

**Drafting Wills For Low-Income
Lesbian, Gay, Bisexual and Transgender
Clients in New York State**

LeGaL and
LGBT Law Project at NYLAG

Trainers:
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March 8, 2011

Hosted by:
New York Legal Assistance Group (NYLAG)

Timed Agenda:

6:00 – 6:10 LGBT Basics, working with Lesbian, Gay, Bisexual and Transgender Clients

6:10 – 6:30 Why low-income LGBT people need Wills

6:30 – 7:00 Will Drafting basics and Special Considerations

7:00 – 7:15 Questions on Drafting Wills

7:15 – 7:45 Proper Procedure for the Will Execution

7:45 – 8:00 Questions

Drafting Wills For Low-Income Lesbian, Gay, Bisexual and Transgender Clients in New York State

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LGBTQ Terminology Basics

- **L** = Lesbian
- **G** = Gay
- **B** = Bisexual
- **T** = Transgender
- **Q** = Queer or Questioning
- **GNC** = Gender Non Conforming
- **SOGI** = Sexual Orientation and Gender Identity

LGBT Terminology Basics

• Sexual Orientation

– Affectional and/or sexual attraction to another person. It can be considered as ranging along a continuum from same-sex attraction only at one end of the continuum to opposite-sex attraction only at the other end.

LGBT Terminology Basics

- **Gender Identity / Gender Expression**
 - Refers to a person's actual or perceived sex, and includes a person's identity, appearance, or behavior, whether or not that identity, appearance, or behavior is different from that traditionally associated with the person's sex at birth.
 - We all have a gender identity / expression.
 - Western societies generally view gender as a binary system (male or female) whereas many in the LGBTQ community adhere to Gender Spectrum Theory.

Masculine

Feminine

LGBT Terminology Basics

Simply put.....

- **Sexual Orientation** describes emotional, romantic and sexual attraction to others.
- **Gender Identity** describes how you identify yourself.

LGBT Terminology Basics

Transgender

As all encompassing umbrella term for people whose gender identity and/or gender expression do not conform to predominant gender roles, their physical and/or behavioral characteristics, their primary identity, or their assigned sex at birth.

Transsexual
Some are transsexuals but not all transsexuals are transsexuals. They may be transsexuals but not all transsexuals are transsexuals.

Crossdresser
Comfortable with their physical gender at birth, but will occasionally dress & take on the mannerisms of the opposite gender. Often heterosexual men.

Performers
They do not live the "opposite" gender for entertainment. For them "drag" is a job or play. It is not an identity. Some are gay, some are not. Some identify as Transgender. Most do not.

Intersex
People born exhibiting a mix of male and female genitalia. Often at birth, the parents "choose" which gender to raise the child, often choosing surgery and/or hormonal treatment.

Gender Benders/Androgynes

Do not fit easily into the above categories as they may be cross-dressing. May have a mix of male & female characteristics. May use "both" or "neither" or "queer" and & enjoy gender expression in both roles.

The term used to describe transgender people who are not transgender is "gender bender" or "androgyne".

It is important to remember that the term "gender bender" or "androgyne" is not a synonym for "transgender" and should not be used to describe transgender people.



LGBT Terminology Basics

- **Transwoman**

- Biological or assigned sex at birth was male, but identifies as female.
- Refer to as woman, use female pronouns and client's chosen name.

- **Transman**

- Biological or assigned sex at birth was female, but identifies as male.
- Refer to as male, use male pronouns and client's chosen name.

LGBT Terminology Basics

- **Outdated / Offensive Terminology**

- "Sexual Preference" – old terminology, implies there is a choice in who you are attracted to.
- "Tranny" – derogatory term for transgender person.
- "Transgendered" – transgender is appropriate.
- "Queer" – used by many in the LGBTQ communities, but should not be used unless you know the person you are speaking with/representing is comfortable with the word.
- "Homosexual" – old terminology, used in the DSM when being attracted to the same sex was considered a mental illness.

LGBT Terminology Basics

- **Working with LGBTQ Clients**

- Avoid assumptions - ask your client. "What is your preferred gender pronoun?" "How do you identify yourself?"
- Use the terminology your client uses and be aware of cultural and generational differences.

Drafting Wills For Low-Income Lesbian, Gay, Bisexual and Transgender Clients

I. Why do low-income LGBT people need a will and other life planning documents?

A. EVERYONE has an estate!

B. Lack of relationship recognition

1. Federal Defense of Marriage Act (DOMA)

2. U.S. Attorney General Eric Holder's announcement that the Justice Department will not defend DOMA – but it is still the law and it will be upheld!

C. Even if (when) same-sex marriages are permitted in New York State, not everyone is interested in getting married, but they still need to protect their relationships and direct who and where their estate shall be distributed to. .

