3d at 1260 (citing *Haig*, 453 U.S. at 290 and *Kent*, 357 U.S.).

100. Mary Emily O’Hara, *Oregon Issues First Gender-Neutral State ID Cards*, NBC NEWS (July 4, 2017, 9:30 AM), [www.nbcnews.com/feature/nbc-out/oregon-issues-first-gender-neutral-state-id-cards-n777801](http://www.nbcnews.com/feature/nbc-out/oregon-issues-first-gender-neutral-state-id-cards-n777801).

101. Emanuella Grinberg, *D.C. Starts Issuing First Gender Neutral Driver’s License in U.S.*, CNN (June 28, 2017), <https://www.cnn.com/2017/06/27/health/washington-gender-neutral-drivers-license/index.html>.

102. O’Hara, *supra* note 100.

103. Melissa Eddy & Jessica Bennett, *Germany Must Allow Third Gender Category*, *Court Rules*, N.Y. TIMES (Nov. 8, 2017), <https://www.nytimes.com/2017/11/08/world/europe/germany-third-gender-category-vanja.html>. In 2013, Australia passed a law that added a sex marker option of “X” to represent “indeterminate, intersex, or unspecified.” *Id.* The “X” marker is available to those who can produce a letter of support from a physician. *Id.* Similarly, Bangladesh added the option of “other” to its passports in 2013. *Id.* In 2005, India passed legislation that added a third sex marker as “E,” which stands for eunuch. *Id.* In 2013, Germany gave intersex (but not transgender) adults the third option of “X” on their passports and birth certificates. *Id.* The law also allows German parents of an intersex child to leave the sex designation blank on the child’s birth certificate. *Id.*

104. Eddy & Bennett, *supra* note 103; see Jillian Todd Weiss, *Transgender Identity, Textualism, and the Supreme Court: What Is the “Plain Meaning” of “Sex” in Title VII of the Civil Rights Act of 1964?*, 18 TEMP. POL. & CIV. RTS. L. REV. 573, 590-91 (2009) (“No court in the United States has ever ruled that a person became legally male or female for all purposes. Thus, it cannot be said [at this time] in any meaningful way that ‘I am now legally male,’ or ‘I am now legally female.’ One can truthfully say that a birth certificate, driver’s license, or passport says ‘M’ or ‘F,’ but that is not the same thing. One can, at most, say that ‘for X purpose, I am now legally male.’ Statements such as ‘I am now legally male’ are a statement of opinion, rather than a statement of law.”).

[A]s is apparent in the case law evolution, there have been exceptional barriers to transsexual people who attempt to exercise their civil rights and responsibilities simply because their transsexual status renders them suspect, or outside the law to the extent that their altered or different bodies make them seem less than human.<sup>105</sup>

Green also notes that transgendered individuals are at the mercy of individual judges who “are free to exercise their personal biases as they interpret whatever laws they can find to apply to the facts at hand.”<sup>106</sup> The next Part will demonstrate that these personal biases were (and are) not only apparent in individual members of the community but have also influenced the judicial system for some time, forcing transgender individuals to be bound by their chromosomal makeup and the sex assigned to them at birth.<sup>107</sup>

### III: TRANSGENDER LEGAL ISSUES IN BENEFITS AND MARRIAGE

In 2016, the Supreme Court came out with perhaps one of its most important decisions to date in *Obergefell v. Hodges*.<sup>108</sup> Justice Kennedy delivered the opinion for the Court, opening with a powerful statement: “The Constitution promises liberty to all within its reach, a liberty that includes specific rights that allow persons, within a lawful realm, to define and express their identity.”<sup>109</sup> This landmark decision recognized the legality of all same-sex marriages within the states.<sup>110</sup>

Before *Obergefell*, transgender individuals were deprived of the most basic of rights, such as inheriting the estate of their spouse,<sup>111</sup> death benefits,<sup>112</sup> and child custody.<sup>113</sup> Frequently, cases involving transgender beneficiaries turned on the legitimacy of the marriage.<sup>114</sup> Thus, in states

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105. Jamison Green, “If I Follow the Rules, Will You Make Me a Man?”: Patterns in Transsexual Validation, 34 U. LA VERNE L. REV. 23, 32 (2012).

106. *Id.* at 64-65; see *In re Harvey*, No. CV-2011-1075, slip op. at 1, 5, 6 (Okla. Dist. Ct. Sept. 2, 2011) (denying name change for transgender woman based on a finding that a name change would be “fraudulent” because the individual would still have male DNA even after undergoing sex-change surgery), *rev’d*, 293 P.3d 224 (Okla. Civ. App. 2012). The appeal of this case is discussed further *infra* Part III.D.

107. See *infra* Part III.A-E.

108. 135 S. Ct. 2584 (2015).

109. *Id.* at 2593 (emphasis added).

110. *Id.* at 2607-08.

111. See *Littleton v. Prange*, 9 S.W.3d 223, 231 (Tex. Ct. App. 1999).

112. *In re Estate of Araguz*, 443 S.W.3d 233, 235, 250 (Tex. Ct. App. 2014).

113. *In re Marriage of Simmons*, 825 N.E.2d 303, 306, 315 (Ill. App. Ct. 2005).

114. See *Littleton*, 9 S.W.3d at 229; see also *Kantaras v. Kantaras* 884 So. 2d 155, 161 (Fla. Dist. Ct. App. 2004) (remanding to the trial court to declare the marriage of the party void *ab initio*, as the law of Florida does not allow for a marriage between a postoperative female-to-male transsexual person and a female); *In re Estate of Gardiner*, 42 P.3d 120, 135 (Kan. 2002) (“[T]he



where same-sex marriage was not recognized, transgender individuals were denied spousal benefits because the state courts determined that the marriage was void as a matter of law.<sup>115</sup> This Part explores cases that provide better insight into the application of law surrounding transgender individuals over time and also highlights some of the inadvertent and overt biases apparent in the judicial system.

#### A. M.T. v. J.T.

In the 1976 case *M.T. v. J.T.*, the plaintiff and wife, M.T., filed a simple complaint in the New Jersey Juvenile and Domestic Relations Court for support and maintenance.<sup>116</sup> Her spouse, J.T., asserted the defense that he owed her nothing for alimony because M.T. was born a man, and thus the marriage was void.<sup>117</sup> In 1971, before their marriage, a surgeon agreed to remove her male genitalia and construct female genitalia.<sup>118</sup> In 1972, M.T. married J.T. and went through a ceremonial marriage in New York.<sup>119</sup>

Dr. Ihlenfeld, who surgically performed M.T.'s gender affirmation surgery, was called to give expert testimony.<sup>120</sup> On the stand, he testified that a transsexual was

a person who discovers sometime, usually very early in life, that there is a great discrepancy between the physical genital anatomy and the person's sense of self-identity as a male or as a female. . . . [T]he transsexual is one who has a conflict between physical anatomy and psychological identity or psychological sex.<sup>121</sup>

Further, he went on to testify that gender identity is usually established "very, very firmly, almost immediately, by the age of 3 to 4 years" and defined gender identity as "a sense, a total sense of self as being masculine or female; [and that it] pervades one's entire concept of one's place in life, of one's place in society and in point of fact the actual facts of the anatomy are really secondary."<sup>122</sup>

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words 'sex,' 'male,' and 'female' in everyday understanding do not encompass transsexuals. The plain, ordinary meaning of 'persons of the opposite sex' contemplates a biological man and a biological woman and not persons who are experiencing gender dysphoria."); *In re Ladrach*, 513 N.E.2d 828, 832 (Ohio P. Ct. 1987) (holding that a postoperative male-to-female transsexual was not permitted to marry a male); *In re Araguz*, 443 S.W.3d at 242.

115. See *Littleton*, 9 S.W.3d at 229; see also *In re Araguz*, 443 S.W.3d at 242.

116. *M.T. v. J.T.*, 355 A.2d 204, 205 (N.J. Super. Ct. App. Div. 1976).

117. *Id.*

118. *Id.*

119. *Id.*

120. *Id.*

121. *Id.*

122. *Id.*

The court carefully considered the psychological aspects of transsexuality, including the validity of a person's feeling of the disconnection between their physical sex and their gender.<sup>123</sup> The court held that M.T. had been of the female gender her entire life and that her anatomical change confirms that she was female at the time of her marriage ceremony.<sup>124</sup> Judge Handler opined:

It is the opinion of the court that if the psychological choice of a person is medically sound, not a mere whim, and irreversible sex reassignment surgery has been performed, society has no right to prohibit the transsexual from leading a normal life. Are we to look upon this person as an exhibit in a circus sideshow? What harm has said person done to society? The entire area of transsexualism is repugnant to the nature of many persons within our society. However, this should not govern the legal acceptance of a fact.<sup>125</sup>

Following this logic, the Court held that at the time of the marriage, M.T. was a woman, the marriage was valid, and therefore J.T. owed M.T. alimony payments.<sup>126</sup> Such a holding was a groundbreaking win, showing the court's willingness to take on a functionalist approach to gender identity and emphasizing realities of day to day life of the transgender community in New Jersey. M.T. was recognized as who she really was, as opposed to being bound to a doctor's opinion at birth.<sup>127</sup>

Albeit a marriage case, the court upholds M.T.'s transgender identity, holding that her identity as a woman should be recognized, entitling her to alimony payments. Alternatively, in the probate context, such a holding would deprive a transgender beneficiary of their bequest because the language in the will does not align with their transgender identity.<sup>128</sup>

### B. Littleton v. Prange

The case of Christie Littleton<sup>129</sup> is a cornerstone on which conservative courts built their logic about transgendered individuals in

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123. *Id.* at 209 ("On this evidential demonstration, therefore, we are impelled to the conclusion that for marital purposes if the anatomical or genital features of a genuine transsexual are made to conform to the person's gender, psyche or psychological sex, then identity by sex must be governed by the congruence of these standards.")

124. *Id.* at 207.

125. *Id.* (emphasis added).

126. *Id.* at 211.

127. *Id.* at 210-11; see also Ruth Ann Robson, *Reinscribing Normality? The Law and Politics of Transgender Marriage*, in TRANSGENDER RIGHTS 301 (Paisley Currah, Richard M. Juang, & Shannon Price Minter ed., 2006).

128. Robson, *supra* note 127.

129. CHRISTIE LEE LITTLETON, [christielee.net/main1.htm](http://christielee.net/main1.htm) (last visited Feb. 3, 2019).

marriages.<sup>130</sup> Christie Littleton filed a medical malpractice suit under the Texas Wrongful Death and Survival Statute in her capacity as the surviving spouse of her husband, Jonathon.<sup>131</sup> Prior to marrying Jonathon, she had undergone three surgical procedures, which fully completed her sex confirmation surgery.<sup>132</sup> In 1989, she married Jonathon Littleton in Kentucky and lived with him until his death in 1996.<sup>133</sup> The case turned on the sex assigned to Christie Littleton at birth and in a stringent and arguably derisive opinion, Chief Justice Hardberger opened with the following:

This case involved the most basic of questions. When is a man a man, and when is a woman, a woman? Every schoolchild, even of tender years, is confident that he or she can tell the difference, especially if the person is wearing no clothes. These are observations that each of us makes early in life and, in most cases, continue to have more than a passing interest in for the rest of our lives. It is one of the more pleasant mysteries. The deeper philosophical (and now legal) question is: can a physician change the gender of a person with a scalpel, drugs and counseling, or is a person's gender immutably fixed by our Creator at birth? The answer to that question has definite legal implications that present themselves in this case involving a person named Christie Lee Littleton.<sup>134</sup>

This decision set precedent for future cases.<sup>135</sup> Ironically, without intending to do so, Chief Justice Hardberger may have established a precedent that would favor transgender individuals when determining whether they are entitled to the estate apportioned to them under their previous identity and before their transition.<sup>136</sup> At the conclusion of the opinion, Chief Justice Hardberger writes:

Christie was created and born a male. Her original birth certificate, an official document of Texas, clearly so states. . . . At the time of birth,

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130. See *Littleton v. Prange*, 9 S.W.3d 223, 231 (Tex. Ct. App. 1999); see also *In re McReynolds*, 502 S.W.3d 884, 888 (Tex. Ct. App. 2016); *In re J.B.*, 326 S.W.3d 654, 667 n.2 (Tex. Ct. App. 2010).

