

Gender balance

Alison Craggs sets out important points to consider when advising a transgender client



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'Under s15 of the GRA, the fact that a person's gender has changed does not affect the disposal or devolution of property under a will or other instrument made before 4 April 2005. However, the disposal or devolution of property under a will or other instrument dated on or after 4 April 2005, takes effect in accordance with the acquired gender.'

As the government announces plans to reform the process of changing legal gender, I explore the changing law in this area focusing on wills, trusts and estates. This article focuses on the issues involved if you are instructed to prepare a will or a trust for a client who wants to benefit a transgender person, or administer the estate of a person who has transitioned.

What is transgender?

There is no legal definition of transgender. Transgender is an umbrella term, as in addition to describing people whose gender identity is the opposite of the gender assigned to them at birth (for example, a transgender man: someone who has transitioned from female to male), it also includes people who identify outside of the man-woman gender binary. A non-binary person may regard themselves as neither a man nor a woman, or as both, or take another approach to gender identity. You only have to open a Facebook account to discover that apart from male and female, there are 69 other gender options to choose from, including polygender, genderfluid, gender questioning, genderqueer, trigender to name just a few.

Gender identity is different to sexual orientation. Transgender people may be heterosexual, homosexual, bisexual, asexual or pansexual (attracted to a person of any sex or gender identity).

While the exact number of transgender people in the UK is not known, the Government Equalities Office estimates that it could be 200,000 to 500,000.

A transgender person may transition by:

- social changes, for example, changing their clothing and their gender, title and name on documents such as credit cards, bank statements, utility bills, medical and employment records and government-issued forms of identification, such as their passport;
- medical changes (for example, speech therapy, taking hormones or undergoing surgery); and
- legal changes (by making an application under the Gender Recognition Act 2004 (the GRA) for a gender recognition certificate (GRC)).

The GRA

Before 4 April 2005, the date the GRA came into force, a transgender person could live in their acquired gender socially, but legally they would still be recognised by the gender assigned to them at birth.

The GRA was a world-leading piece of legislation. It allowed, for the first time in the UK, transgender people to have their acquired gender legally recognised. The UK was also the first country in the world to give legal recognition without a transgender person having had surgical treatment.

The GRA enables a transgender person to obtain a GRC, giving them full recognition of their acquired gender in law for all purposes thus ensuring that all their documentation matches. It also gives them important legal rights, such as the right to marry in their

acquired gender and the right to a pension at the age applicable to that gender.

In order to obtain a GRC, a transgender person has to apply to the Gender Recognition Panel. There are three routes, with the standard route being the one used by around 95% of applicants. The standard route requires a transgender person, aged over 18, to make a statutory declaration that they intend to live in their acquired gender until death, provide two medical reports confirming that they have gender dysphoria (discomfort with their birth gender) and show evidence that they have lived in their acquired gender for at least two years. Almost all the applications are decided 'on the papers' and if successful the transgender person will obtain a GRC and, if their birth was registered in the UK, a new birth certificate.

Despite having been in force for over 13 years, only 4,910 transgender people have successfully obtained a GRC. An LGBT survey showed that many transgender people find the current process of applying for a GRC intrusive, costly, humiliating and administratively burdensome. On 3 July 2018 the government launched a 16-week GRA consultation on how to make it easier for transgender people to change their legal gender.

The GRA only recognises the two binary genders of male and female. It makes no provision for those with a gender identity which is non-binary. This is something that the government is considering people's views on in the consultation.

Marriage and civil partnerships

Prior to the Marriage (Same Sex Couples) Act 2013 (MSSCA), a married transgender person who wanted to get a GRC needed to divorce. Legal recognition was not possible because it would have meant that the marriage changed from an opposite-sex one to a same-sex one and at that time, same-sex marriages were not legal.

The MSSCA removed the requirement that a married transgender person must divorce and instead required their spouse to consent, by way of a statutory declaration, to the marriage continuing after the GRC has been granted.

