

I KNEW HIM AS MY DAUGHTER: THE IMPACT OF GENDER CHANGES ON SEX-BASED BENEFITS FROM CLASS GIFTS

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I. HYPOTHETICAL: “I AM JASON”

When Jillian Benner (Jill) was born in 1949, her parents William and Caroline were thrilled to welcome their second child and first baby girl into the family. Jill had the stereotypical upbringing of a young woman in a traditional society. She was a great daughter and a loyal sister to three siblings (two brothers, Scott and Brody, and one sister, Jennifer). Jill wore feminine clothing, participated in the Girl Scouts of the United States of America, and nearly made a career out of participating in female-only beauty pageants. Later in life, Jill modeled for women’s clothing brands and eventually married and gave birth to four children.

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In 2015, after years of battling anxiety and discomfort regarding her “true self” versus her public identity, Jill delivered groundbreaking news to her family and friends when she announced her decision to transition and live publicly as a man.¹ Jill started wearing male clothing and changed her name on identification documents, such as her driver’s license, to “Jason Benner.” Jason took even more permanent measures to align his personal gender identity with his anatomical and biological sex by undergoing medical procedures and committing to hormonal treatments.

While many aspects of Jason’s life, such as his hobbies and interests, stayed the same, he felt some of his interpersonal relationships change after his “big reveal.” Jason insisted his parents still refer to him as their “daughter” and his siblings refer to him as their “sister.” However, his family’s understanding of him became somewhat unclear. His father, William, who always thought of Jason fondly as his little girl, struggled the most to explain to others, and to himself, Jason’s new lifestyle. On multiple occasions, William’s confusion with regard to Jason’s identity resulted in him calling Jason by his given name “Jill” and communicating with him using the female pronouns (i.e., she, her, hers). At times, this resulted in long, heated arguments. At one point, during the middle of a disagreement, William told Jason his sex change was “not possible” and he would “always be a woman.”

By early 2017, William and Jason seemed to resolve some of their differences about Jason’s identity. During that year, Jason recalls one instance when William referred to him as a woman, but William had largely began to treat Jason as a man. During the holidays, William even invited Jason to participate in the family’s annual father-son camping trip along with his two older brothers. Jason politely declined.

On January 1, 2018, William Benner passed away peacefully in his sleep. His will, which was executed in 2017, left a class gift of \$100 million, as well as a significant portion of land and the family ranch in Montana, to “all his sons.” William did not leave a similar class gift to his daughters. However, he named Jennifer individually as the recipient of a mixed gift of real property and money.

Now, after his death and taxes, the question arises as to whether William Benner intended to cut ties with Jill, who transitioned to Jason. The stakes are high, as this question is the only thing standing in the way of leaving Scott and Brody with more money and land than they expected. Does Jason fit the description to take under the class gift?²

1. From this point forward, the reader should use the pronouns *he*, *him*, and *his* to describe the individual (Jason) in this hypothetical scenario after his transition. To refer to the individual before his transition it is proper to use the pronouns *she*, *her*, and *hers*.

2. The above hypothetical was created by the author for purposes of this comment.

II. INTRODUCTION

From Hollywood to hometowns, through public media and private conversations, a new wave of information surrounding gender identity and gender equality has brought attention to the unique legal issues transgender individuals face.³ Transgender individuals are emerging from the margins of our society to challenge traditional cultural norms and the legal institutions that support them.⁴ While some critics note that since 2014 we have reached a “transgender tipping point,” there is no question that transgender equality represents a new frontier in the American civil rights movement.⁵ As social activists continue to come forward and inspire change, it is important for lawyers to familiarize themselves with the distinct battles this misunderstood minority faces to better protect their rights and fight against potential discrimination.⁶

This comment examines the shortfall of rights and remedies available to transgender individuals by looking through the lens of a simple estate plan that creates a sex or gender-based class gift.⁷ When a testator creates a class gift based on birth, biology, or boy versus girl, concerns about a potential beneficiary’s legal gender becomes increasingly relevant.⁸ This issue highlights the need to grant wider legal recognition to the transgender

3. See, e.g., *New Trans Youth Storytelling Platform Will Connect Voices and Experiences Across the U.S.*, TRANSGENDER LAW CENTER (Jan. 17, 2018), <https://transgenderlawcenter.org/archives/14183> [perma.cc/NJ6H-MQH3] (announcing the launch of a new youth-led program to build trans youth power through online storytelling in order to bring more voices to the spotlight); see also Ravi Somaiya, *Caitlyn Jenner, Formerly Bruce, Introduces Herself in Vanity Fair*, N.Y. TIMES (June 1, 2015), <https://www.nytimes.com/2015/06/02/business/media/jenner-reveals-new-name-in-vanity-fair-article.html> [perma.cc/QLJ2-52KK] (announcing former Olympic gold medalist Bruce Jenner’s transition to a woman and her use of media attention to push for acceptance of transgender people across the world).

4. See Katy Steinmetz, *The Transgender Tipping Point*, TIME (May 29, 2014), <http://time.com/135480/transgender-tipping-point/> [perma.cc/2V3N-VZCN].

5. See Samantha Allen, *Whatever Happened to the Transgender Tipping Point?*, THE DAILY BEAST (Mar. 31, 2017), <https://www.thedailybeast.com/whatever-happened-to-the-transgender-tipping-point> [perma.cc/9QR5-UC99] (commenting on the lack of change and progress despite increases in media representation and pressure in the legislature to embrace transgender rights since 2014); see also Melissa Gira Grant, *After the Transgender Tipping Point*, PACIFIC STANDARD (Feb. 16, 2016) <https://psmag.com/news/after-the-transgender-tipping-point> [perma.cc/Q7OV-FL4D] (expressing that the transgender tipping point that transpired in 2014 may be declining); see also *State Action Center*, NAT’L CTR. FOR TRANSGENDER EQUAL. (2018), <https://transequality.org/action-center> [perma.cc/TRV3-9U96] (tracking the number of anti-trans state bills introduced across the country since the beginning of the 2018 legislative session); cf., Jacqueline Thomsen, *Joe Kennedy to Bring Transgender Soldier to Trump’s State of the Union*, THE HILL (Jan. 28, 2018, 4:30 PM) <http://thehill.com/homenews/house/371134-joe-kennedy-to-bring-transgender-soldier-to-trumps-state-of-the-union> [perma.cc/UW6H-VVZY] (activism as recent as 2018 provides hope for continuing a forward push of transgender rights).

6. See *Why It Matters*, TRANS MEDIA WATCH, <http://www.transmediawatch.org/why.html> [perma.cc/GJ33-HDDB] (last visited Feb. 8, 2018).