131. *Littleton*, 9 S.W.3d at 225.

132. *Id.*

133. *Id.*

134. *Id.* at 223-25.

135. See *Kantaras v. Kantaras*, 884 So. 2d 155, 159 (Fla. Dist. Ct. App. 2004); *In re Estate of Gardiner*, 42 P.3d 120, 124 (Kan. 2002).

136. In the conclusion of his decision, Judge Hardberger wrote: "We hold, as a matter of law, that Christie Littleton is a male. As a male, Christie cannot be married to another male. Her marriage to Jonathon was invalid, and she cannot bring a cause of action as his surviving spouse." *Littleton*, 9 S.W.3d at 231. In holding that her sex at birth is the controlling factor of the case, such a sentiment would be favorable to a transgender beneficiary who is identified as their previous identity. See *id.*

Christie was a male, both anatomically and genetically. The facts contained in the original birth certificate were true and accurate, and the words contained in the amended certificate are not binding on this court. There are some things we cannot will into being. They just are.<sup>137</sup>

In this case, Christie Littleton loses the benefits derived from her marriage to Jonathan.<sup>138</sup> But in a probate context, especially in the proposed hypothetical, holding that one is bound to the sex declared at birth and the individual's chromosomal makeup allows for the transgender beneficiary to prevail, as Julia would always be bound to the identity decided for her by her parents and doctor.<sup>139</sup>

### C. In re Marriage of Simmons

In 2005, Sterling Robert Simmons appealed his case when he lost custody of his child.<sup>140</sup> Assigned to the female sex at birth, and experiencing gender dysphoria as a child, Sterling began taking testosterone at age twenty-one.<sup>141</sup> Since then, he has, what Judge South describes as, the “outward appearance of a man, which includes facial and body hair, male pattern baldness, a deep voice, a hypertrophied clitoris, and increased muscle and body mass.”<sup>142</sup> Sterling was married in 1985, and in 1991, he and his wife had a child via artificial insemination.<sup>143</sup> Sterling was named as the father on the child's birth certificate.<sup>144</sup> Also in 1991, Sterling underwent a total abdominal hysterectomy and a bilateral salpingo-oophorectomy, which removed his uterus, fallopian tubes, and ovaries.<sup>145</sup>

In October 1994, Sterling was re-issued a birth certificate where his gender marker was changed from female to male.<sup>146</sup> The relationship between Sterling and his wife became tumultuous and began to deteriorate over the years.<sup>147</sup> In 1998, Sterling filed for a petition for dissolution of marriage in which he sought temporary and permanent sole care and custody of their minor child.<sup>148</sup> The court found that based

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137. *Id.* at 231.

138. *Id.*

139. *Id.*

140. *In re Marriage of Simmons*, 825 N.E.2d 303, 306 (Ill. App. Ct. 2005).

141. *Id.* at 307.

142. *Id.*

143. *Id.*

144. *Id.*

145. *Id.*

146. *Id.*

147. *Id.*

148. *Id.*

on expert testimony by multiple doctors, Sterling was not a “man” despite his changed name, birth certificate, and being named as the father on his child’s birth certificate because he had “the musculature of a male, facial and male body hair, and a male torso, but who still [had] female genitals, including atrophic or dysfunctional female breasts, atrophic labia, an enlarged clitoris, and a vagina.”<sup>149</sup>

In 2004, Sterling appealed to the First District Court of Appeals, claiming that under either the Illinois Parentage Act or the Parentage Act of 2004, he was entitled to custody of his child.<sup>150</sup> Reviewing de novo and using legislative intent, the court concluded that the Parentage Act only applied to “husbands” and “wives;” since same-sex marriage was illegal in Illinois at this time, the court upheld the lower court’s decision, holding that Sterling was not a “man” in the eyes of the law. Thus, he could not be a “husband.”<sup>151</sup> The court went on to state that the statute, “which confers a presumption on a ‘man’ to be the natural father of a child even after a marriage has been declared invalid, is based on the premise that the parties who are involved are a man and a woman.”<sup>152</sup> In a holding such as this, only one question remains: What features or qualities would Sterling have to possess in order to be seen as a “man” in the eyes of the law?<sup>153</sup>

#### D. In re Harvey: Discrimination in the Legal System

In 2012, Steven Charles Harvey filed a Petition for Change of Name in the District Court of Oklahoma County.<sup>154</sup> Harvey sought to change his name to “Christie Ann Harvey” because she was in the process of undergoing a sexual/gender change.<sup>155</sup> The trial court denied Harvey’s petition, citing Title 12, Section 1634, which provided that: “The material allegations of the petition shall be sustained by sworn evidence, and the prayer of the petition *shall* be granted *unless the court*

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149. *Id.* at 308-09.

150. *Id.* at 310-12.

151. *Id.* at 311 (“However, inasmuch as we have upheld the trial court’s determination that the petitioner was not a ‘husband’ and respondent was not a ‘wife’ due to the invalidity of their marriage, we are compelled to find that the agreement is also invalid.”).

152. *Id.* at 312.

153. *Id.* at 309-10 (“According to Dr. McDermott and even Dr. Ettner, the sex change procedure is still ‘in process’ and has not been completed, and there is still other procedures which must be done in order to complete the sex reassignment or change. . . . Furthermore, it is unlikely that the State Registrar would have issued the new birth certificate had the information been disclosed to him that the individual seeking the new ‘male’ birth certificate still had external female genitalia.”).

154. *In re Harvey*, 293 P.3d 224, 224 (Okla. Civ. App. 2012).

155. *Id.*

or judge finds that the change is sought for an illegal or fraudulent purpose, or that a material allegation in the petition is false.”<sup>156</sup>

Harvey, who had no criminal record, appealed, contending that there was no fraud in identifying oneself by a traditionally male or female name while having the DNA of the other sex.<sup>157</sup> The appellate court agreed with Harvey and held that the decision was to be reversed and remanded with instructions.<sup>158</sup> The court’s denial of Harvey’s petition—based solely on an oppositional opinion rather than supported by the evidence—underlines the discrimination of transgender persons within the legal system.<sup>159</sup>

### E. In re Estate of Araguz

In 2014, Mrs. Nikki Araguz attempted to receive death benefits after her husband, Thomas, a firefighter, died in the line of duty.<sup>160</sup> Her husband’s mother and his ex-wife joined the suit, alleging that the marriage was void because Mrs. Araguz was transgender.<sup>161</sup> Nikki had both her name and gender marker changed before the death of her husband.<sup>162</sup> Two years before her husband’s death, she underwent what the court called “genital reassignment” or “neocolporrhaphy” surgery.<sup>163</sup> There was no question that her husband was aware of her transition.<sup>164</sup> The court cited *Littleton*, holding that “a person’s gender, while subject to physical manipulation for the purpose of assuming the appearance of an alternate gender, is nonetheless governed by the gender of a person at birth, as determined by both anatomical and genetic examinations of the person.”<sup>165</sup> Using this logic, the trial court held that despite Nikki’s name change, gender marker change, and sex confirmation surgery, she was still a male in the eyes of the law, thus not entitled to spousal benefits.<sup>166</sup> At this time, Texas did not recognize same-sex marriage. If this case had

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156. *Id.* at 224-25 (citing OKLA. STAT. tit. 12, § 1634 (2011)).

157. *Id.* at 225.

158. *Id.*

159. *See id.* at 224-25. The Court of Civil Appeals held that “the trial court abused its discretion by overruling Harvey’s Motion for New Trial and denying his application for a change of name. The trial court’s finding that Harvey sought a name change for an illegal or fraudulent purpose is not supported by the evidence.” *Id.*

160. *In re Estate of Araguz*, 443 S.W.3d 233, 235 (Tex. Ct. App. 2014).

161. *Id.*

162. *Id.* at 236.

163. *Id.*

164. *Id.* at 237 (“According to Nikki, Thomas was fully aware of the genital reassignment surgery.”).

165. *Id.* at 238.

166. *See id.* at 241.

been decided a year later, after the Supreme Court's ruling in *Obergefell*, the result would likely be different.<sup>167</sup>

The decisions of *Obergefell*<sup>168</sup> and *United States v. Windsor*<sup>169</sup> solved the issues regarding the validity of marriages and benefits that come with marriage such as social security and death benefits. If Nikki had the recognition and validation of same-sex marriage, she would have received the death benefits of her husband because it would not have mattered what her assigned sex at birth was and, thus, the marriage would have been valid regardless. Therefore, she would be entitled to any benefits derived from the marriage.<sup>170</sup>

#### IV. DIFFERENT APPROACHES TO INTERPRETING THE RIGHT TO INHERIT

Consider the hypothetical from Part I: William Smith, father of Joseph Smith, executes a will to leave his estate to his children.<sup>171</sup> In his will, the phrase, "to my son, Joseph" precedes a bequest for the property.<sup>172</sup> Before William dies, Joseph embraces his transgender identity, obtaining a lawful name change to Julia, obtains a lawful gender marker change, and undergoes sex confirmation surgery.<sup>173</sup> William dies, and as his estate is divided, Julia's siblings allege that his portion ought to be divided amongst the rest of the children because the will reads "to my son, Joseph."<sup>174</sup> They argue that "Joseph" no longer exists, as Joseph changed his name to Julia and now identifies as a

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167. *Id.* at 242-43 ("Twelve states and the District of Columbia have decided that same-sex couples should have the right to marry and so live with pride in themselves and their union in a status of equality with all other married persons . . . . To date, these developments have not affected the law banning same-sex marriages in Texas." (citation omitted)). Please note that on appeal, the Court of Appeals reversed and remanded on the grounds that "there is a genuine issue of material fact regarding Nikki's sex . . ." *Id.* at 250. *See generally* *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015).

168. *Obergefell*, 135 S. Ct. at 2590 (stating that "same sex couples are denied the constellation of benefits that the States have linked to marriage").

169. 570 U.S. 744 (2013) (Where the Defense of Marriage Act ("DOMA") defined "marriage" as being between two opposite sex partners, preventing the same-sex spouse from qualifying as a "surviving spouse" for tax purposes. The Supreme Court ultimately held that the definition of marriage as being between one man and one woman deprived same sex couples of equal protection.).

170. *Obergefell*, 135 S. Ct. at 2607-08 ("The Court, in this decision, holds same-sex couples may exercise the fundamental right to marry in all States. It follows that the Court must also hold—and it now does hold—that there is no lawful basis for a State to refuse to recognize a lawful same-sex marriage performed in another State on the ground of its same-sex character.").

171. *See supra* Part I.

172. *See supra* Part I.

173. *See supra* Part I.