The position for civil partnerships is different because the Civil Partnership Act 2004 (CPA) only allows a same-sex couple to enter into a civil partnership. So a transgender person in a civil partnership would need to end that civil partnership, or convert it into a marriage, in order to apply for a GRC.

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However, the case of *R (on the application of Steinfeld and Keidan) v Secretary of State for International Development* [2018] in which a heterosexual couple fought for the right to have a civil partnership may change this position. In the judgment dated 27 June 2018, the Supreme Court declared that ss1 and 3 of the CPA, to the extent that they preclude a different-sex couple from entering into a civil partnership, are incompatible with Art 14 (the prohibition on discrimination) taken in conjunction with Art 8 (the right to respect for private life) of the Human Rights Act 1998. This case may therefore lead to a change in the above position, although a declaration of incompatibility does not oblige the government or Parliament to do anything.

Effect of ending a civil partnership on your will

If, for example, a transgender man ends his civil partnership (on a final dissolution order) in order to apply for a GRC then his will would take effect as if his former civil partner had died before him, unless he expresses a contrary intention in the will.

Using the same example, but if instead the transgender man converted his civil partnership to a marriage, then his will would not be revoked by the conversion, nor would the conversion affect any disposition in the will as any

references to his civil partner would be read as referring to his spouse.

Wills and trusts

Under s15 of the GRA, the fact that a person's gender has changed does not affect the disposal or devolution of property under a will or other instrument made before

4 April 2005. However, the disposal or devolution of property under a will or other instrument dated on or after 4 April 2005, takes effect in accordance with the acquired gender.

So where a client makes a gender-specific gift in their will, the effect of this will depend on when the will was made. For example:

Stephen makes a will which provides that '50% of his estate will be divided equally between his sons and 50% will be divided equally between his daughters'. He dies survived by two sons Adrian (aged 50) and Brian (aged 45) and a daughter Charlene.

After the will is made Adrian transitions from being male to being female, changes her name to Dawn and obtains a GRC.

If Stephen made his will before 4 April 2005, for succession purposes Dawn would be recognised by what is on her original birth certificate, so she would still be treated as a son and therefore the estate would be divided as to 50% equally between Dawn and Brian and 50% to Charlene.

If, however, Stephen's will was made after this date then the law provides that for succession purposes the estate devolves in accordance with your acquired gender. So the estate would be divided as to 50% to Brian and 50% equally between Charlene and Dawn.

Careful consideration would need to be given if a codicil was prepared to Stephen's pre 4 April 2005 will. The general rule is that a codicil

republishes a will. Perhaps the best course of action would be to make a new will referring to the children by name.

If instead of the gender-specific gift the will had been written to leave 'my estate as to 50% equally

Clarity could also be achieved by referring to Dawn by both her current and previous names, but this might not be what Stephen or Dawn would want. Another option would be for Stephen to ensure that his will uses gender-

Personal representatives and trustees

Personal representatives and trustees are not under a duty to enquire before conveying or distributing property whether a GRC has been issued to a person, nor are they liable in respect of such a conveyance or distribution for failure to take into account a GRC of which they had no notice at the time (s17 of the GRA). If the personal representatives or trustees distribute property wrongly then the correct beneficiary has the right to trace the assets, but without any liability for breach of trust on the part of the personal representatives or trustees.

A transgender person's legal status as the father or mother of their children will not change after a GRC has been issued and neither will their rights and responsibilities for their children.

between Adrian and Brian and as to the remaining 50% to Charlene' then the provisions are unlikely to fail on the basis that Dawn can prove that she was previously Adrian. The GRC will show the link, but if the transgender person does not have one then they should keep paperwork showing their past identity.

neutral wording, such as 'my child'.

Continuing my example, in 2006, before Dawn had transitioned, Stephen also set up a trust which made provision for 'the settlor's eldest son'. As Dawn who was the eldest son has become a daughter, Brian who is now the eldest son would take.