7. See *supra* Part I.

8. See *infra* Parts IV–V.

community by implementing a system that will give individuals more freedom to choose and to change their legal gender identities.⁹

Section II.A provides background material including definitions and brief explanations of relevant terminology.¹⁰ Following the introduction of terminology, Part III examines the current legal climate relating to transgender rights, including the status of transgender spouses and the ability for transgender individuals to update their gender identities on legal documents.¹¹ Part IV illustrates the approaches courts use to construe wills to ascertain the testator's intent when parts of the will are ambiguous.¹² Using Part III and Part IV's framework, Part V will apply the general rules of will construction in a context in which the legal gender of an individual is uncertain.¹³

Finally, Part VI of this comment proposes legislation that will bring more certainty to transgender individuals facing the kind of dilemma Jason Benner experienced.¹⁴ This section will identify useful drafting tools that lawyers can use to dispose of the need for courts to determine whether the testator intended the individual to be a beneficiary post gender transformation.¹⁵ Additionally, this section will address the need for states to amend estate statutes to specifically provide guidelines for courts to use in situations in which a change in a beneficiary's gender conflicts with the testator's characterization of the individual in his or her will.¹⁶ Courts should adopt a policy to defer to an individual's social transition to grant relief to transgender individuals who are not immediately identifiable in a will.¹⁷

A. Relevant Terminology

To accurately describe and appreciate the legal issues in this comment, it is important to establish a basic understanding of the relevant gender terminology.¹⁸ As the LGBTQ+ community continues to grow and evolve, the language and terminology this community prefers may change and vary

9. *See supra* Part I.

10. *See infra* Section II.A.

11. *See infra* Part III.

12. *See infra* Part IV.

13. *See infra* Part V.

14. *See infra* Part VI.

15. *See infra* Part VI.

16. *See infra* Part V.

17. *See infra* Part V.

18. *Tips for Journalists*, NAT'L CTR. FOR TRANSGENDER EQUAL. (Jan. 26, 2014), <http://www.transequality.org/issues/resources/tips-journalists> [perma.cc/TT2Q-TW6J] (providing an overview of ways to cover transgender people in the media and offering sources to use as reference guides when reporting on issues related to transgender people).

from its current usage.¹⁹ Despite these variations, the following definitions provide an overview of common terms to describe transgender individuals.²⁰

“Sex” refers to classification of a person as male or female, usually given at birth, based on the physical or psychological peculiarities of an individual, including both primary (e.g., the reproductive system) and secondary (e.g., height and muscularity) characteristics.²¹ Typically, sex classifications are either male or female; however, an individual’s assigned sex may also qualify as intersex.²²

“Gender identity” is one’s deeply held sense of being male, female, or something else.²³ “Gender expression” is the external manifestation of one’s gender identity.²⁴ However, note that gender expression may differ from society’s expectations of the behaviors or physical attributes associated with an individual’s gender identity.²⁵ “Cisgender” refers to an individual whose sex assigned at birth corresponds with his or her gender identity.²⁶

“Transgender” is an umbrella term for people whose gender identity, expression, or behavior is different from those typically associated with their sex assigned at birth.²⁷ During a period known as a “transition,” transgender individuals may begin to live exclusively and publicly according to his or her gender identity.²⁸ The transition process is personal, and no one transition is more or less complete than another.²⁹ Some steps that a transgender individual may take to effectuate his or her transition include dressing according to his or her gender, changing his or her name, undergoing medical procedures to change his or her anatomy, or changing the gender marker on his or her birth certificate.³⁰

“Sex reassignment” describes medical treatment intended to make a sex change.³¹ Medical treatment may involve surgery or hormonal treatments

19. *LGBTQ+ Definitions*, TRANS STUDENT EDUC. RES., <http://www.transstudent.org/definitions> [perma.cc/DV7X-5DKF] (last visited Jan. 31, 2018).

20. *See id.*

21. *Glossary of Terms*, GLAAD: GLAAD MEDIA REFERENCE GUIDE, <https://www.glaad.org/reference/transgender> [perma.cc/549P-B6X9] (last visited Jan. 31, 2018).

22. *LGBTQ+ Definitions*, *supra* note 19; *see also* Susan Scutti, ‘The Protocol of the Day Was to Lie’: NYC Issues First US ‘Intersex’ Birth Certificate, CNN (Jan. 2, 2017, 11:03 AM), <http://www.cnn.com/2016/12/30/health/intersex-birth-certificate/index.html> [perma.cc/D79G-G6FS] (reporting on the first birth certificate issuing an individual’s sex as intersex).

23. *LGBTQ+ Definitions*, *supra* note 19.

24. *Id.*

25. *Glossary of Terms*, HUMAN RIGHTS CAMPAIGN, <http://www.hrc.org/resources/glossary-of-terms> [perma.cc/3L7F-PPVM] (stating that gender nonconforming describes those whose gender expression does not fit neatly into one category) (last visited Jan. 31, 2018).

26. *See id.*

27. *See id.*

28. *Transgender FAQ*, GLAAD: GLAAD MEDIA REFERENCE GUIDE, <https://www.glaad.org/transgender/transfaq> [perma.cc/V7B4-CUJV] (last visited Jan. 31, 2018).

29. *See id.*

30. *See id.*

31. *Sex Reassignment*, BLACK’S LAW DICTIONARY (10th ed. 2014).

designed to alter a person's gender.³² It is important to understand that while some transgender individuals may choose to take medical steps to align their bodies more closely with their gender, not all transgender individuals can or want to undergo medical procedures.³³

B. The Gender Binary . . . And Something in Between

For many people, the term "gender" suggests two distinct classifications—male or female.³⁴ However, for others, a whole spectrum of gender identification exists somewhere between this binary of male and female sex categories.³⁵ These individuals understand gender identity in a way that may be fluid or may not fit neatly into a single category.³⁶ This group of individuals may often identify as gender non-binary.³⁷ Though not an exhaustive list, other terms used by individuals who reject static categories of gender include genderqueer, agender, and bigender.³⁸ These terms vary in their meaning, but they all convey the underlying notion that the individual does not experience gender as strictly male or female.³⁹

Typically, though not always, transgender individuals choose to conform with the gender binary, identifying as either male or female.⁴⁰ Still, some transgender individuals may identify as neither male nor female and fit the definition of gender non-binary described above.⁴¹ For purposes of this comment, the understanding of a transgender individual who identifies as gender non-binary, genderqueer, agender, or other similar terms extends beyond the scope of this analysis.⁴² The transgender individual this comment hypothesizes chose to identify exclusively and publicly as male.⁴³ Thus, it is appropriate to use the terms *he* and *him* to refer to Jason, a transgender man.⁴⁴

32. *See id.*

33. *Transgender FAQ*, *supra* note 28.

34. *Understanding Non-Binary People: How to Be Respectful and Supportive*, NAT'L CTR. FOR TRANSGENDER EQUAL. (July 9, 2016), <http://www.transequality.org/issues/resources/understanding-non-binary-people-how-to-be-respectful-and-supportive> [perma.cc/GX72-P7LM].

35. *See id.*

36. HUMAN RIGHTS CAMPAIGN, *supra* note 25.

37. NAT'L CTR. FOR TRANSGENDER EQUAL., *supra* note 34.

38. *Id.*

39. *Id.*

40. *Id.*

41. *Id.*

42. *Id.*

43. *See supra* Part I.