174. *See supra* Part I.

woman.<sup>175</sup> Is Julia still entitled to Joseph's portion of William's estate?<sup>176</sup> The answer is unclear.<sup>177</sup>

There are many different methods of interpretation that courts may use when attempting to address this legal question.<sup>178</sup> There are, however, more complicated questions: How is gender defined by law?<sup>179</sup> Is a person's identity rooted in their gender?<sup>180</sup> Is gender even relevant in determining a testator's intention to give to their child?<sup>181</sup> What if William was not supportive of Julia's identity and therefore did not change his will to reflect his feelings about the issue?<sup>182</sup> In deciding whether a transgender beneficiary has a right to the estate, courts must first analyze how to identify the transgender beneficiary; should a transgender person be defined by their natal sex or their brain sex?<sup>183</sup> Identifying a transgender beneficiary's gender identity by their natal sex

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175. See *supra* Part I.

176. See *supra* Part I.

177. Samantha Gilbert, *Transgender Equality in Wills and Inheritance*, LEXISNEXIS (Nov. 30, 2017), <https://www.boodlehatfield.com/media/1671/transgenderism-in-wills-and-inheritance.pdf> (discussing whether inheritance conditioned on a person altering their gender identity would be void as a matter of public policy and finding that, "[t]he position is unclear."). The focus of this Note is not on the hypothetical of inheritance being conditioned on a certain action, however, the answer in the scenario presented here is likewise unclear.

178. See *supra* Part III; see, e.g., Paul, *supra* note 5 ("So on June 18, Elliot and his parents, Kylan and Stephanie Leigh, went to court to make his name change official, appearing in front of Judge Joseph Kirby at the Warren County Probate courthouse in Lebanon, Ohio. They expected the hearing to be a formality, but Kirby's questions and commentary quickly turned to gendered toilets and Caitlyn Jenner, according to court transcripts. . . . On Monday, Kirby issued a written response to the lawsuit, stating that he 'holds no bias against those that are transgender' and that his two decades on the bench have taught him that 'children do not always know what is best for them during childhood.'").

179. *Gender*, BLACK'S LAW DICTIONARY (10th ed. 2014) ("Defined difference between men and women based on culturally and socially constructed mores, politics, and affairs. Time and location give rise to a variety of local definitions. Contrasts with what is defined as the biological sex of a living creature.").

180. James Paul Gee, *Identity as an Analytic Lens for Research in Education*, 25 REV. RES. EDUC. 99, 100 (2001). According to Gee, there are four different ways to view identity: (1) Nature-identity: a state, (2) Institution-identity: a position, (3) Discourse-identity: an individual trait, and (4) Affinity-identity: experiences. *Id.* Gee also notes that "all people have multiple identities connected not to their 'internal states' but to their performances in society. This is not to deny that each of us has what we might call a 'core identity' that holds more uniformly, for ourselves and others, across contexts." *Id.* at 99.

181. *Cf. In re Estate of Wilson*, 452 N.E.2d 1228, 1237 (N.Y. 1983). Here, the New York Court of Appeals held that a trust that would finance the education of male students and not female students was not in violation of the Fourteenth Amendment as it was private conduct and that any trustee unwilling to dispense the trust as instructed would be replaced. *Id.* Such a holding further solidifies that depending on the circumstances, gender can play an important role in a bequest. See *id.*

182. See, e.g., Jesse Singal, *When Children Say They're Trans*, ATLANTIC (July 2018), [www.theatlantic.com/magazine/archive/2018/07/when-a-child-says-shes-trans/561749](http://www.theatlantic.com/magazine/archive/2018/07/when-a-child-says-shes-trans/561749).

183. Reiner, *supra* note 25.



acts as a tool to invalidate their identity.<sup>184</sup> However, to identify a transgender individual by using their actual sex or brain sex, there is still room for those individuals' rights to be exploited.<sup>185</sup> For instance, in using a plain language approach where a will is strictly construed by the language and words used, a transgender beneficiary potentially loses their bequest because the property that the testator indicated was left to their previous identity, which includes a gender identity given to them by a physician based on the appearance of their genitalia at birth.<sup>186</sup> If this question is not addressed, by statute or case law, transgender individuals continue to be a marginalized group in the eyes of the law.<sup>187</sup> Courts can interpret the issue of identity in many ways.<sup>188</sup> This Part explores the different ways that a court may approach a case involving a bequest to a transgender beneficiary's previous identity.

#### *A. Determining the Testator's Intent Through Legal Analysis*

Joseph's transition to Julia creates an ambiguity.<sup>189</sup> To address this ambiguity and to further determine the intent of the clause "to my son, Joseph," a court may conduct a hearing to determine the testator's intent at the time of the will's formation.<sup>190</sup> The intent of a testator is gathered from the entirety of the will, with all of its provisions taken together, as opposed to focusing on one provision in particular.<sup>191</sup> In some jurisdictions, a court will generally look to the "four corners"<sup>192</sup> of the will and read the document as a whole; if the intention is ambiguous, the court invokes the rules of construction and will potentially allow extrinsic evidence to clarify the testator's intent.<sup>193</sup> A will is considered

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184. Gee, *supra* note 180, at 99-100. As explained by Gee, there are many other aspects of identity beyond gender and sexual orientation. *Id.*; see also Levasseur, *supra* note 4, at 951 ("Gender identity has a strong biological and genetic component and is the most important determinant of a person's sex." (citation omitted)).

185. See, e.g., *Littleton v. Prange*, 9 S.W.3d 223, 231 (Tex. Ct. App. 1999). Christie Lee Littleton was denied her spousal benefits after the Court held that she was bound by her birth sex. *Id.*

186. See 80 AM. JUR. 2D *Wills* § 991 (2018) ("If the whole will clearly indicates the testator's intention, the rules of law which aid in the construction of wills need not be invoked.").

187. See *supra* Part II.C.

188. See *infra* Parts IV. A-H.

189. See *infra* text accompanying notes 210-13.

190. 80 AM. JUR. 2D *Wills* § 991 n.3 (citing *Will of Ackert*, 398 N.Y.S.2d 97, 98 (Sur. Ct. 1977)).

191. *Id.*

192. See *infra* Part IV.C.

193. See *infra* Part IV.C.; see also RESTATEMENT (THIRD) OF PROP.: WILLS AND OTHER DONATIVE TRANSFERS § 10.2 cmt. d (AM. LAW INST. 2003) ("Extrinsic evidence of the circumstances surrounding the execution of the donative document that might bear on the donor's intention, directly or circumstantially, may always be considered. Examples include evidence of the

ambiguous if it is susceptible to more than one reasonable interpretation.<sup>194</sup> Alternatively, a will is unambiguous if only one reasonable meaning emerges from the terms used in the instrument.<sup>195</sup> However, a term or phrase in a will is not ambiguous because the parties offer different interpretations of it.<sup>196</sup> Generally, extrinsic evidence is not admissible where it varies, contradicts, or adds to the terms of a will or to show that there was a different intention by the testator.<sup>197</sup>

### *B. When Extrinsic Evidence Is Appropriate*

A court may allow certain pieces of extrinsic evidence to be admitted to resolve ambiguities.<sup>198</sup> However, extrinsic evidence is only admissible where the evidence would resolve and not serve to complicate an ambiguity further.<sup>199</sup> The courts use a two-pronged test for the standard of admissibility of extrinsic evidence of a testator's intent.<sup>200</sup> Not only must the evidence demonstrate that a literal reading of the will is not expressive of the testator's intent, but that the "testator's actual words also must be susceptible to the interpretation gleaned from the extrinsic evidence."<sup>201</sup> If a will is silent regarding a particular contingency, a court cannot rewrite or add meaning to address unforeseen circumstances by the testator "since silence does not, in itself, create ambiguity so as to permit consideration of extrinsic evidence."<sup>202</sup>

### *C. Plain Language Approach: The "Four Corners" and No Reformation Rules*

When a will is contested, courts adhere to the "Four Corners Rule," which limits the interpretation of the language within the "four corners" of the document.<sup>203</sup> As a general practice, courts have held:

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donor's occupation, property at the time of execution of the document, and relationships with family members and with other persons, including the designated or apparently designated donees. Because a donor formulates his or her intention largely based upon what the donor knows or believes concerning the persons whom he or she includes or excludes as donees, evidence regarding this knowledge or belief can help in the construction of a donative document.").

194. 80 AM. JUR. 2D *Wills* § 975 (2018).

195. *Id.*

196. *Id.*

197. *Id.* § 1097.

198. *Id.*

199. *Id.*

200. *Id.*

201. *Id.*

202. *Id.*

203. *Id.* § 991.

[A] will may contain within itself all the needed evidence of its meaning. However, there is also authority that, in giving effect to any will, even the simplest and clearest, some extrinsic evidence may be admitted to identify the persons and property referred to in the will and to enable the court to apply the words of the will to the matters to which it relates.<sup>204</sup>

External evidence surrounding the circumstances of the agreement that would retract, modify, or contradict the original statement will not be considered.<sup>205</sup> There are two different types of ambiguities that are common when interpreting wills: patent ambiguities and latent ambiguities.<sup>206</sup> A patent ambiguity appears on the face of the document, “which arises upon the words of the instrument as looked at in themselves, and before any attempt is made to apply them to the object to which they describe.”<sup>207</sup>

Latent ambiguities, on the other hand, are not discoverable from the perusal of the will, “but upon the words of the instrument when applied to the object or subject which they describe which appears upon consideration of extrinsic circumstances.”<sup>208</sup> However, “a latent ambiguity in a will is not established unless it is possible to interpret the language deployed in the will to be in alignment with the intent established by extrinsic evidence.”<sup>209</sup> Thus, showing that a testator might have intended something different than the plain meaning set forth by the document is not enough to establish a latent ambiguity.<sup>210</sup> If a court holds that the transgender beneficiary’s transition qualifies as a latent ambiguity, then extrinsic evidence may be examined to clarify the ambiguity.<sup>211</sup> However, direct evidence of intention contradicting the plain meaning of the text does not establish a latent ambiguity.<sup>212</sup>

204. *Id.* § 1098; *see, e.g., In re McSwain*, 946 So. 2d 417, 420 (Miss. 2006).

205. 80 AM. JUR. 2D *Wills* § 975.

206. *Id.* § 1099.

207. *Id.*

208. *Id.*

209. *Id.*

210. *Id.* (“[T]he mere showing that a testator may have intended a testamentary construction in direct contradiction to the plain meaning of the will’s language is not enough to establish latent ambiguity.”).

211. *See, e.g., Demeraski v. Bailey*, 35 N.E.3d 913, 924-25 (Ohio Ct. App. 2015). In this case, a father consented to daughter’s name change. *Id.* Upon probate of the father’s will, the daughter was not specifically named and sought to be included as one of his children. *Id.*

212. RESTATEMENT (THIRD) OF PROP.: WILLS AND OTHER DONATIVE TRANSFERS § 11.1 cmt. c (AM. LAW INST. 2003) (For example, “[i]f the testator . . . had a cousin named John when he executed his will, the devise ‘to my cousin John’ would not be rendered ambiguous by evidence that the testator directed his lawyer to designate the testator’s cousin James as the devisee and that the lawyer’s secretary typed in John’s name by mistake. . . . However, for the possibility of reforming the will if the testator’s intention to designate his cousin James as the devisee rather than his cousin

Latent ambiguities can further fall into one of two categories: equivocation (also known as a misnomer) or misdescription.<sup>213</sup> An equivocation is a description that may describe more than one object.<sup>214</sup> Conversely, a misdescription aligns with a patent ambiguity in that it is a description of a piece of property, or a beneficiary, where part of the bequest is incorrect.<sup>215</sup> To circumvent this, many jurisdictions—especially in the past—will attempt to delete the ambiguous words to see if a plain meaning can be given to the resulting sentence.<sup>216</sup> However, “[i]f a plain meaning [less] crossed-out words does not resolve the ambiguity, then these courts treat the gift as a failed gift, in keeping with their rule that they will admit extrinsic evidence to resolve ambiguous wording, but not rewrite wills.”<sup>217</sup>

There are ambiguities in which the rules of construction or constructional preference do not apply; these ambiguities include situations where: “(1) the test or extrinsic evidence reveals a mistaken description of persons or property; (2) the text reveals an apparent mistaken inclusion or omission; (3) extrinsic evidence reveals that the donor’s personal usage differs from the ordinary meaning of the term used in the text.”<sup>218</sup>

Some jurisdictions will refuse to admit extrinsic evidence for a patent ambiguity.<sup>219</sup> The Restatement (Third) of Property takes the approach that “no legal consequences” attach to the distinction between latent and patent ambiguities.<sup>220</sup> Cases in Tennessee, Nebraska, and Mississippi have held that the plain meaning rule and the patent/latent distinctions are still to be used by the courts.<sup>221</sup> States like Indiana have

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John can be shown by clear and convincing evidence.”).