Orders

Where the devolution of property under a will or other instrument made on or after 4 April 2005 is different from what it would have been as a result of the gender change, anyone (not necessarily the person who has changed gender) may, under s18 of the GRA, apply to the High Court for an order on

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the grounds of being adversely affected by the different devolution. The court may make such order as it sees fit including the transfer of property or the payment of a lump sum.

Other courses of redress could include with regard to:

- wills, bringing an Inheritance (Provision for Family and Dependents) Act 1975 claim or, if all parties agree, entering into a deed of variation; or
- trusts, exercising, if there is one, a power to amend the trust or making a Variation of Trusts Act 1958 claim.

Pensions and benefits

When a transgender person obtains their GRC it can affect their National Insurance contributions, as well as any social security benefits, state pension and workplace pension that they or their spouse or civil partner may receive. It is important for a transgender person to notify their pension provider to ensure that the correct payments are made.

Parenthood

A transgender person's legal status as the father or mother of their children will not change after a GRC has been issued and neither will their rights and responsibilities for their children (s12 GRA).

At a preliminary High Court hearing on 7 June 2018, a woman who transitioned to become a man before having a baby asked the court to allow him to be named as the child's 'father' or 'parent' on the birth certificate, instead of 'mother'. The registrar recording the birth told him that the law required the person who gave birth to the child to be registered as the mother. The father is arguing that forcing him to register as the child's 'mother' breaches his human right to respect for private and family life within Art 8 of the Human Rights Act 1998. While other transgender men have given birth, they have been registered on the child's birth certificate as the child's 'mother'. If the court agrees to the request the child will become the first person

born in England and Wales not to legally have a mother. A decision in the case is awaited.

Peerages

The issuing of a GRC does not affect the succession to any 'dignity or title of honour' (such as

a peerage) or property that passes with these (s16 GRA).

Health and welfare power of attorney and advance decision

A transgender person, like anyone else, may find it helpful to put in place one or both of the above setting out their beliefs and values and preferences regarding care should they lose mental capacity. This is important as, for the first time, we are seeing an ageing transgender population who may face daily issues to manage a transgender body. A transgender man could set out his wishes, for example, whether he would prefer his own room, the type of clothing he would like to wear, whether he would want to take any medication normally associated with women etc.

Registration of death

Difficulties can arise for relatives of transgender people when having to state the sex of the deceased. Relatives sometimes register the death in the transgender person's birth gender, despite the person having lived in their acquired gender for some time.

Where a transgender person has a GRC, their acquired gender must be used when registering their death. If a GRC was not obtained, the transgender person's acquired gender can still be used provided their passport or medical card supports this.

Equality Act 2010

Protection under the Act is on the basis of nine 'protected characteristics'. A person has the

protected characteristic of 'gender reassignment' if the person is:

... proposing to undergo, is undergoing or has undergone a process (or part of a process) for the purpose of reassigning the person's sex by changing physiological or other attributes of sex.

Where a transgender person has a GRC, their acquired gender must be used when registering their death.

Under the Act, service providers must not discriminate against someone requiring a service regardless of whether the service is provided for free or is charged for. An organisation will be liable for unlawful discriminatory acts (direct or indirect discrimination, harassment or victimisation) unless it has taken reasonable steps to prevent such acts occurring. Helpful guidance on providing services to transgender customers has been published by the Government Equalities Office (see www.legalease.co.uk/transgender-customers) and firms may also find that staff training on the issues of equality and diversity is very effective.

The government is keen to make it easier for transgender people to change their legal gender. As attitudes change, more and more people, whether it is the younger generation or people who transition later in life, feel able to publically disclose that they are transgender. It is important when taking will and trust instructions that we gain our clients' confidence to open up to us about these sensitive matters so that we can ensure that the interpretation of documentation is clear and avoids potential disputes arising. It is an interesting time to be a private client lawyer. ■

R (on the application of Steinfeld and Keidan) v Secretary of State for International Development (in substitution for the Home Secretary and the Education Secretary)
[2018] UKSC 32