44. *See supra* Part I; *see also* NAT'L CTR. FOR TRANSGENDER EQUAL., *supra* note 34.

III. THE GREAT DIVIDE: LEGAL CONCEPTUALIZATIONS OF SEX AND GENDER

The American jurisprudence surrounding rights relating to gender and gender identity is largely rooted in the assumption that sex is strictly binary.⁴⁵ Federal and state entities continue to conflate biological sex with gender.⁴⁶ As a result, the framework for analyzing legal issues related to gender is largely restricted to this inflexible system of categorizing people based on the male or female sex.⁴⁷ In other words, while sex and gender are often distinguished from one another in social contexts, the law continues to treat them as one and the same.⁴⁸

For years, this conflation of sex and gender has played an important role in society.⁴⁹ As a social construct, the ability to classify people based on their sex assignment at birth has allowed different world cultures to assign different expectations to men and women.⁵⁰ Today, growing movements toward gender-neutrality seek to lessen the role of gender and eliminate gender-based stereotyping.⁵¹ Nevertheless, there are still ways gender informs the types of challenges and choices an individual may encounter in his or her lifetime.⁵² One principle way gender continues to operate as a predictive measure in one's life is through the law.⁵³ Consequently, as this section demonstrates, the failure of courts to match an individual's gender identity to his or her legal identity leads to inconsistent outcomes and inadequate protection of transgender individuals' rights.⁵⁴

A. *Marrying Trans: An Overview of Obergefell's Legal Legacy and Promise*

The United States Supreme Court decision in *Obergefell v. Hodges* has been influential with respect to its application to various bodies of federal,

45. See Elise Holtzman, *I am Cait, But it's None of Your Business: The Problem of Invasive Transgender Policies and a Fourth Amendment Solution*, 68 FLA. L. REV. 1943, 1952 (2016).

46. See *id.*

47. See *id.*

48. See *id.*

49. See generally Noël Wise, *Judge: Gender Laws Are at Odds With Science*, TIME (Mar. 8, 2017), <http://time.com/4679726/judge-biological-sex-laws-marriage-bathrooms/> [perma.cc/Y98Q-MUZE]

(commenting on how long, deep-rooted beliefs about gender continues to impact our law and society, making it “virtually impossible for judges to consistently apply a law that permits or prohibits conduct based on whether someone is a man or a woman”).

50. Adam Banner, *The ‘Orville’ Explores Issues Related to Gender Neutrality*, A.B.A. J. (Nov. 9, 2017, 8:30 AM), www.abajournal.com/news/article/the_orville_explores_issues_related_to_gender_neutrality/ [perma.cc/M8CE-LQLG].

51. See *id.*

52. See *id.*

53. See *id.*

54. See *infra* Section III.B.

state, and local laws.⁵⁵ Therefore, it is important to discuss *Obergefell*'s immediate impact on the body of laws dealing with estate distribution.⁵⁶ *Obergefell*'s holding legalizing same-sex marriage indicates that a spouse is a spouse regardless of an individual's sex.⁵⁷ As a result, this landmark case gave succession rights to any individual a decedent named as a "spouse."⁵⁸ Prior to *Obergefell*, this was not the case.⁵⁹ A transgender man whose birth certificate identified him as a female at birth could not have been the legal spouse to his wife for purposes of marriage and the subsequent property rights that flow from the marital relationship.⁶⁰ Today, however, when a testator leaves a gift to a spouse using any of the language that expresses the spousal relationship (e.g., husband, wife, spouse), the beneficiary's birth sex is irrelevant.⁶¹ In other words, courts will find the intent to leave the specified gift to that beneficiary is valid without reference to the individual's sex.⁶²

In short, *Obergefell* invalidated laws using gender as a device to prohibit and regulate marital status.⁶³ A simple probate proceeding may no longer use evidence of a transgender's amended birth certificate to void a marriage that would otherwise confer upon that person the property benefits of a decedent's spouse.⁶⁴ While this outcome is laudable, it is also narrow in application.⁶⁵ *Obergefell*'s legal legacy is limited to marital status and supplementary matters.⁶⁶ Therefore, its precedent does not regulate behavior outside of the marital relationship.⁶⁷ Various bodies of law relying on legal identity documents continue to use gender as a regulatory, and often exclusionary, device.⁶⁸ Inconsistencies between a beneficiary's gender identity and legal gender may still result in legal limbo.⁶⁹

55. See generally *Obergefell v. Hodges*, 135 S. Ct. 2584, 2607 (2015) (holding it unconstitutional to deny same-sex couples the right to marry).

56. See generally *id.* (giving same-sex couples the right to marry).

57. See *id.* (giving same sex-couples the right to marry, and those rights that flow from marriage).

58. See *id.*

59. E.g., *Littleton v. Prange*, 9 S.W.3d 223 (Tex. App.—San Antonio 1999, pet. denied); see also *In re Estate of Gardiner*, 42 P.3d 120, 135 (2002) (standing for the proposition that a post-operative transgender remains his or her sex-assigned at birth for purposes of marriage).

60. See *In re Estate of Gardiner*, 42 P.3d at 135.

61. Rhonda H. Brink & Brooke Hardie, *Fathers, Mothers, Sisters, Brothers and Others: Shower the People You Love With "Tangential" Planning*, STATE BAR OF TEX., 27TH ANN. EST. PLAN. AND PROB. DRAFTING COURSE (2016).

62. *Id.*

63. See *Obergefell*, 135 S. Ct. at 2607 (giving same sex-couples the right to marry, and those rights that flow from marriage).

64. *Contra In re Estate of Gardiner*, 42 P.3d at 135 (standing for the proposition that a post-operative transgender remains his or her sex-assigned at birth for purposes of marriage).

65. See Kyle C. Velte, *Obergefell's Expressive Promise*, 6 HOUS. L. REV. 157, 158 (2015) (departing from the widely held opinion that the *Obergefell* decision marked a game-changing advance in the doctrinal framework vis-à-vis the LGBT community and shedding light on some areas for improvement).

66. See *id.*

67. See *id.*

68. See discussion *infra* Section III.B.

69. See Spencer Bergstedt, *Estate Planning and the Transgender Client*, 30 W. NEW ENG. L. REV.

B. Regulating Identity by Sex and Gender

The power to control one's identity is central to the personal freedom and individual autonomy the law guarantees.⁷⁰ In *Obergefell*, Justice Kennedy reaffirmed these principles, stating in his opinion to the court, "The Constitution promises liberty to all within its reach, a liberty that includes certain specific rights that allows persons, within a lawful realm, to define and express their identity."⁷¹ Despite this powerful message, the ability to self-identify remains little more than wishful thinking.⁷² For example, the use of male and female sex-markers on birth certificates and other legal documents illustrates how a person's identity continues to be subject to the power and control of the law.⁷³ From birth, a person's biological sex becomes a legal record used to predetermine and regulate his or her identity in society.⁷⁴ Vital records carry legal implications because they serve as prima facie evidence of the facts stated within them.⁷⁵ Thus, the inability to change sex markers on legal records to reflect an individual's gender identity bears on the ability to live a full life.⁷⁶

C. If I Change, Will the Law Change with Me?

As noted in Section II.A above, the decision to transition marks the beginning of a life-changing personal process.⁷⁷ No true rules govern this process, and some transgender people are content with maintaining their

675, 699 (2008).