213. William C. Spaulding, *Will Construction and Extrinsic Evidence*, THISMATTER.COM, [thismatter.com/money/wills-estates-trusts/will-construction-extrinsic-evidence.htm](http://thismatter.com/money/wills-estates-trusts/will-construction-extrinsic-evidence.htm) (last visited Feb. 3, 2019).

214. *Id.*

215. *Id.*

216. *Id.*; see also 3A HORNER PROBATE PRAC. & ESTATES § 62:4 (2018) (“Where the ambiguity consists of a misnomer or misdescription, the false words may be stricken, and if after these words are discarded a sufficient description remains, when interpreted in light of the surrounding circumstances, to identify the object or subject of the testator’s gift with certainty, the will may be read and construed with the false words eliminated.”).

217. Spaulding, *supra* note 213.

218. RESTATEMENT (THIRD) OF PROP.: WILLS AND OTHER DONATIVE TRANSFERS § 11.2 (AM. LAW INST. 2003).

219. Spaulding, *supra* note 213.

220. *Use of Extrinsic Evidence in Construing Ambiguities in Wills*, 33 EST. PLAN. 53, 53 (2006) (citing RESTATEMENT (THIRD) OF PROP.: WILLS AND OTHER DONATIVE TRANSFERS § 11.1 cmt. a (citing *In re Roland*, 920 So. 2d 539 (Miss. 2006), *In re Estate of Mousel*, 715 N.W.2d 490 (Neb. 2006), and *McBride v. Sumrow*, 181 S.W.3d 666 (Tenn. 2005))).

221. *Id.*; see, e.g., *McBride*, 181 S.W.3d at 669-70 (holding that without specific language about how his property was to vest if his wife predeceased him, the will contained a “patent

taken an alternative approach and abolished the patent/latent distinction altogether, leaving the interpretation of the document solely to the words on the instrument.<sup>222</sup>

Courts may also choose to abide by the “no reformation rule.”<sup>223</sup> Under this rule, courts cannot “reform” a will to correct a mistake in the will so that it would reflect what the testator intended it to say.<sup>224</sup> In *Sanderson v. Norcross*, the Massachusetts court held:

Courts have no power to reform wills. . . . [M]istakes of testators cannot be corrected. Omissions cannot be supplied. Language cannot be modified to meet unforeseen changes in conditions. The only means for ascertaining the intent of the testator are the words written and the acts done by him.<sup>225</sup>

Under this doctrine, courts are bound to the words on the face of the document, regardless of intention or potential mistake.<sup>226</sup> Thus, the testator’s intent is bound to the definition of the word chosen to appear in the document, and a single word could be the difference between receiving and being denied a bequest.<sup>227</sup>

In the states that use the plain meaning rule and the no reformation rule, there are still underlying issues.<sup>228</sup> For instance, a court must decide how to recognize the transgender beneficiary. If a court chooses to recognize the transgender beneficiary’s identity as they are before the court, then the transgender beneficiary may lose their right to the decedent’s property, as their name and sex do not align with the language of the will.<sup>229</sup> However, if the Court looks to the logic used in

ambiguity” and thus, “extrinsic evidence may not be used to determine the intent of the testator”); *see also, e.g.*, *Univ. of S. Ind. Found. v. Baker*, 843 N.E.2d 528, 535 (Ind. 2006) (“[T]he distinction between patent and latent ambiguities is not useful, and it is proper to admit extrinsic evidence to resolve any ambiguity.”).

222. *Id.*

223. RESTATEMENT (THIRD) OF PROP.: WILLS AND OTHER DONATIVE TRANSFERS § 12.1 cmt. c.

224. *Id.*

225. *Sanderson v. Norcross*, 136 N.E. 170, 172 (Mass. 1922).

226. *Id.* (“Hypothetical or imaginary mistakes of testators cannot be corrected. Omissions cannot be supplied. Language cannot be modified to meet unforeseen changes in conditions. The only means for ascertaining the intent of the testator are the words written and the acts done by him.”); *see also Polsey v. Newton*, 85 N.E. 574, 575 (Mass. 1908).

227. *Newton*, 85 N.E. at 575.

228. *Cf. REID KRESS WEISBORD ET AL., WILLS, TRUSTS AND ESTATES: THE ESSENTIALS* 299 (2018) (“Although the majority of jurisdictions has retained the common law ‘no reformation’ rule, the modern trend, reflected in both the Restatement and the UPC, permits a will to be reformed to correct a mistake.”); *see also* RESTATEMENT (THIRD) OF PROP.: WILLS AND OTHER DONATIVE TRANSFERS § 12.1 cmt. d.

229. *Cf. Littleton v. Prange*, 9 S.W.3d 223, 231 (Tex. Ct. App. 1999) (“At the time of birth, Christie was a male, both anatomically and genetically. The facts contained in the original birth

cases like *M.T.*,<sup>230</sup> *Littleton*,<sup>231</sup> *Harvey*,<sup>232</sup> and *Araguz*,<sup>233</sup> while the reasoning behind the holdings in those cases works against the transgender person in the realms of marriage and benefits, it would likely have the opposite effect in probate proceedings.<sup>234</sup> Using the same reasoning from those cases, the beneficiary's birth sex would be the determining factor in deciding whether the beneficiary has a right to the estate.<sup>235</sup> Thus, with the logic used in those cases, the transgender beneficiary has a valid claim to their portion of the estate by law because their natal sex and identity aligns with that in the executed will.<sup>236</sup>

#### D. Personal Use Exception

Courts have allowed a "personal use exception" where the testator has habitually used the same words to connote a specific meaning.<sup>237</sup> The most common example of the exception is the use of nicknames, where a testator identifies a beneficiary by a nickname rather than their legal name.<sup>238</sup> Other examples include referring to stepchildren as the testator's children.<sup>239</sup> Using this exception, one could claim that the

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certificate were true and accurate, and the words contained in the amended certificate are not binding on this court."). If Christie's case was aligned with that of the hypothetical, then she would likely receive her bequest because this court's decision turned on the sex at birth, not who Christie appeared to be before the court at the time of the case. *See id.*

230. *M.T. v. J.T.*, 355 A.2d 204, 211 (N.J. Super. Ct. App. Div. 1976).

231. *Littleton*, 9 S.W.3d at 231.

232. *In re Harvey*, 293 P.3d 224, 225 (Okla. Civ. App. 2012).

233. *In re Estate of Araguz*, 443 S.W.3d 233, 248 (Tex. Ct. App. 2014).

234. *Cf. Littleton*, 9 S.W.3d at 231. Justice Hardberger opined that "[a]t the time of birth, Christie was a male, both anatomically and genetically. The facts contained in the original birth certificate were true and accurate, and the words contained in the amended certificate are not binding on this court." *Id.* at 231. However, in a probate proceeding involving a transgender beneficiary, such conservative ideology would be favorable for the transgender beneficiary receiving the bequest made to their previous identity. In being bound to the sex determined at birth, the identifier of "son" or "daughter" is clarified, and thus upon proof of a name change, the transgender beneficiary would receive their bequest. *Id.*

235. *Id.*

236. *Id.*

237. RESTATEMENT (THIRD) OF PROP.: WILLS AND OTHER DONATIVE TRANSFERS § 11.2(b)(3) (AM. LAW INST. 2003).

238. *See* 31 STANDARD PENN. PRAC. 2d § 150:47; *see also In re Grawe*, 822 N.Y.S.2d 683, 683 (App. Div. 2006) (holding that the bequest to "that woman, if there be one, with whom I am cohabitating in said residence at the time of my death" provided enough criteria to obtain a rightful beneficiary); *In re Jacobson's Estate*, 224 N.Y.S.2d 640, 641, 643 (Sur. Ct. 1962); *Moseley v. Goodman*, 195 S.W. 590, 592 (Tenn. 1917) ("[W]hen it was proven that there was existence a Mrs. Moseley, whose legal name was such, satisfied the language of the will, and the testimony referred to concerning Mrs. Trimble's being called Mrs. Moseley by the testator could not be used to raise a latent ambiguity. We are of the opinion that this view is erroneous.").

239. *See* RESTATEMENT (SECOND) OF PROP.: DONATIVE TRANSFERS § 25.6 cmt. b (AM. LAW INST. 1988).

intent to give to their transgender child was evident in the language of the will, but that the testator simply used the language that he believed was correct.<sup>240</sup> In our example, if William did not know of Joseph's gender dysphoria until the transition to Julia was made, then he simply used the wrong words to identify the true beneficiary—Julia.

In a bequest to a transgender beneficiary, one might argue that their previous identity was used in the will simply as an identifier—a description of a person who was readily ascertainable to receive the property should the testator pass away.<sup>241</sup> With a legal name change and a legal gender marker change, the transgender beneficiary could present supporting documentation that the adjectives and words used in the will were intended to identify them as they were when the will was executed.<sup>242</sup> However, since the passing of the testator, the identifiers have changed, but the intent remained the same—property was to flow from the testator to the transgender beneficiary.<sup>243</sup>

Adversely, one might argue that the identifying adjectives for the transgender beneficiary aided in the *intent* of the testator. The identifiers indicate that in the hypothetical above, that William intended for his estate to go to *Joseph*, his *son*, not Julia, his daughter. If the beneficiary is still readily attainable and identifiable, does the name and gender identifier really matter?<sup>244</sup>

What if William knew of Julia's transition and did not change the language of the will? It could be inferred that William's lack of action constitutes an act to withhold his estate from Julia.<sup>245</sup> However, this

240. See RESTATEMENT (THIRD) OF PROP.: WILLS AND OTHER DONATIVE TRANSFERS § 11.2(b)(2) (AM. LAW INST. 2003).

241. See *Bosserman v. Burton*, 120 S.E. 261, 262 (Va. 1923) (“It is not necessary for a testator to give the full name or description of a legatee or devisee, in order to give effect to the bequest. It is sufficient if the beneficiary is designated with reasonable certainty . . .”).

242. RESTATEMENT (THIRD) OF PROP.: WILLS AND OTHER DONATIVE TRANSFERS § 11.2(b)(1) (AM. LAW INST. 2003); see also *Use of Extrinsic Evidence in Construing Ambiguities in Wills*, *supra* note 220, at 54.

243. RESTATEMENT (THIRD) OF PROP.: WILLS AND OTHER DONATIVE TRANSFERS § 11.2(b)(1) (AM. LAW INST. 2003).

244. *Bosserman*, 120 S.E. at 262.