D. Sense of empowerment – taking charge of our lives and our futures.

E. Family may not respect our wishes or approve of our relationships and/or friendships.

II. Intestacy Laws

A. Intestacy laws determine who your estate will be left to if you die without a Will.

1. New York Estates Powers and Trusts Law (EPTL) §4-1.1

a) Spouse and/or Children

b) Parent(s)

c) Siblings

B. Will NYS recognize an out of state same-sex marriage and/or civil union, etc. with regard to intestacy laws?

1. Marriage: yes, at least in the 1st Dept.

a) Ranflet v. Leiby, 1st Dept Appellate Court recognized a same-sex marriage performed in Canada for purposes of probating the will for one of the spouses (the decedent's brother petitioned to vacate the probate decree on the ground that the Surrogate's Court did not have jurisdiction because the same sex marriage was not valid and was against public policy).

2. Civil Unions and (state-wide) Domestic Partnerships: There is no pending litigation or definitive decision on this yet.

a) It may depend on the statute from the state where the civil union or domestic partnership was performed (similar to the parentage decision in Deborah H.)

III. Drafting a Will:

A. Required Clauses

1. Revocation Clause – A clause revoking all previously executed Wills and Codicils.

2. Residuary Bequest – A clause bequeathing to a beneficiary or beneficiaries the Testator's "residuary estate," which is all property owned by the Testator and not specifically bequeathed, after the payment of debts, taxes and the expenses of administering the estate.

a) It is important to name an alternate residuary beneficiary, in case the named primary residuary beneficiary predeceases the Testator. If there is only one named residuary beneficiary who predeceases the testator and there is no alternate residuary beneficiary, the residuary estate will be distributed according to the NY intestacy law

b) EPTL §3-3.4 provides that when there is more than one primary residuary beneficiary and one of the primary

beneficiaries dies, with no alternate residuary beneficiary, the remaining primary residuary beneficiary takes the entire residuary estate.

3. Appointment of Executor – A clause appointing an Executor to probate the Will and administer the estate, together with a direction to require any bond of security from the Executor.

a) When there is no named Executor, the Surrogate's Court will appoint an Administrator that may be a family member or a Public Administrator.

b) An alternate or successor Executor should be named in the event that the named Executor is unable or unwilling to act.

4. Investment and Administrative Powers – A clause authorizing the Executor to make all financial and administrative decisions with respect to Estate assets.

5. Publication Clause – A provision in which the Testator inserts the date and a line for his or her signature.

6. Attestation Clause – A provision pursuant to which the witnesses certify that the Will was duly executed in their presence with lines for the witnesses to sign the Will and add their addresses.

7. Affidavit of the Attesting Witnesses – An affidavit attached to the Will and notarized by a notary public, which generally obviates the need for the witnesses to testify in Court as to the due execution of the Will, pursuant to Surrogate's Court Procedure Act (SCPA) § 1406.

B. Clauses that may be included based on a case-by-case assessment:

1. Specific Bequests of tangible personal property to individual(s) or to a charity – A clause allowing the Testator to direct who will receive items of a personal nature, such as jewelry, furniture, clothing and automobiles. These clauses must be descriptive of the property so that the item is easily identifiable

a) Note: When making any charitable bequest, use the proper corporate name of the organization. You may have to contact the organization or look them up online.

2. General Bequests of cash to an individual or a charity – A clause allowing the Testator to leave a specific sum of money to a named individual or charity.

3. Specific Bequest of Real Property – A clause disposing of the Testator's interest in real property. This disposition can be to an individual(s) or a charity.

4. Appointment of Guardian – In Wills for clients who are legally responsible for minor children (i.e. parent – either natural or adopted, legal guardian) a clause nominating a Guardian and an alternate Guardian.

5. Gifts to Minors – In Wills for clients with children or other beneficiaries under the age of twenty-one, a clause authorizing the Executor to distribute the minor's gift to a guardian for the minor or a custodian for the minor under the Uniform Transfers to Minors Act until the minor reaches the age of twenty-one.

6. In Terrorem Clause – (no contest clause) A clause that threatens if anyone challenges the legality of the Will or any part of it, then that person will be cut off or given only one dollar.

a) If the will is challenged and found to be invalid b/c of undue influence, lack of mental capacity, failure to have it properly executed, then the in terrorem clause will fail.
EPTL § 3-3.5

7. Intentional Disinheritance – A clause that clearly acknowledges that you have left someone out of your Will, or a clause leaving a nominal amount (\$1.00) to show that this person was not left out by mistake (special rules apply to minor children and spouses).

IV. Special Issues

A. Probate vs. Non-Probate

1. Probate Property

a) Property which passes upon death under the individual's Will and includes tangible personal property and cash in the individual's name.

2. Non-Probate Property

a) Property that passes by operation of law or by contact upon death, regardless of the language in the Will

(1) Tenants by the Entirety – property owned by spouses. Upon the death of either spouse, the property automatically passes to the surviving spouse.