70. *Obergefell v. Hodges*, 135 S. Ct. 2584, 2597 (2015).

71. *Id.* at 2593.

72. See Holtzman, *supra* note 45, at 1953 (arguing that the current legal framework requires transgender people to submit to a strict binary view of sex and gender, thereby creating a burden that they are unable to meet for purposes of identifying themselves within a distinct class of individuals afforded protection under the Equal Protection Clause); see also 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, 285 (2005) (arguing that the sex-gender distinction perpetuated by the law keeps transgender people's self-identity from being recognized as valid by courts, by doctors, and by people in general).

73. Bergstedt, *supra* note 69.

74. See, e.g., TEX. HEALTH & SAFETY CODE ANN. ch. 19 (Supp.).

75. See generally TEX. HEALTH & SAFETY CODE ANN. § 191.052 (Supp.).

76. See Kristin Wenstrom, "What the Birth Certificate Shows": *An Argument to Remove Surgical Requirements from Birth Certificate Amendment Policies*, 17 LAW & SEXUALITY 131, 136 (2008) (stating, in reference to transgender people, "in a practical sense, their inability to obtain a birth certificate that matches their lived gender not only prevents them from obtaining other forms of identification, but also subjects them to a looming threat of detection and potential invasion of privacy"); see *Identity Documents & Privacy*, NAT'L CTR. FOR TRANSGENDER EQUAL. <https://www.transequality.org/issues/identity-documents-privacy> [perma.cc/7SS9-M5JQ] (last visited Feb. 7, 2018) ("gender incongruent identification exposes people to a range of negative outcomes, from denial of employment, housing, and public benefits to harassment and physical violence").

77. See *supra* Section II.A.

given sexual identities (i.e., the sex assigned at birth) as a legal matter.⁷⁸ For many, however, it is important to gain legal recognition of their gender identity through applying for a legal name or gender change on identity documents such as a driver's license, passport, social security card, or birth certificate.⁷⁹

In general, absent evidence of fraud, applying for a legal name change is a relatively easy process.⁸⁰ Because names are rooted in social tradition and gender associations of names change over time, the law generally does not distinguish between male or female for purposes of a name change.⁸¹ In an opinion from New York, a court stated that "there is no sound basis in law or policy to engraft upon the statutory provisions an additional requirement that a transgendered-petitioner present medical substantiation for the desired name change."⁸² To the contrary, the standard for changing the sex designation on an individual's legal identity documents is often more burdensome.⁸³ Many barriers exist to obtaining a legal gender change that make it difficult for a transgender individual to align legal identity with gender identity.⁸⁴ The following provides an overview of the various state laws and administrative policies in regard to changing the sex-marker on identity documents.⁸⁵

1. State Birth Certificate Statutes

Generally, the most important step towards gaining legal recognition of gender identity for individuals who are transgender is to change the sex designation on their birth certificates.⁸⁶ Currently, all but three states (Idaho, Ohio, and Tennessee) have statutes or policies allowing transgender people to amend the sex-marker on their birth certificates.⁸⁷ The Idaho statute is silent, but the Idaho Office of Vital Statistics reports that the state currently does not amend birth certificates to correct the sex of individuals who have had sex reassignment procedures.⁸⁸ Similarly, the Ohio statute is non-specific, but courts have interpreted the birth certificate statute under Section 3705.15 of the Ohio Revised Code as allowing corrections of sex

78. See *supra* Section II.A.

79. See *Identity Documents & Privacy*, *supra* note 76.

80. Karen Moulding, 1 SEXUAL ORIENTATION & THE LAW § 10.9 (Oct. 2017).

81. *In re Guido*, 771 N.Y.S.2d 789, 791 (N.Y. 2003).

82. *In re Winn-Ritzenberg*, 891 N.Y.S.2d 220, 221 (Oct. 2009).

83. Moulding, *supra* note 80; see also *In re Winn-Ritzenberg*, 891 N.Y.S.2d at 220 (explaining that whether a person has changed gender for legal purposes is a separate issue from that of a name change).

84. See *Identity Documents & Privacy*, *supra* note 76.

85. See *infra* Section III.C.1.

86. See *Identity Documents & Privacy*, *supra* note 76.

87. Moulding, *supra* note 80.

88. See *Changing Birth Certificate Sex Designations: State-By-State Guidelines*, LAMBDA LEGAL, <https://www.lambdalegal.org/know-your-rights/article/trans-changing-birth-certificate-sex-designations> [perma.cc/TKM5-XBZU] (last visited Feb. 2, 2018).

only when the change would reflect the sex as it was at birth.⁸⁹ Additionally, an Ohio court refused to recognize an amended out-of-state birth certificate as prima facie evidence of a transgender man's sex when the original birth certificate stated that the individual was born female.⁹⁰ Furthermore, the Tennessee law explicitly addresses the amendment of a birth certificate to reflect a sex change.⁹¹ Under Section 68-3-203(d) of the Tennessee Code, "[t]he sex of an individual shall not be changed on the original certificate of birth as a result of sex change surgery."⁹²

In states that allow a person to change his or her gender-marker, the standard for making an amendment varies.⁹³ In the majority of states, the standard remains relatively high.⁹⁴ For example, many states require proof of a surgical procedure.⁹⁵ In other states, the statute may require a court order to amend a birth certificate.⁹⁶ Both of these requirements place a heavy burden on a transgender individual both financially, and, in the case of gender reassignment surgeries, physically.⁹⁷

In Kansas, despite the existence of a regulatory law permitting an individual to change the sex-marker on his birth certificate, the agency responsible for administration of vital records prohibits transgender people from making such changes.⁹⁸ After reading a 2002 state court decision, the Kansas Department of Health interpreted the law as forbidding such changes.⁹⁹ The Department read the decision as indicating that the statute allows an individual to make minor corrections to his or her birth certificate or to amend the sex when the issuing authority recorded the sex incorrectly.¹⁰⁰ Further, based on this reading, Kansas authorities indicated that amending the sex on a birth certificate of an individual who has undergone gender reassignment surgery does not constitute a minor change within the meaning of the statute.¹⁰¹

89. *In re Ladrach*, 32 Ohio Misc. 2d 6, 10, 513 N.E.2d 828, 832 (Ohio Prob. Ct. 1987) (interpreting Ohio's birth certificate statute as only a correction statute that does not encompass correction of sex on birth certificates of individuals who have changed their sex by surgical procedure); see also OHIO REV. CODE ANN. § 3705.15 (West 2017) (providing no specific provision addressing the ability of an individual to change the sex marker on his or her birth certificate after a sex-change procedure).

90. *In re Application for a Marriage License for Jacob B. Nash & Erin A. Barr*, No. 2003-T-0179, 2003 WL 23097095, at *5–8 (11th Dist. Dec. 31, 2003).