245. Tim Fitzsimmons, *Over \$20k Raised for Funeral of Trans Student Whose Remains Went Unclaimed*, NBC NEWS (July 18, 2018, 6:35 PM), <https://www.nbcnews.com/feature/nbc-out/over-20k-raised-funeral-trans-student-whose-remains-went-unclaimed-n892611>. After coming out as transgender, Daine Grey's parents disowned him, and Daine later committed suicide. *Id.* His body was not claimed, even after two weeks had passed. *Id.*; see also Joanne Herman, *When Parents Reject Their Transgender Child*, HUFFINGTON POST (June 11, 2011, 2:16 PM), [https://www.huffingtonpost.com/joanne-herman/when-parents-reject-their\\_b\\_872191.html](https://www.huffingtonpost.com/joanne-herman/when-parents-reject-their_b_872191.html) (last visited Feb. 3, 2019); Jaimie Seaton *Homeless Rates for LGBT Teens Are Alarming, But Parents Can Make a Difference*, CHI. TRIB. (Mar. 29, 2017, 2:10 PM), <https://www.chicagotribune.com/lifestyles/ct-homeless-lgbt-teens-parents-20170329-story.html> (“Up to 1.6 million young people experience homelessness in the United States every year. Forty

argument works for both sides: William's lack of action to change the language in his will or silence on the matter could also indicate that he accepted Julia's transition and believed that the estate would pass to her without any legal issues.<sup>246</sup>

#### *E. Construction Hearing To Determine the Intent of the Testator*

In New York, "the court will infer the gift only in rare and exceptional cases where a reading of the entire will reveals that the testator intended to dispose of [her] property in a certain manner but through error or omission failed to make clear [her] exact intent or purpose."<sup>247</sup> In a will construction, the Surrogate's Court is authorized to attempt to discern the intent of the testator (or testatrix) through the language used.<sup>248</sup> In a will construction proceeding, the job of the court is to determine the intent of the testator to clarify an ambiguous will provision.<sup>249</sup> The intention of the testator is not be drawn from a single word or phrase, but from a sympathetic reading of the will as a whole, and in light of all the facts and circumstances under which it was framed.<sup>250</sup> Upon ascertainment of the intention of the testator, that intention controls, unless it is contrary to statute or public policy.<sup>251</sup> In many decisions involving will construction issues, courts have relied on the dominant purpose evidenced by the decedent.<sup>252</sup> No matter how "inept, ambiguous and obscure the language," the court will construe the will so as to give force and effect to the main purpose of the testator.<sup>253</sup> Great liberality is exercised by courts

in committing the execution of wills to those persons indicated in any manner by the will, in accordance with the intent of the testator, and in

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percent of them identify as LGBT (lesbian, gay, bisexual or transgender), according to a 2012 study conducted by the Williams Institute at UCLA Law. It's estimated that LGBT youth represent about 7 percent of the population, which puts that 40 percent figure into heartbreaking context.").

246. *Cf. Sanderson v. Norcross*, 136 N.E. 170, 172 (Mass. 1922). Although the language of the will was not changed to reflect Julia's identity, it could be possible that William's silence on the issue constituted consent for Julia to receive her share of his estate. *See* RESTATEMENT (FIRST) OF AGENCY § 94 (1933) (AM. LAW INST., amended 2018). ("An affirmation of an unauthorized transaction may be inferred from failure to repudiate it. Silence under such circumstances that, according to the ordinary experience and habits of men, one would naturally be expected to speak if he did not consent, is evidence from which assent may be inferred.").

247. N.Y. SURR. CT. PROC. ACT LAW § 1420 (McKinney 2018) (citing *In re Gallucci*, 533 N.Y.S.2d 758, 759 (App. Div. 1988)).

248. 11 WARREN'S HEATON ON SURROGATE'S COURT PRACTICE § 187.05 (2018).

249. *Id.*

250. *Id.*

251. *Id.*

252. *Id.*

253. *Id.*



such manner so as not to disappoint the testator's intent regardless of technicalities. The courts have accommodated the intent of the testators, rather than require the will to give way to technical forms and modes of procedure.<sup>254</sup>

#### F. *Dead Man's Statutes or Dead Man Acts*

Returning to the hypothetical, what if Julia was to be considered an after-born child? Is she not a child that was, in essence, "born" after the will was executed, but before the testator died?<sup>255</sup> If William died in a state that uses the Uniform Probate Code ("UPC"), there may be a question as to whether the omission of Julia from the will was intentional. However, the best way to examine William's intentions is to hear testimonies from those who knew him best.<sup>256</sup> "Dead man's statutes," also known as "dead man acts," prohibit interested parties from testifying against the estate of a deceased person or to transactions with the decedent.<sup>257</sup> The underlying need for the dead man's statute is the fear of "imperil[ing] the estates of the dead by subjecting them to the uncontradicted perjuries of the mendacious."<sup>258</sup> While this rule has been discarded by the Federal Rules of Evidence,<sup>259</sup> in some states, the statute is regarded as applicable to certain probate proceedings but not others. Thus, it may be inapplicable to will contests on the ground of mental condition or undue influence, but applicable on other grounds and to proceed to prove a lost will.<sup>260</sup> However, controversies concerning the distribution of a decedent's estate are generally not deemed to be within

254. *Id.*

255. Rick Rojas, *Transgender on the Force*, N.Y. TIMES (Aug. 5, 2016), <https://www.nytimes.com/2016/08/07/nyregion/transgender-on-the-force.htm> ("He was transgender, and about a year before he started the academy, a time of exams and interviews and extensive digging into his background, he began his transition to physically becoming a man. 'I'll put it like this,' he said. 'It was a rebirth.'"); see also Gabby Hinsliff, 'Age Has Nothing to Do with It': How It Feels to Transition Later in Life, GUARDIAN (Nov. 17, 2018), <https://www.theguardian.com/society/2018/nov/17/age-nothing-do-with-it-transition-later-life-transgender> (last visited Feb. 3, 2019) ("But the surgery she underwent at the age of 81 has opened doors she would never have thought possible. 'In some ways, it's like having new hips after being told you would be condemned to arthritis for the rest of your life,' she says. 'You do it, and life begins again. And that's what happened to me. Age has nothing to do with it.'").

256. 81 AM. JUR. 2D *Witnesses* § 531 (2018).

257. *Id.*

258. *Artists Rights Enf't Corp. v. King*, No. 16-CV-1121, *ute*, 2018 WL 704990, at \*1 (S.D.N.Y. Feb. 5, 2018) (citation omitted).

259. *Id.*; see also FED. R. EVID. 601 Advisory Committee's note to 1972 proposed rules ("The Dead Man's Acts are surviving traces of the common law disqualification of parties and interested persons. They exist in variety too great to convey conviction of their wisdom and effectiveness.").

260. 81 AM. JUR. 2D *Witnesses* § 531 (2018) (citing *In re Van Houten's Will*, 124 N.W. 886 (Iowa 1910); *Gibbs v. Terry*, 281 S.W.2d 712 (Ky. 1955); *In re Wind's Estate*, 178 P.2d 731 (Wash. 1947)).

the purview of the dead man's statute.<sup>261</sup> In a case such as the hypothetical, a court may want to examine witnesses to resolve any possible inconsistencies with William's intent in his bequest to Joseph. If Julia's siblings allege that William intentionally omitted her from the will by using her former identity, it may be beneficial for a court to have disinterested witnesses testify on that issue.<sup>262</sup>

### *G. Legislative Intent: Pretermitted Heir and Omitted Child Statutes*

The primary purpose of a pretermitted heir or omitted child statute is to protect the omitted heir from being unintentionally disinherited.<sup>263</sup> However, if the omission by the testator is proved to be intentional, then the statutes do not take effect.<sup>264</sup> Pretermitted statutes "were categorized as one of two different types of statutes."<sup>265</sup> The most common type is the "Massachusetts type," where the testator fails to provide for one or more of his children in their will. Under this type of statute, the omitted child still inherits as though the testator died intestate unless the court holds that there was an intentional omission or a mistake.<sup>266</sup> The second type of pretermitted statute is referred to as the "Missouri type," which provides that if the testator does not name or provide for a child in their will, courts allow for the omitted child to receive their intestate share.<sup>267</sup> The key distinction between the two types is that the "Massachusetts type" leaves room for an exception in cases where the court finds a purposeful omission of a child, whereas the "Missouri type" has no focus whatsoever on the testator's intent.<sup>268</sup>

Some states have enacted versions of omitted child and pretermitted child statutes to reflect or follow the UPC.<sup>269</sup> However, there are also some states that did more than just adopt the principles of the UPC; states such as Arkansas, Georgia, Kansas, Louisiana, and Wisconsin all take different approaches on the issue.<sup>270</sup> In Arkansas, the intent to disinherit any child must be apparent on the face of the will.<sup>271</sup>

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261. 81 AM. JUR. 2D *Witnesses* § 531.

262. See *Artists Rights Enf't Corp.*, 2018 WL 704990, at \*2.

263. 96 AM. JUR. 3D *Proof of Facts* 107 § 6 (2007).

264. *Id.*

265. *Id.*

266. *Id.*

267. *Id.*

268. *Id.* There are also some "Missouri type" states that have amended their statutes to allow testators to intentionally omit a child. See *id.* § 9; see also, e.g., WASH. REV. CODE § 11.12.094 (1994).

269. 96 AM. JUR. 3D *Proof of Facts* 107 § 9.

270. *Id.*

271. *Id.*

Otherwise, the child is able to inherit as they would if the testator died intestate.<sup>272</sup> In Georgia, “the birth or adoption of a child revokes a subsequent execution to the extent provided within the section.”<sup>273</sup> The child is then allowed to inherit as if the testator died intestate.<sup>274</sup> Taking an entirely different approach, Kansas has enacted a revocation statute: “in the case where a testator marries and subsequently a child is born or adopted, the will is revoked as a matter of law.”<sup>275</sup> In this case, the revocation of the will allows the child to receive their intestate share.<sup>276</sup> Like Arkansas, Louisiana requires any disinheritance to be on the face of the will, along with the reasoning for disinheriting the child.<sup>277</sup> However, disinheritance can be rebutted by a preponderance of the evidence.<sup>278</sup> Wisconsin has enacted a statute similar to the UPC, but takes the approach a step further, protecting from an unintentional omission by allowing an omitted child to receive an intestate share so long as clear and convincing evidence shows that the omission was unintentional.<sup>279</sup>

If a testator provides for his children in his will and uses the former identity of his transgender child to make a bequest, a court could grant a transgender beneficiary their intestate share without practicing or participating in judicial activism.<sup>280</sup>

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272. *Id.*

273. *Id.*

274. *Id.*

275. *Id.*

276. *Id.*

277. *Id.*

278. *See* *Macedo-Flores v. United States*, No. 3:16-cv-2975-O, 2019 WL 457541, at \*1-2 (N.D. Tex. Feb. 6, 2019) (citing *Balfour Beatty Rail Inc. v. Kan. City S. Ry. Co.*, 173 F. Supp. 3d 363, 384 (N.D. Tex. 2016)) (“Proving a fact by a ‘preponderance of the evidence’ means showing that the existence of a fact is more likely than not. Thus, to prove a fact or claim by a preponderance of the evidence, a party must prove that it is more likely than not that its version of the facts is true.”).