91. TENN. CODE ANN. § 68-3-203(d) (West 2011).

92. *Id.*

93. Moulding, *supra* note 80.

94. See LAMBDA LEGAL, *supra* note 88.

95. See *id.*

96. Moulding, *supra* note 80.

97. *Id.*

98. *Id.*

99. *Id.*

100. *Id.*

101. See *id.*; see also KAN. STAT. ANN. § 65-2422(c) (West 2009).

2. Case Law

Case law also provides guidance about how states view the right to transition as a legal matter.¹⁰² Before *Obergefell*, several courts were pressed to determine whether an individual could legally change his or her gender for purposes of validating a marriage.¹⁰³ Today, courts no longer need to rely on a sex-determination analysis to conclude whether two individuals are in a legal union.¹⁰⁴ However, the decisions before *Obergefell* reflect reasoning that courts have never expressly or implicitly overruled.¹⁰⁵ While the law remains in flux regarding this nascent issue, a few trends are beginning to emerge.¹⁰⁶ Two trends concerning the determination of a transgender person's legal sex have appeared: sex is biologically-based and fixed at birth; sex is a matter of function and anatomy.¹⁰⁷

Some courts addressed the issue of whether an individual could change his or her legal gender through "biological factors such as chromosomes, gonads, and genitalia at birth."¹⁰⁸ For instance, in the Texas case *Littleton v. Prange* a widow sought relief for the death of her husband in a wrongful death suit.¹⁰⁹ During discovery the opposing party found that the widow, Christie Lee Littleton, was born a physically healthy male and had undergone sex reassignment surgery when she was a young adult.¹¹⁰ Further evidence revealed that while the suit was pending, Christie successfully amended her birth certificate to change the sex-marker from male to female.¹¹¹ Despite Christie changing her anatomy and her birth certificate, the court in *Littleton* held that Christie was a male as a matter of law.¹¹² The court stated, "[t]he 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."¹¹³ There are some things we cannot will into being. They just are."¹¹⁴ While more recent Texas case law demonstrates a departure from the attitude in

102. *Littleton v. Prange*, 9 S.W.3d 223, 223 (Tex. App.—San Antonio 1999, pet. denied) ("This case involves the most basic of questions. When is a man a man, and when is a woman a woman?").

103. *See id.*

104. *See supra* Section III.A; *see also* *Obergefell v. Hodges*, 135 S. Ct. 2584, 2607 (2015).

105. *See Littleton*, 9 S.W.3d at 225.

106. Rebecca J. Moskow, *Broader Legal Implications of Transsexual Sex Determination Cases*, 7 U. CIN. L. REV. 1421, 1425 (2003).

107. *Id.*

108. *Littleton*, 9 S.W.3d at 225 (Angelini, J., concurring).

109. *Id.*

110. *Id.*

111. *Id.* at 231; *see also* TEX. HEALTH & SAFETY CODE ANN. § 192.028 (Supp.) ("On the request of a person or the person's legal representative, the state registrar, local registrar, or other person who issues birth certificates shall issue a birth certificate that incorporates the completed or corrected information.").

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

113. *Id.*

114. *Id.*

Littleton, Texas courts have never overruled the logic underpinning *Littleton*'s ultimate holding.¹¹⁵

In a similar case, the New Jersey court in *M.T. v. J.T.* took a view different from the court in *Littleton*.¹¹⁶ Ultimately, the court in *M.T.* held the marriage between a male and a post-operative female (born male, surgically changed to female) was not void.¹¹⁷ The court determined that M.T., although born a male, took significant steps sufficient to render her a female as a matter of law.¹¹⁸ The court focused on the meaning of "sex," and with respect to this issue, refused to accept the argument that sex is fixed at birth.¹¹⁹ The court reasoned that if there is evidence that an individual takes steps to align his physical body with his gender identity, and in doing so the individual can function as the sex he claims, then no legal barrier should prevent that person from gaining legal recognition as such gender.¹²⁰ Whereas the *Littleton* court viewed sex as fixed and unchangeable, *M.T.* illustrates a more progressive analysis of questions of sex-determination.¹²¹ The court in *M.T.* represents an approach wherein the courts view sex as an issue of fact, requiring a consideration of multiple factors.¹²²

The state and local laws that make it difficult for transgender individuals to update birth certificates or other identification documents with accurate gender markers subject them to a wide array of discrimination.¹²³ Specifically, legal barriers undermine the ability of transgender people to keep their status as transgender private, secure bank accounts, start new jobs, enroll in school, travel, and inherit.¹²⁴ For purposes of estate planning, courts' denial of recognition of a transgender individual's new gender threatens to undermine his or her personal relationships.¹²⁵ When relationships define how a testator intended to identify an individual in his will, a court's failure to properly recognize these relationships can effectively disinherit a beneficiary.¹²⁶

115. Compare *Littleton*, 9 S.W.3d at 231, with *In re Estate of Araguz*, 443 S.W.3d 233, 250 (Tex. App.—Corpus Christi 2014, pet. denied) (demonstrating a clear trend away from the *Littleton* decision regarding the question of whether a sex change may be proof for an individual's identity).

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

117. *Id.*

118. *Id.*

119. *Id.*

120. *Id.*

121. See Moskow, *supra* note 106, at 1432.

122. *Id.*

123. See *Identity Documents & Privacy*, *supra* note 76 ("[G]ender incongruent identification exposes people to a range of negative outcomes, from denial of employment, housing, and public benefits to harassment and physical violence.").

124. See *id.*

125. Bergstedt, *supra* note 69, at 695.

126. *Id.*

IV. WHO'S WHO: CONSTRUING A WILL TO ASCERTAIN BENEFICIARIES

Estate planning professors have long pointed out that no matter how clearly a will is worded, it is always necessary to “go through the process of giving meaning to the will in order that the estate should go to the proper persons in the manner outlined by the testamentary document.”¹²⁷ Thus, to ensure only rightful takers enjoy the benefits of testamentary gifts, courts must apply the words of the will to people and things in context.¹²⁸ This situation often requires a court to go through a process of “construction.”¹²⁹ As Professor Gerry Beyer explains, will construction consists of “assigning meaning to the instrument when the testator’s intent cannot be fully ascertained from proper sources.”¹³⁰ In construing the terms of a will, the court views the instrument in its entirety to ascertain the testator’s true intent.¹³¹ Consistent with this general rule, Texas courts will not limit the effect of the will in such a way that causes it to yield to a technical or precise reading of the language in a particular paragraph.¹³² Further, courts construe the testator’s intent from within the four corners of the will, stating the principle that the testator’s “intent must be drawn from the will, not the will from the intent.”¹³³ Therefore, the traditional rules instruct the courts to construe the express language the testator uses in the will to ascertain the intention of the testator at the time of the will execution.¹³⁴

Issues of will construction arise if the will language is ambiguous.¹³⁵ Even if the language in the will appears to be clear on its face, ambiguities may still exist due to intrinsic facts or extraneous evidence.¹³⁶ Therefore, the court must choose between two or more possible meanings.¹³⁷ The law recognizes a distinction between two types of ambiguities: patent ambiguities and latent ambiguities.¹³⁸

127. Gerry W. Beyer, 10 TEX. PRAC., TEXAS LAW OF WILLS § 47:1 (4th ed. 2018).

128. *Id.*

129. *Id.* (Professor Beyer explains that the terms “construction” and “interpretation” are often confused as having the same meaning. However, interpretation, when properly used, refers to the process of determining, from the language of the will and permissible extrinsic data, the actual intent of the testator.).

130. *Id.*

131. *Disabled Am. Veterans v. Mullin*, 773 S.W.2d 408, 410 (Tex. App.—San Antonio 1989, no writ); *Huffman v. Huffman*, 339 S.W.2d 885, 888 (Tex. 1960).

132. *McNabb v. Cruze*, 101 S.W.2d 902, 904 (Tex. App.—El Paso 1937, no writ).

133. *S. Antonio Area Found. v. Lang*, 35 S.W.3d 636, 640 (Tex. 2000); *Lehman v. Corpus Christi Nat’l Bank*, 668 S.W.2d 687, 688 (Tex. 1984); *Huffman v. Huffman*, 339 S.W.2d at 888.

134. *See generally* *McMurray v. Stanley*, 6 S.W.2d 412, 413 (1887) (explaining that the court will look to the entire will to ascertain the testator’s intention for any and every particular paragraph within the will); *see also* *Shriner’s Hosp. for Crippled Child. of Tex. v. Stahl*, 610 S.W.2d 147, 151 (Tex. 1980) (stating that the focus is not on “what the testatrix intended to write, but the meaning of the words she actually used”).

135. Beyer, *supra* note 127.

136. *Id.*

137. *Id.*

138. *Id.*

Patent ambiguities occur when a will is ambiguous on its face.¹³⁹ Latent ambiguities, on the other hand, are rather hidden and only become apparent upon execution of the will.¹⁴⁰ Simply put, “the will appears to convey a sensible meaning on its face but cannot be carried out without further clarification.”¹⁴¹ In both of these situations, Texas courts may hear evidence from interested parties and enter a declaratory judgment respecting the construction of the will.¹⁴² Further, the courts will allow parties to introduce extrinsic evidence to bring clarity to the meaning the testator intended to give the words he or she used.¹⁴³ In some instances, it may be necessary to apply the rules of will construction to resolve ambiguities that exist with respect to the beneficiaries to a decedent’s will.¹⁴⁴

A. Identifying the Individual Beneficiary

When one is drafting a will, estate planning practice guides recommend gathering general information from clients to correctly identify interested parties and subject matter that will appear within the will.¹⁴⁵ In terms of potential beneficiaries to the will, helpful information includes the names, residences, vital statistics, and relationship to the testator.¹⁴⁶ Typically, a testator will leave a gift to an individual beneficiary by referring to his or her given name and including any other relevant details that would be necessary to adequately identify the individual.¹⁴⁷ Texas’s estate planning practice guide provides that “a testator should identify his or her family members by name and description.”¹⁴⁸

In most cases, designations to individual beneficiaries are unambiguous and do not require further clarification.¹⁴⁹ However, courts may find a will is ambiguous when it inaccurately describes the beneficiary or some other named subject matter.¹⁵⁰ In these cases, the court may use extrinsic evidence to determine the intent of the testator when he mischaracterizes an individual

139. *Id.*

140. *Id.*

141. *Id.*

142. TEX. EST. CODE ANN. § 257.101 (Supp.) (declaratory judgment construing will); *see also* TEX. CIV. PRAC. & REM. CODE ANN. § 37.004 (Supp.).

143. *Hultquist v. Ring*, 301 S.W.2d 303, 305 (Tex. App.—Galveston 1957, writ ref’d n.r.e.).

144. *See* Beyer, *supra* note 127.

145. *See* 20A AM. JUR. 2D *Legal Forms* § 266:36 (2017).

146. *See id.*

147. *See id.*

148. *See* Ronald Cresswell, *Common Introductory Provisions—Identification of Family*, 1 TEX. PRAC. GUIDE WILLS, TRUSTS AND EST. PLAN. § 4:109 (Dec. 2016).

149. R.T. Kimbrough, *Admissibility of Extrinsic Evidence to Aid Interpretation of Will*, 94 A.L.R. 26 (Originally published in 1935—cumulative supplement).

150. *See generally In re Estate of Cohorn*, 622 S.W.2d 486 (Tex. App.—Eastland 1981, writ ref’d n.r.e.) (illustrating a case in which the testator erred in the description of a tract of land, resulting in a latent ambiguity); *see also Hultquist v. Ring*, 301 S.W.2d 303, 305 (Tex. App.—Galveston 1957, writ ref’d n.r.e.).

beneficiary.¹⁵¹ For example, in one Texas case, *Hultquist v. Ring*, the testator named a beneficiary whom he described as the child of his sister.¹⁵² In *Hultquist*, a conflict arose during administration of the decedent's estate because extrinsic evidence revealed that name of the beneficiary and the description attached to it corresponded with two different people.¹⁵³ The name in the will was "Alma," which was the name of the testator's estranged sister, but the description attached to it matched the testator's nephew Elmer.¹⁵⁴ The *Hultquist* court considered evidence showing that the testator did not read the will himself due to impaired vision.¹⁵⁵ Additionally, the court found evidence that the testator's Swedish accent caused him to pronounce the English letter "E" as if it were the letter "A."¹⁵⁶ Based on this evidence and testimony by the secretary who drafted the will for the testator, the court concluded that the testator must have intended the beneficiary to be Elmer.¹⁵⁷ Therefore, the case demonstrates the principle that a single inconsistency between the name and characterization of an individual should not ordinarily preclude that individual from rightfully taking those interests that a testator intended for him to inherit.¹⁵⁸

Additionally, other cases specifically point out the ambiguities of using personal pronouns or other general terms to describe a beneficiary.¹⁵⁹ Given the equivocal nature of using pronouns such as "he," "she," etc., courts in some jurisdictions have referred to extrinsic evidence to identify the person the testator intended the pronoun to describe.¹⁶⁰ But, unsurprisingly, courts confronting ambiguous descriptive pronouns followed the traditional understanding of gender and sex as rigid concepts.¹⁶¹ Thus, these cases make it evident that the ambiguous nature of the personal pronoun emanates not from any particular understanding of gender or sex.¹⁶² To illustrate this concept, a Kentucky court stated:

The rule permitting the introduction of extrinsic evidence in aid of the intention of the testator is furthermore confined to showing such persons and objects as correspond with the terms which he employed, and will not allow the developing by extrinsic proof, as a person or object intended, one

151. See generally *In re Estate of Cohorn*, 622 S.W.2d 486, 488 (Tex. App.—Eastland 1981, writ ref'd n.r.e.) (illustrating a case in which the testator erred in the description of a tract of land, resulting in a latent ambiguity).

152. *Hultquist*, 301 S.W.2d at 305.