279. *Id.*

280. *See* *Edwards v. Kia Motors of Am., Inc.*, 8 So. 3d 277, 283 (Ala. 2008) (Cobb, C.J., dissenting) (“The term ‘judicial activism’ is susceptible to make meanings; it has been referred to as a ‘notoriously slippery term.’ However, as this Court discusses the term in the context of the review of substantive law or statutes, it implies a willingness on the part of the Court to invade, improperly, the province of the legislature by refusing to apply the plain meaning of the statute before us in favor of substituting language and meaning that are not otherwise present. Thus, the Court becomes a sort of ‘superlegislature’ that imposes its particular agenda on the citizens of our State without the benefit of the usual legislative process. . . . Not only does the Court disregard its obligations under the state and federal constitutions, but it also demonstrates an abandonment of principles that are absolutely critical to an effective system of justice.” (citation omitted)).

### H. Are Transgender Beneficiaries Considered After-Born Children?

If a transgender beneficiary completes a legal name change and gender marker change after the execution of a will, but shortly before the death of the testator, could the transgender beneficiary be considered an after-born child?<sup>281</sup> The approach is a creative one, seeing the transgender beneficiary as a new child of the testator when they have come into their own, changing their name, appearance, and gender marker.<sup>282</sup>

After-born children are “children [that] are born after the execution of the testator’s will, either before or after the testator’s death.”<sup>283</sup> In New York, after-born children who are not provided for, not mentioned in the will, nor provided for in any settlement, are entitled to take a share of the testator’s estate if either: (1) the testator had no living child when he executed the will, or (2) the testator provides in his will for one or more of the children that were alive when he executed the will.<sup>284</sup> If none of the testator’s children who were alive when he executed the will are provided for, the after-born child is not entitled to a share of the estate.<sup>285</sup> If the testator has no children living when he executed the will, then the after-born children are entitled to any amount equal to the intestate shares they would have otherwise received if the testator had died without a will.<sup>286</sup>

Similarly, in states that use the UPC, Section 2-302 is comparative to New York’s Estates, Powers and Trusts Law (“EPTL”) Section 5-3.2, except that Section 2-302(b) states: “Neither subsection (a)(1) nor subsection (a)(2) applies if: (1) it appears from the will that the omission was intentional; or (2) the testator provided for the omitted after-born or after-adopted child.”<sup>287</sup> Similar to omitted children, the UPC asks courts to look to the intentions of the testator. If the child was intentionally omitted or provided for in another fashion, then a child may have no right to a share of the estate.<sup>288</sup>

To complicate things further, jurisdictions have different views on whether an after-born child should receive a share of the testator’s estate.<sup>289</sup> In the case of *In re Estate of Kolacy*,<sup>290</sup> decided by a New

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281. See 11 WARREN’S HEATON ON SURROGATE’S COURT PRACTICE § 207.01[6][a] (2018).

282. *Id.* § 207.01[6][c].

283. *Id.* § 207.01[6][a].

284. *Id.*; see also N.Y. EST. POWERS & TRUSTS LAW § 5-3.2 (McKinney 2007).

285. 11 WARREN’S HEATON ON SURROGATE’S COURT PRACTICE § 207.01[6][a] (2018).

286. *Id.*

287. UNIF. PROBATE CODE § 2-302(b) (2010).

288. *Id.*

289. *Id.*; cf. *In re Estate of Kolacy*, 753 A.2d 1262, 1258 (N.J. Super. Ct. Ch. Div. 2000).

Jersey court, Amanda and Elyse Kolacy were born via artificial insemination approximately eighteen months after the death of their father.<sup>291</sup> The mother of the twins sought social security benefits for the children and was denied because the children were conceived after the death of their father.<sup>292</sup> The court examined the New Jersey statute that read: “Relatives of the decedent conceived before his death but born thereafter inherit as if they had been born in the lifetime of the decedent.”<sup>293</sup> The court recognized that

there have long been exceptions to the rule that the identity of takers from a decedent’s estate is determined as of the date of death. Those exceptions are based on human experience going back to time immemorial. . . . To deal fairly with this reality, decisional law and statutory law have long recognized that it is appropriate to hold the process of identifying takers from a decedent’s estate open long enough to allow after-born children to receive property from and through their father.<sup>294</sup>

Although transgender beneficiaries may not be physically birthed after the execution of a testator’s will, they are arguably “born.”<sup>295</sup> The word “born” can be defined as “brought into existence,”<sup>296</sup> which would be applicable to a transgender beneficiary.<sup>297</sup> In the given hypothetical, Julia was arguably born the day that she was truly recognized, be it through a name change, a gender marker change, a physical change or the completion of all three.<sup>298</sup> In *Kolacy*, Judge Stanton found that despite the statutory language, Amanda and Elyse were allowed to inherit as descendants of their father. He writes:

We judges cannot simply put those problems on hold in hope that someday (which may never come) the Legislature will deal with the problem in question. Simple justice requires us to do the best we can with the statutory law which is presently available. . . . Be all that as it may, once a child has come into existence, she is a full-fledged human

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290. *In re Kolacy*, 753 A.2d at 1257.

291. *Id.* at 1258.

292. *Id.*

293. *Id.* at 1260 (citing N.J. STAT. ANN. § 3B:5-8 (West 2007)).

294. *Id.* at 1260-61 (citing *Byerly v. Tolbert*, 108 S.E.2d 29, 35 (N.C. 1959); see *Baugh v. Baugh*, 973 P.2d 202, 206 (Kan. Ct. App. 1999)).

295. *Born*, OXFORD DICTIONARY, <https://en.oxforddictionaries.com/definition/born> (last visited Feb. 3, 2019). While Oxford predicates this definition to relate to “an organization, movement or idea,” it is important to remember that organizations (i.e., companies) are also a legal person in the eyes of the law, just as a transgender beneficiary would be.

296. *Id.*

297. See *supra* text accompanying notes 252-53.

298. See *supra* Part II.D.

being and is entitled to all the love, respect, dignity and legal protection which that status requires. It seems to me that a fundamental policy of the law should be to enhance and enlarge the rights of each human being to the maximum extent possible, consistent with the duty not to intrude unfairly upon the interests of other persons.<sup>299</sup>

Judge Stanton understood that the legislature does not always provide for those who fall outside of the norm and that regardless of the situation of the child, they are a human being that deserves “love, respect, dignity, and legal protection.”<sup>300</sup> Under the same rationale, even if past precedent and the legislature fail to provide them, surely the inheritance rights of a transgender beneficiary ought to be protected and upheld.<sup>301</sup> Thus, if the same reasoning was carried forward to the given hypothetical, then Julia, as a “full-fledged human being” who is entitled to “love, respect, dignity, and the legal protection what that status requires,” then certainly she would be recognized for who she is and would be fully entitled to the bequest from her father.<sup>302</sup>

### 1. An Uphill Battle

While it may not present as the best option for examining such an extraordinary situation, considering the transgender beneficiary as an after-born child may be a niche argument that a court could utilize to its advantage in deciding a case.<sup>303</sup> Considering the transgender beneficiary as an after-born child allows them to inherit if the testator’s other children are provided for in the will;<sup>304</sup> however, for courts in states that utilize the UPC, this option may open the door for more issues rather than solutions.<sup>305</sup> In these states, considering the transgender beneficiary as an after-born child opens the door for argument as to whether or not

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299. *In re Kolacy*, 753 A.2d at 1261-63.

300. *Id.*

301. *Edwards v. Kia Motors of Am., Inc.*, 8 So. 3d 277, 283 (Ala. 2008) (Cobb, C.J., dissenting). Failing to abide by stare decisis (past precedent set by case law) our current legislature requires the court to participate in “judicial activism,” in which the court “invade[s], improperly, the province of the legislature.” *Id.*

302. *See supra* text accompanying notes 298-99.

303. *See supra* text accompanying notes 298-99. Also note that if a court chooses to use this idea to allow the transgender beneficiary to inherit, there is a possibility that the court would be accused of “judicial activism.”

304. N.Y. EST. POWERS & TRUSTS LAW § 5-3.2 (McKinney 2007); UNIF. PROBATE CODE § 2-302(a) (2010).

305. *Uniform Probate Code*, LEGAL INFO. INST., <https://www.law.cornell.edu/uniform/probate> (last visited Feb. 3, 2019). States that currently use the UPC are Alaska, Arizona, Colorado, Florida, Hawaii, Idaho, Maine, Michigan, Minnesota, Montana, Nebraska, New Mexico, North Dakota, South Carolina, South Dakota, and Utah. *Id.*

the testator intended to give to Julia, when the plain language of the will reads “to my son, Joseph.”<sup>306</sup>

Before deciding whether or not a transgender beneficiary should be considered an after-born child, a court should consider not only the facts, but the future course of the litigation. While it provides a creative approach to the issue, taking the stance that transgender beneficiaries are “after-born children” might prove to be an uphill battle.<sup>307</sup>

#### V. WHAT’S IN A NAME? WHAT’S IN A GENDER? QUESTIONS THAT MIGHT NOT BE IMPORTANT IN INTERPRETING A BEQUEST

In a case involving a transgender beneficiary, the crux of the issue is that both the name and the identifier (i.e. son, daughter) do not match who the beneficiary has become.<sup>308</sup> It could be the case that the beneficiary’s identity does not neatly fit in the gender binary that society commonly recognizes.<sup>309</sup> However, when examined independently, the difference in name or identifier may not be detrimental to a transgender beneficiary.<sup>310</sup> This Part explores name changes in estate cases, as well as mistaken pronouns, the relationship between gender and one’s identity, and future challenges for transgender beneficiaries.<sup>311</sup>

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306. 96 AM. JUR. 3D *Proof of Facts* § 9 (2007). If she was successful in proving that she should be considered an “after-born child,” Julia could then receive an intestate share of William’s estate.

307. UNIF. PROBATE CODE § 2-302(a) (2010).

308. Caggiano, *supra* note 14, at 820.

309. Levasseur, *supra* note 4, at 947 (“For transgender people to be recognized as full human beings under the law, the legal system must make room for the existence of transgender people—not as boundary crossers but as people claiming their birthright as a part of a natural variation of human sexual development.” (citation omitted)).

310. See *In re Grawe*, 822 N.Y.S.2d 683, 683 (App. Div. 2006) (successfully using the identifier: “that woman, if there be one, with whom I am cohabitating in said residence at the time of my death”); *Frierson v. Gen. Assembly of Presbyterian Church*, 54 Tenn. (6 Heisk) 683, 693 (1872) (holding that name changes are not important. Rather, the emphasis lies in “whether the bequests vested in a party capable of taking at the death of the testator subsequent changes of name in the corporate body could not defeat the right vested, the body itself remaining substantially the same legal person.”); *Dickson v. Montgomery*, 31 Tenn. (1 Swan) 348, 360 (1851) (holding that the beneficiary need only prove their name change); *Bosserman v. Burton*, 120 S.E. 261, 262 (Va. 1923) (“It is sufficient if [the legatee] be so described therein as to be readily ascertained and identified by the aid of extrinsic evidence.”).