153. *Id.*

154. *Id.*

155. *Id.*

156. *Id.*

157. *Id.*

158. *Id.* at 309.

159. *Eichhorn v. Morat*, 193 S.W. 1013, 1014 (1917).

160. *Id.*

161. *Id.*; see also *supra* Part III (discussing how the law conflates sex and gender).

162. *Eichhorn*, 193 S.W. at 1014.

who or which will not apply to, or correspond with, the word or words which the testator used . . . *Illustrative of our meaning: In the instant case it would be wholly incompetent to show by extrinsic proof that the testatrix meant by the use of the personal pronoun 'he' a female to whom the word used did not apply . . .* (emphasis added).¹⁶³

Texas laws do not expressly address the meaning of personal pronouns in relation to gender. However, Texas law does provide that “a word or phrase with a specific meaning will ordinarily be given that meaning when the court construes the will.”¹⁶⁴ Following this instruction, cases matching pronouns to beneficiary designations have almost exclusively relied on traditional social constructs to give legal meaning to gender based pronouns.¹⁶⁵

B. Identifying the Beneficiaries in a Class Gift

Class gifts are gifts to beneficiaries that the testator intends to take as a group.¹⁶⁶ According to Texas law, the persons in the group are uncertain at the time the will is executed.¹⁶⁷ During administration of the estate, the individuals who answer to the label the testator used to define the class qualify as members of the class.¹⁶⁸ Often, a testator chooses to make class designations because they are a flexible and useful tool in anticipation of potential fluctuations in the class membership.¹⁶⁹

Testators tend to define the class of beneficiaries according to a common group label such as children, grandchildren, nieces, nephews, etc.¹⁷⁰ For example, using the hypothetical from Part I, the testator, William, chose to leave a class gift to “all his sons,” with the noun “sons” serving as the label defining class membership.¹⁷¹ The same overarching principles of will construction guide the court when the testator chooses to designate beneficiaries of a will, trust, or other transfer as a group rather than as individuals.¹⁷² Yet, in the context of class gifts, the application of the basic principles of will construction have historically created confusion for the

163. *Id.*

164. See Cresswell, *supra* note 148.

165. See, e.g., *Eichhorn*, 193 S.W. at 1014 (showing how courts rely on traditional understandings of gender based pronouns).

166. RESTATEMENT (THIRD) OF PROPERTY, WILLS AND OTHER DONATIVE TRANSFERS § 13.1 (AM. LAW INST. 2017).

167. *In re Estate of Womack*, 280 S.W.3d 317, 316 (Tex. App.—Amarillo 2008, no pet.).

168. *Hagood v. Hagood*, 186 S.W. 220, 225 (Tex. App.—Fort Worth 1916, writ ref'd).

169. See *McKen V. Carrington, The Texas Inheritance Lottery Lapse and the Class Gift Rule: At Last a Statutory Resolution*, 17 T. MARSHALL L.R. 31, 57 (1991) (stating that class gifts are useful when the members of a class may fluctuate in the future).

170. *Hagood*, 186 S.W. at 225.

171. See *supra* Part I.

172. See *Carrington*, *supra* note 169, at 57.

courts.¹⁷³ The confusion usually arises when a testator uses a variation of the typical language used to create class gifts.¹⁷⁴ When the testator uses facially unambiguous language to create a class gift, courts will presume the testator intended to give ordinary meaning to the terms.¹⁷⁵ As more individuals question gender identity and sex, the meaning behind words associated with gender (e.g., son, daughter, etc.) will likely become a question of fact.¹⁷⁶ Thus, courts may no longer be able to presume that the word “son” has a single, ordinary meaning.¹⁷⁷

V. WHAT ABOUT JASON?

In the hypothetical from Part I, whether Jason will take as a beneficiary of the class gift given his sex change depends on the resolution of key issues.¹⁷⁸ First, will the state afford legal recognition to Jason’s gender change?¹⁷⁹ As explained in Section III.C, states vary with regard to recognizing an individual’s sex change as a matter of law.¹⁸⁰ By analyzing various statutes, policies, and case law about changing identity documents, an individual will uncover general trends and attitudes about obtaining a legal sex-change.¹⁸¹ However, this area of the law is inconclusive.¹⁸² For instance, even if Jason lives in a state recognizing sex reassignment procedures as evidence sufficient to change the sex-marker on his birth certificate from female to male, a state court confronting the issue may determine that sex is based on biology and that biology is fixed at birth.¹⁸³ If sex is fixed at birth, Jason’s sex change will carry no legal meaning, and under strict interpretations of the meaning of “son,” a court would likely find that Jason does not qualify as a member of the class gift in William Benner’s will.¹⁸⁴

Should the state’s interpretation of sex and gender stay relevant?¹⁸⁵ That is, if Jason’s sex or gender, as a matter of law, is incongruent with his father’s view of Jason’s gender, then which of the two should resolve the current

173. *Id.* at 38.

174. *Id.* at 44.

175. Lawrence W. Waggoner, *Class Gifts Under the Restatement (Third) of Property*, 33 OHIO N.U. L. REV. 993, 995 (2007).

176. *See, e.g., In re Estate of Araguz*, 442 S.W.3d at 250 (showing a case in which the court suggested determination of sex may be a question of fact).

177. *See supra* Part III.

178. *See supra* Part I.

179. *See supra* Part I.

180. *See supra* Section III.C.

181. *See supra* Section III.C.

182. *See supra* Section III.C.

183. *See generally* Littleton v. Prange, 9 S.W.3d 223, 231 (Tex. App.—San Antonio 1999, pet. denied) (stating that although the petitioner obtained a birth certificate reflecting her sex reassignment procedure, the court relied on biological factors to hold that she was a male as a matter of law).

184. *See, e.g., Eichhorn*, 193 S.W. at 1014 (showing how courts rely on traditional understandings of gender-based pronouns).

185. *See supra* Parts III–IV.

issue?¹⁸⁶ Until courts establish clear authority on this issue, it will remain uncertain whether this is a question of law or a question of fact.¹⁸⁷ Since the law of wills assumes that courts will respect testamentary freedom, the best answer would be consistent with this practice.¹⁸⁸

On the other hand, respecting testamentary freedom may prove unworkable when there is not one clear outcome.¹⁸⁹ The courts would become responsible for finding a label to represent the relationship between a child and his father.¹⁹⁰ Was there a father-son relationship or a father-daughter relationship?¹⁹¹ Without specific direction from the testator himself, this process is arbitrary.¹⁹²

VI. RECOMMENDATIONS AND CONCLUSIONS

The best advice estate planning attorneys can follow is to take special care to ensure that they understand the nature of their clients' personal relationships, as well as any potential challenges related to their clients' wills.¹⁹³ For instance, in the Benner family hypothetical, the attorney would need to make herself aware of the changing family dynamic, and account for the possibility that the legal identities of potential beneficiaries may not be easy to ascertain under common understandings of the language used to describe them.¹⁹⁴ However, sometimes even the most careful estate planning cannot account for all changes that may occur within a family.¹⁹⁵

In the case that a client is unsure of the legal status of his or her child's preferred gender, one may insert a clause into the will specifically addressing this matter.¹⁹⁶ The will could specifically provide a section describing each child.¹⁹⁷ Within this section, the will would explain the nature of the relationship between testator and child (e.g. father-son) and detail the transition the child made during his life.¹⁹⁸

186. *See supra* Parts III–IV.

187. *See supra* Parts III–IV.

188. *See supra* Part III.

189. *See supra* Part III.

190. *See supra* Part III.

191. *See supra* Parts I, III.

192. *See supra* Part I.

193. *See supra* Part I.

194. *See supra* Parts I, III.

195. *See, e.g., supra* Part I.

196. *See, e.g., supra* Part I.

197. TEX. EST. CODE ANN. § 251.000 (Supp.) (with no current provision related the determining the sex of a potential members' sex).

198. *Id.*

A. Legislative Reform for Legal Recognition

Amending state legislation to clarify the legal status of transgender individuals will provide more certainty when it comes to estate planning issues.¹⁹⁹ While a person's family or friends may understand that their gender does not align with the sex recorded on their birth certificate, social recognition is distinct from legal recognition, and one does not always translate to the other.²⁰⁰ The inability to gain legal recognition or to acquire only a legal sex change by invasive means (e.g. medical procedures) may often leave transgender individuals without legal relief.²⁰¹ States should adopt legislation that provides clear and accessible means for individuals to change the gender markers on their birth certificates.²⁰² Further, states should make private the fact that an individual has amended his or her birth certificate, eliminating the possibility that courts will override the facts stated within the amended certificate.²⁰³ This change will allow transgender individuals to identify themselves with certainty, ensuring that the chosen identity will be recognized both socially and legally.²⁰⁴ Additionally, granting individuals the power to change their identity documents and taking the decision away from the courts may decrease potential constitutional rights violations and suits against the government.²⁰⁵

Ideally, states will model new policies after a "self-identification" model.²⁰⁶ Under this model, the standard for changing identity documents is based on individual choices and self-defined understandings of one's gender.²⁰⁷ An individualized standard would put the individual seeking a gender change in control, making it easier for him to live in accordance with his true self.²⁰⁸ Further, to ensure that lowering the standard for amending sex or gender markers on birth certificates does not lead to fraud, the government may continue to require a reasonable application fee and a third-party affidavit to verify that an individual is who he says he is.²⁰⁹

199. *Id.*

200. Jack Byrne, *License to Be Yourself*, OPEN SOC'Y FOUND. 6, (2014) <https://www.opensocietyfoundations.org/sites/default/files/license-to-be-yourself-20140501.pdf> [perma.cc/R3TL-69DK].

201. *See supra* Part II.

202. *See* Byrne, *supra* note 200.

203. *See, e.g.*, *Littleton v. Prange*, 9 S.W.3d 223, 231 (Tex. App.—San Antonio 1999, pet. denied) (stating that if amendments to birth certificates are made private, the court in *Littleton* would not have had the opportunity to invalidate the marriage between the transgender petitioner).

204. *See* Byrne, *supra* note 200.

205. *See* Moulding, *supra* note 80.

206. Emily Blincoe, *Sex Markers on Birth Certificates: Replacing Model with Self Identification*, 46 VICTORIA U. WELLINGTON L. REV. 57, 65 (2015).

207. *Id.*

208. *Id.*

209. *Id.* at 71.

B. Estate Planning: A New Cause of Action?

In an estate planning context, some legal scholars propose creating a private cause of action to promote equity among family members who may have received more or less financial help from a testator based on sex.²¹⁰ While this seems fairly radical, reformists reason that statutes prohibiting sex-based discrimination in beneficence could be considered “a refinement on the parent’s obligation to provide for the child.”²¹¹ Enacting a statute that would require testators to support both children equally would override the need for the court to resolve tough questions about an individual’s gender identity versus his legal identity.²¹² However, this approach overrides principles of testamentary freedom and as long as conditioning gifts based on sex or gender is legal, states will hesitate to adopt this method.²¹³

C. Estate Statutes

Perhaps a more realistic approach is adopting a statute defining at what point in time a potential beneficiary’s sex or gender is determined.²¹⁴ One of the defining “characteristic[s] of a class gift is that its membership is not ascertainable until some time after the execution of the will unless the will plainly provides otherwise.”²¹⁵ However, without altering this rule, the statute should create a presumption that the sex of potential members shall be determined at the time of will execution as opposed to at the time of testator’s death.²¹⁶ The determination of potential members’ sex at the time of will execution could be based on the testator’s own specific directions as to what sex the beneficiary is, or in the absence of direction from the testator, may rely on the beneficiary’s current legal birth certificate.²¹⁷ Additionally, the section of the code should provide that, absent direction from the testator providing otherwise, the current legal birth certificate shall serve as the sole evidentiary basis for identifying the beneficiary.²¹⁸ The estates code should adopt a statute to this effect by adding a section that deals with the identity of persons named in the will.²¹⁹

210. Jeremy E. Stake, *Biologically Based Beneficence*, 48 ARIZ. ST. L.J. 1101, 1114 (2017).

211. *Id.*

212. *Id.*

213. 38 Am. Jur. 2d *Gifts* § 67, Westlaw (database updated Feb. 2018) (“the donor of a gift may attach certain lawful conditions precedent to the vesting of title in the donee”).

214. TEX. EST. CODE ANN. ch. 251 (Supp.) (with no current provision related the determining the sex of a potential members’ sex).

215. Gerry W. Beyer, 9 TEXAS LAW OF WILLS § 30:3 *Time of Determining Class Membership* (4th ed. 2016).

216. *See id.*

217. TEX. EST. CODE ANN. ch. 251 (Supp.).

218. *Id.*

219. *Id.*

D. Conclusion

The right to be recognized before the law is an important human right.²²⁰ To adequately protect this right, it is the responsibility of lawyers and policymakers to ensure that laws reflect changes in society.²²¹ As of 2016, demographics estimated that nearly 1.4 million adults in the United States identify as transgender.²²² As that number continues to grow, it is important to reform the law to ensure that individuals will gain the legal recognition that aligns with who they truly are.²²³ It is crucial for transgender individuals that the law becomes more inclusive and does not automatically equate one's sex as recorded at birth with his or her gender.²²⁴ This may require lawmakers and judges to make a courageous departure from traditional allegiances that produce predictable outcomes such as understanding sex as solely binary.²²⁵ As a result, the law will confirm that transgender individuals are treated fairly and receive the benefits to which they are legally entitled.²²⁶

220. *See supra* Parts II–IV.

221. *See supra* Parts II–IV.

222. Jan Hoffman, *Estimate of U.S. Transgender Population Doubles to 1.4 Million Adults*, N.Y. TIMES (June 30, 2016) <https://www.nytimes.com/2016/07/01/health/transgender-population.html> [perma.cc/TCJ7-2YVH].

223. *See supra* Parts II–IV.

224. *See supra* Parts II–IV.

225. *See supra* Parts II–III.

226. *See supra* Parts II–III.