311. See *infra* Part V.A–D.

### A. Name Changes

In deciding how to dissect the issue of a bequest to a transgender beneficiary who is identified using a previous identity, courts could look to precedent in cases where the testator left a bequest to a beneficiary who changed their name.<sup>312</sup> In as early as 1851, courts have recognized:

The general rule upon this subject [speaking of mistakes in names] is that where the name or description of a legatee is erroneous, and where there is no reasonable doubt as to the person who was intended to be named or described, the mistake will not disappoint the bequest. The error may be rectified, and the true intention of the testator ascertained in two ways: first, by the context of the will; second, in certain cases, by parol proof. Here the context and parol, as also the second proof, point unmistakably to the true object of the testator's bounty.<sup>313</sup>

As discussed previously, a court will likely allow extrinsic evidence to be heard in the event that the beneficiary indicated in the will does not match the beneficiary's identity when the will is probated.<sup>314</sup> If the beneficiary can prove their name change, which is generally done by judicial decree,<sup>315</sup> then the bequest of the will is likely to pass to them.<sup>316</sup>

In the case of *Frierson v. General Assembly of Presbyterian Church*, a testator, William Kennedy, left a bequest to the General Assembly of the Presbyterian Church in the Confederate States ("General Assembly").<sup>317</sup> When Kennedy died, the name of the General Assembly had changed to the General Assembly of the Presbyterian Church of the United States.<sup>318</sup> Objectants asserted that at the time the will was executed, the General Assembly of the Presbyterian Church of the United States was not incorporated.<sup>319</sup> The court ultimately held:

We need not give the details as to the date and history of the changes in the name of this body, as we think the main question is, whether the bequests vested in a party capable of taking at the death of the testator. Subsequent changes of name in the corporate body could not defeat the right vested, the body itself remaining substantially the same legal person.<sup>320</sup>

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312. See, e.g., *Dickson*, 31 Tenn. (1 Swan) at 360.

313. *Id.* (citing 2 WILLIAMS ON EXECUTORS 736 (2018)).

314. *Id.*

315. *Know Your Rights: FAQ About Identity Documents*, *supra* note 76.

316. *Id.*

317. *Frierson v. Gen. Assembly of Presbyterian Church*, 54 Tenn. (6 Heisk) 683, 688 (1872).

318. *Id.* at 692-93

319. *Id.*

320. *Id.* at 693 (citing *Dickson v. Montgomery*, 31 Tenn. (1 Swan) 368 (1851)).



Although the holding, in this case, is in relation to a corporate entity, the words “the body itself remaining substantially the same legal person” could still be applicable to a probate proceeding involving a transgender beneficiary.<sup>321</sup> Indeed, name changes cannot defeat a vested right because the individual is still “the same legal person” as they were at birth.<sup>322</sup>

In states such as Virginia, the courts have taken a more liberal approach when inconsistencies or ambiguities arise.<sup>323</sup> Instead of strictly construing the language, the court realized that the general scheme is just as important.<sup>324</sup> Judge Kelly wrote:

Nor must we forget that uniform justice is better than strict consistency, especially when dealing with the language of a will, because the testator necessarily confides his meaning to an instrument which courts of equity are sacredly enjoined to interpret justify as between him and those he leaves behind, should controversy arise, death having closed his own lips.<sup>325</sup>

Judge Kelly also wrote of the importance of the rules and principles of construction as set forth in *Corbin v. Mills*.<sup>326</sup> Perhaps Judge Kelly’s notion of “uniform justice is better than strict consistency” should be reflected upon if a court presides over a case involving a transgender beneficiary.<sup>327</sup> Indeed, there is only so much that a testator can foresee in preparing the document that will bestow his property to future generations.<sup>328</sup> The testator “confides” in the document to construe his intent and plan for distribution of his property when he cannot.<sup>329</sup> Thus, there should be “uniform justice”<sup>330</sup> for the transgender beneficiary; to assume that the testator would know of the transgender beneficiary’s

321. *Id.*

322. *Id.* at 693.

323. *See* Hill’s Adm’rs v. Hill, 103 S.E. 605, 607 (Va. 1920).

324. *Id.*

325. *Id.* (citing JAMES SCHOULER, LAW OF WILLS AND ADMINISTRATION 529 n.1 (2018)).

326. *Id.* at 608 (citing *Corbin v. Mills*, 60 Va. (19 Gratt.) 438, 470 (1869)).

327. *Id.*

328. 11 WARREN’S HEATON ON SURROGATE’S COURT PRACTICE § 187.05[1][a] (2018) (citing *In re Bauer*, 284 N.Y.S.2d 98, 102-03 (Sur. Ct. 1967)) (“Subsequent to the decedent’s death, a statutory rule of construction was added to permit the court to presume that the testator intended such a contingency . . .”).

329. *See* 79 AM. JUR. 2D WILLS § 1 (2018) (“Similarly, a will has been defined as the legal expression of a person’s wishes as to the disposition of his or her property after death or the legal declaration of one’s intentions, which he or she wills to be performed after his or her death.” (citations omitted)); *see also In re Estate of Warren*, 39 N.Y.S.3d 282, 285 (App. Div. 2016) (“[E]qually well established is the axiom of testamentary construction that the testator is presumed to have intended to dispose of the whole estate by will, and did not intestacy as any part of it.” (quoting *Matter of Biele*, 695 N.E.2d 1119, 1122 (N.Y. 1998))).

330. Hill’s Adm’rs v. Hill, 103 S.E. 605, 607 (Va. 1920).

self-actualization in coming into their true gender and identity when executing his will would be the equivalent of assuming that the testator was also aware of when death would silence him forever.<sup>331</sup> Neither is predictable nor should it have to be for the transgender beneficiary to receive the bequest indicated by the testator to them in the will.

### *B. Mistaken Uses of Personal Pronouns*

As noted previously, where there is inconsistency or ambiguity, a court will look to extrinsic evidence to decipher the intent of the testator or to ascertain “the person or object intended.”<sup>332</sup> For instance, a bequest to “him” or “her” requires extrinsic evidence because the identity of the person that the pronoun refers to is unclear.<sup>333</sup> In *Eichhorn v. Morat*,<sup>334</sup> a case before the Kentucky Court of Appeals, Judge Thomas opined:

It is true that in the case we now have the pronoun “he” which the testatrix employed might be applied to a great many persons, but when it is remembered that in the illustration given the same might be said with reference to the name “John,” which is but the more restricted, we are unable to distinguish any logical reason why the rule should not be applied in the one case as well as the other. There is just as much room for an error to be made by the parol proof as to the real person to whom the testator intended in the one case as in the other. The two cases exhibit a difference in degree only, not in kind.<sup>335</sup>

With pronouns, terms like “he,” “she,” and “them” are far more indefinite than a simple identifier such as “John” because they are applicable to a larger number of people.<sup>336</sup> However, in a case involving a transgender beneficiary, the terms are not indefinite because the will indicates their former name and sex through the surrounding identifiers.<sup>337</sup> To the contrary, the identifier is specific.<sup>338</sup> In the hypothetical, the phrase “to my son, Joseph” makes clear that the bequest is to the testator’s son named Joseph. Such a phrase only refers to one person, and the terms are not indefinite. With the admission of extrinsic evidence, the court will find that the clause refers to the same

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331. *Id.*

332. R. T. Kimbrough, *Admissibility of Extrinsic Evidence to Aid Interpretation of Will*, 94 A.L.R. § 26 III.b(2)(b)(2)(dd) (1935) (citing *Eichhorn v. Morat*, 193 S.W. 1013, 1014 (Ky. 1917)).

333. *Id.*

334. 193 S.W. 1013 (Ky. 1917).

335. *Id.* at 1015.

336. *See* *Bosserman v. Burton*, 120 S.E. 261, 262 (Va. 1923).

337. *Id.* A transgender beneficiary is an identifiable and ascertainable person.

338. *Id.*

physical, legal person.<sup>339</sup> Although the features of that physical person may have been altered to align with the beneficiary's gender identity, the court cannot deny that the beneficiary is still the same—they merely present themselves in a different way.<sup>340</sup> Although the testator may have referenced to “Joseph,” both “Joseph” and Julia reside in the same physical vessel that is the human body—the only difference being that “Joseph” was an identity chosen by “his” parents and doctors. Julia was there all along, waiting for the world to see *her* as she truly was.

### C. Is One's Identity Rooted in Their Gender?

The word “identity” is defined as: “(a) the distinguishing character or personality of an individual; (b) the relation established by psychological identification.”<sup>341</sup> However, a person's identity is more than a name or a gender. A person's identity is more than an “M” or an “F” on state and federal documents.<sup>342</sup> Yet, it is possible that the interpretation of a last will and testament comes down to such markings.<sup>343</sup> Perhaps the most pivotal issue that the court will address when probating a will with a transgender beneficiary is how the court chooses to identify the transgender beneficiary. Will they be recognized for who they *are*, or are they bound by who they *were*, based on the name and gender given to them at birth?<sup>344</sup> If they are recognized for who they *are*—a transgender individual whose sex is now aligned with who they were truly meant to be—then, in assuming their “new”<sup>345</sup> identity, would that void the interests that attached to who they were, including benefits and bequests derived from a will?<sup>346</sup> Or will the holdings of *Simmons*, *Littleton*, and *Araguz* triumph, forcing the transgender individual to be legally bound to their sex and identity at birth?<sup>347</sup>

339. 11 WARREN'S HEATON ON SURROGATE'S COURT PRACTICE § 187.05[1][a] (2011); see also *Bosserman*, 120 S.E. at 262.

340. *Vade*, *supra* note 21, at 269; see also *Caggiano*, *supra* note 14, at 818 (“The biological model presumes that there are only two biological categories and that the social and cultural attribute associated with gender are the natural result of a person's biological sex.”).

341. *Identity*, MERRIAM-WEBSTER, [www.merriam-webster.com/dictionary/identity](http://www.merriam-webster.com/dictionary/identity) (last visited Feb. 3, 2019).

342. *Weiss*, *supra* note 104, at 591.

343. *Id.*

344. *Cf. Littleton v. Prange*, 9 S.W.3d 223, 231 (Tex. Ct. App. 1999) (holding that sex at birth is the determinant factor).

345. It is important to note that a transgender individual coming into their true identity is not a “new” identity; it only seems “new” to those outsiders who became accustomed to the name/sex assigned at birth.

346. *Littleton*, 9 S.W.3d at 231.

347. *In re Marriage of Simmons*, 825 N.E.2d 303, 315 (Ill. App. Ct. 2005); *In re Estate of*

If a person was forced to be bound to their sex and identity at birth, it would raise interesting questions, especially for people like Andrew Wardle.<sup>348</sup> Wardle was born without a penis because he was born with an ectopic bladder (meaning the bladder formed on the outside of his body), a twenty-million-to-one condition.<sup>349</sup> In coming out of the womb with no genitalia whatsoever, would Wardle be bound to one gender versus the other? Perhaps doctors would opine that because he had testes, he was a man. But what about men who lose their penis to penile cancer? Are they stripped of their manhood when the penis is amputated or when the testes are removed?<sup>350</sup>

Consider this: in the Dominican Republic, one in ninety children in the village of Salinas is born with “*guevedoces*,” which translates to “penis at twelve.”<sup>351</sup> As a result, these children are born without a labeled sex.<sup>352</sup> As a part of his BBC series, *Countdown to Life—the Extraordinary Making of You*, Dr. Michael Mosley interviewed some of the boys born with *guevedoces*.<sup>353</sup> Dr. Mosley interviewed a child named Johnny who told Dr. Mosley that he was brought up as a girl before he grew his penis at the age of seven.<sup>354</sup> Other cases have also been seen in the Sambian villages of Papua New Guinea.<sup>355</sup> In a case involving a child with this condition, how would Justice Hardberger rule if there was no clear sex at birth to label the child?<sup>356</sup> Could the child be bound to having no sex at all? An occurrence of a child contesting a will with such a unique genetic condition would be rare, but highlights that the sex at birth may not be as important as courts have previously held it to be.<sup>357</sup>

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Araguz, 443 S.W.3d 233, 250 (Tex. Ct. App. 2014); *Littleton*, 9 S.W. at 231.

348. Paddy Dinham, *Man Born Without a Penis Due To 20 Million-to-One Condition Is About to Get a Bionic One Fitted but Insists He’s in No Rush To Have Sex*, DAILY MAIL (Jan. 19, 2017, 4:09 PM), [www.dailymail.co.uk/news/article-4137938/Andrew-Wardle-Man-born-without-penis-bionic-one-made.html](http://www.dailymail.co.uk/news/article-4137938/Andrew-Wardle-Man-born-without-penis-bionic-one-made.html).

349. *Id.*

350. Ian Franks, *Penectomy for the Treatment of Penile Cancer*, HEALTHLINE (Sept. 15, 2017), [www.healthline.com/health/mens-health/penectomy](http://www.healthline.com/health/mens-health/penectomy).

351. Amy Packham, *Rare Disorder Means Some Boys in The Dominican Republic Don’t Grow a Penis Until Puberty*, HUFFINGTON POST (Sept. 9, 2015, 2:12 PM), [www.huffingtonpost.co.uk/2015/09/21/guevedoces-boys-grow-penis-at-puberty-countdown-to-life-documentary\\_n\\_8171272.html](http://www.huffingtonpost.co.uk/2015/09/21/guevedoces-boys-grow-penis-at-puberty-countdown-to-life-documentary_n_8171272.html).

352. *Id.*

353. *Id.*

354. *Id.*

355. *Id.*

356. *Id.*; see also Dinham, *supra* note 348. Justice Hardberger likely would hold the standard to the child’s genetic makeup, as in his opinion he writes: “At the time of birth, Christie was a male, both anatomically and *genetically*.” *Littleton v. Prange*, 9 S.W.3d 223, 231 (Tex. Ct. App. 1999) (emphasis added).

357. *Cf. Bosserman v. Burton*, 120 S.E. 261, 262 (Va. 1923).

In the holding of *Obergefell*, an opinion that expanded LGBTQ+<sup>358</sup> rights, Justice Kennedy begins the majority opinion with: “The Constitution promises liberty to all within its reach, a liberty that includes specific rights that allow persons, within a lawful realm, to *define and express their identity*.”<sup>359</sup> Those words could prove to be revolutionary for the transgender community, who were and continue to be misunderstood by those upholding the law time and time again.<sup>360</sup> For instance, in a 1973 case petitioning a change of gender on a birth certificate, a New York court agreed with the report that describing the petitioner, Ms. Hartin, stating “the male-to-female transsexual . . . is anatomically and chromosomally a male who is deeply disturbed in his gender orientation and role.”<sup>361</sup> The report went on to say “[h]e has an overpowering desire to be a woman.”<sup>362</sup> In allowing people to “define and express their identity,” Justice Kennedy’s powerful statement in *Obergefell* finally gives the transgender community what it has been searching for: validity.<sup>363</sup>

#### D. Future Challenges

A transgender beneficiary challenging the bequest to a previous identity presents the court with an abundance of questions, but not many solutions.<sup>364</sup> Certainly, a court could use holdings from cases involving name changes, misuse of pronouns, and cases involving transgender beneficiaries to juxtapose a holding that offers uniform justice.<sup>365</sup> However, such a situation provides a unique set of circumstances. If the testator’s intent is brought into question, should the testator’s stance on transgender individuals hold weight regarding intent?<sup>366</sup> The dead man’s statute prevents any party who has anything to gain from the litigation from testifying one way or the other.<sup>367</sup> As a matter of public policy, perhaps a court will hold that the clause in the hypothetical, “to my son,

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358. LGBTQ refers to Lesbian, Gay, Bisexual, Transgender, Queer, and Questioning, as well as other non-binary or non-cisgender identities. *Glossary of Terms - Lesbian/Gay/Bisexual/Queer*, *supra* note 61.

359. *Obergefell v. Hodges*, 135 S. Ct. 2584, 2593 (2015) (emphasis added).

360. See *In re Marriage of Simmons*, 825 N.E.2d 303, 315 (Ill. App. 2005); *In re Estate of Araguz*, 443 S.W.3d 233, 250 (Tex. Ct. App. 2014); *Littleton v. Prange*, 9 S.W.3d 223, 231 (Tex. Ct. App. 1999).

361. *Hartin v. Dir. of Bureau of Records & Statistics*, 347 N.Y.S.2d 515, 517 (Sup. Ct. 1973).

362. *Id.*

363. *Obergefell*, 135 S. Ct. at 2593.

364. See *supra* Part III.

365. *Dickson v. Montgomery*, 31 Tenn. (1 Swan) 348, 360 (1851).

366. 11 WARREN’S HEATON ON SURROGATE’S COURT PRACTICE § 187.05[1][a] (2018).

367. *Artists Rights Enf’t Corp. v. King*, No. 16-CV-1121, 2018 WL 704990, at \*2 (S.D.N.Y. Feb. 5, 2018).

Joseph,” merely served as an identifier for a person who was readily ascertainable and could take the property. If this is the case, as long as the person is still readily identifiable, then the label of name and gender at the time of probate is irrelevant.<sup>368</sup>

The transgender beneficiary will take the stance that the property is meant to flow to them; after all, if the testator was so against the transgender beneficiary receiving the property, surely they would have changed the instrument or had a new will drawn to reflect their disapproval.<sup>369</sup>

The issue is akin to navigating uncharted waters.<sup>370</sup> It is uncertain how a court will hold until it is faced with the issue.<sup>371</sup> However, there are ways to prevent litigation that challenges a bequest to a transgender beneficiary.<sup>372</sup> The easiest and most convenient way to preemptively solve the problem is for the drafter of such documents to add a clause to the will or codicil that is similar to the following:

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368. See *Bosserman v. Burton*, 120 S.E. 261, 262 (Va. 1923).

369. RESTATEMENT (FIRST) OF AGENCY § 94 (AM. LAW INST., amended 2018).

370. See *supra* Part II.C. Transgender individuals are a marginalized group that is victim to high rates of unemployment, underemployment, violence, and suicide. Should a situation similar to the hypothetical arise, it is likely that the transgender beneficiary might not have the economic means to litigate this issue. See Jen Christensen, *Killings of Transgender People in the US Saw Another High Year*, CNN (Jan. 17, 2019), <https://www.cnn.com/2019/01/16/health/transgender-deaths-2018/index.html> (“For example, 30% of transgender employees report that they have been fired, denied a promotion or mistreated at work due to their gender identity” and “[t]heir unemployment rate is three times higher for transgender people than the gender population.” Further, “[w]ithout jobs, some transgender people have to turn to the ‘underground economy.’ Sex workers are three times more likely to experience physical or sexual violence.”); see also Marina Pitofsky, *‘Epidemic of Violence’: 2018 Is the Worst for Deadly Assaults Against Transgender Americans*, USA TODAY (Sept. 26, 2018), <https://www.usatoday.com/story/news/2018/09/26/2018-deadliest-year-transgender-deaths-violence/1378001002> (“These deaths are a very clear example of the toxic combination of multiple prejudices and the risk for those living in this country who live at the intersection of multiple marginalized identities.”); Rokia Hassanein, *New Study Reveals Shocking Rates of Attempted Suicide Among Trans Adolescents*, HUM. RTS. CAMPAIGN (Sept. 12, 2018), <https://www.hrc.org/blog/new-study-reveals-shocking-rates-of-attempted-suicide-among-trans-adolescen> (“Harrowing statistics from a study recently published by the American Academy of Pediatrics revealed alarming levels of attempted suicide among transgender youth—with the highest rates among transgender boys and non-binary youth.”). There has also been a significant increase in gender affirmation surgeries, thus increasing the likelihood that this issue will soon need to be litigated. See Dave Mosher and Skye Gould, *Gender Transition Surgeries Jumped Nearly 20% in a Year—But the New Data Highlight a Worrisome Problem*, BUS. INSIDER (May 22, 2017, 7:42 AM), <https://www.businessinsider.com/sex-transition-plastic-surgery-statistics-2017-5> (showing a total of 3256 gender affirmation surgeries in 2016 as opposed to 2740 performed in 2015). As of 2017, there were an estimated 1.4 million transgender people living in the U.S. *Id.*

371. See *supra* Part II.C.

372. See *supra* text accompanying notes 345-46.

#### Paragraph Titles and Gender:

The titles given to the paragraphs of this Will are inserted for reference purposes only and are not to be considered as forming a part of this Will in interpreting its provisions. All words used in this Will in any gender shall extend to include all genders, and any singular words shall include the plural expression, and vice versa, specifically including “child” and “children,” when the context and facts so require, and any pronoun shall be taken to refer to the person or persons intended regardless of gender or number.<sup>373</sup>

This clause eliminates the need for litigation and recognizes that the birth of the beneficiary is not important for the bequest to be made.<sup>374</sup> It highlights that both the name and the pronouns used are merely for reference, and, should the issue arise, the transgender beneficiary can be recognized before the court as they are, with their own unique identity and expression—just as Justice Kennedy opined.<sup>375</sup>

The holding in *Obergefell* was never intended to disadvantage the transgender community, yet it may in a situation such as the hypothetical because it forces the court to recognize the transgender beneficiary as they are before the court, which does not align with the name and identifier outlined in the will. This was likely unintentional—just as Justice Hardberger likely did not intend for his holding in *Littleton* to be a sword for the transgender beneficiary in a probate proceeding.<sup>376</sup> Even today, the government and members of the community struggle to accept transgender individuals.<sup>377</sup> In realizing this, even in 1976, progressive courts have tried to balance the rights of transgender individuals while addressing the concerns and discourse of members of the community.<sup>378</sup>

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373. *Last Will and Testament*, SCRIBD (Feb. 23, 2012), [www.scribd.com/document/82508633/Last-Will-and-Testament](http://www.scribd.com/document/82508633/Last-Will-and-Testament).

374. *Id.*

375. *Obergefell v. Hodges*, 135 S. Ct. 2584, 2593 (2015).

376. *Id.*; *Littleton v. Prange*, 9 S.W.3d 223, 231 (Tex. Ct. App. 1999).

377. See *Latest Hate Crime Statistics Released*, *supra* note 43; see also Memorandum from Attorney Gen. Jeff Sessions to United States Attorneys and Heads of Dep’t Components, *supra* note 50 (“Title VII’s prohibition on sex discrimination encompasses discrimination between men and women but does not encompass discrimination based on gender identity *per se*, including transgender status.”); Erica L. Green, et al., ‘Transgender’ Could Be Defined Out of Existence Under Trump Administration, N.Y. TIMES (Oct. 21, 2018), [www.nytimes.com/2018/10/21/us/politics/transgender-trump-administration-sex-definition.html](http://www.nytimes.com/2018/10/21/us/politics/transgender-trump-administration-sex-definition.html) (“The Trump administration is considering narrowly defining gender as a biological, immutable condition determined by genitalia at birth, the most drastic move yet in a government wide effort to roll back recognition and protections of transgender people under federal civil rights law. . . . The agency’s proposed definition would define sex as either male or female, unchangeable, and determined by the genitals that a person is born with. . . . Any dispute about one’s sex would have to be clarified using genetic testing.”).

378. *M.T. v. J.T.*, 355 A.2d 204, 207 (N.J. Super. App. Div. 1976).

In his opinion of *M.T. v. J.T.*, Judge Handler opined that: “The entire area of transsexualism is repugnant to the nature of many persons within our society. However, this should not govern the legal acceptance of a fact.”<sup>379</sup> Indeed, regardless of the sex assigned by the doctor at their birth and regardless of the name given to them by their parents, transgender beneficiaries are the “same legal person”<sup>380</sup> as they were at birth. Joseph and Julia are not two souls trapped within a human body; at her birth, Julia was there all along, growing and evolving into the woman that she was meant to be.

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379. *Id.*

380. *See supra* text accompanying note 322.

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