(2) Joint Tenants with the Right of Survivorship – property owned by two people. Upon the death of either person, the property automatically passes to the survivor.

(3) Life Insurance, Pension or other Retirement Plans – these monies will pass to the beneficiary that is named by the individual prior to their death.

(i) It is important to check these documents with our clients to be sure their beneficiary designation is current.

(4) Joint Bank Accounts – upon the client's death, the entire account will become the property of the joint tenant. This type of account allows either party to use the account while both individuals are living.

(5) Bank Account "In Trust For" or "Payable on Death"— upon the account holder's death, the account will become the property of the person named on the account ITF, or POD. Note that this person does not have access to this bank account while the original account holder is living.

TOKEN TRUST.

B. Spousal Right of Election

- 1. EPTL § 5-1.1A directs that a decedent's spouse is entitled to their "elective" share of their spouse's estate.**
- 2. The elective share is the greater of either \$50,000 or one-third of the client's "Net Estate" (which can sometimes include property passing outside of the Will).**
- 3. Remember that since valid out of state, same-sex marriages are currently being recognized in New York, this affects our clients who have entered a valid, same-sex, out of state marriage, as well as clients who have not filed for divorce from same or opposite sex marriages, but are separated from their former spouses.**
 - a) Note: this is why it is important to get the Judgment of Divorce, marriage license or other legal relationship documentation from your client.**
 - b) There are no cases on domestic partners or civil union partners and the right of election, so it is not clear if this entitlement will be mandated.**

C. Waiver of Right of Election

- 1. A spouse may execute a document waiving their right to the elective share. A sample waiver is attached.**

V. Will Executions –

A. Estate Planning –

1. As attorneys drafting and executing the last wills and testaments of our clients, it is important to remember what our obligations are to our clients. Not only are we drafting their wishes concerning how they would like their estate to be distributed after they are deceased, and conducting a ceremony to ensure that these wishes become legally binding, but we are also “responsible” to ensure that these wishes will actually be carried out after our clients pass away by ensuring that each Last Will and Testament will pass the probate process.

2. Additionally, although perhaps not part of our legal obligations at attorneys, we can take steps during the planning process so that our client’s appointed fiduciary will be able to probate our client’s Wills with the least amount of difficulty possible.

B. Pre-Execution Requirements:

1. The first part of the interview should be establishing that your client has the capacity to make a Will.

2. First, your client must be over 18 years old, and of sound mind and memory. EPTL § 3-1.1.

3. Testamentary have further been defined by case law to include:

a) that your client knows she is making a Will and has a general comprehension of its plan and effect;

b) that in a general way, your client understands the nature, extent and condition of her property;

c) that you client knows which individuals would ordinarily be the natural objects of her bounty (property); and

d) that you client be able to recall this information without prompting.

See e.g., Matter of Kumstar, 66 N.Y.2d 691,692, 487 N.E.2d 271,272, 496 N.Y.S.2d 414,415 (1985)

To establish the above, your client may need to divulge information to you which she may not feel comfortable discussing with a relative stranger. At this point you can remind her that your conversation is confidential and you cannot repeat it outside the confines of your office without her permission, and that you are asking these questions to ensure that her Last Will and Testament will pass the probate process

Second, make sure there is no undue influence involved. Your client may arrive with a family member, home health aide, or friend for support. At least initially, interview your client alone to see if anyone is pressuring your client to make the Will, and if that person is a beneficiary. If so, investigate a bit further to see whether it is truly your client's wishes that this person is a beneficiary. Ask about your client's family and friends, see if and why they are being excluded, if the answers don't make sense, and you suspect undue influence, you may have to refuse to draft and execute her Will.

C. Pre-Execution due diligence.

1. Asset List – I suggest to my clients that they make a list of all their assets and keep it with their Wills so that their executors know what property they have. If they wish, I will also review their assets to see if they can be consolidated, because generally it is to your client's advantage to make it easy for the executor to marshal and distribute the assets.

2. Family Tree – I suggest to my clients that they make a family tree with names and addresses all the way through first cousins if possible. If there are no immediate family members alive, I also ask if there are one or more persons not directly related to any beneficiary that could attest to the family tree. This information may be important for the probate of the Will, and it is much easier and cheaper to get the information from the Testator while alive, rather than after he or she is deceased.

3. Prior Wills – it is also a good idea to ask if your client has a prior Will for you to review. You can then go over the Will with your client and request reasons for the changes she is making.

4. Taking Notes – I recommend taking full notes of the pre-execution meetings with clients. This is a record of establishing testamentary capacity, no undue influence, etc. If the Will is contested, this may be important information you can proffer in defense of your client's state of mind and soundness of her testamentary plan.



(All notes for the LGBT Life Planning Legal Clinic should be forwarded to Virginia Goggin at NYLAG at vgoggin@nylag.org so that a proper record can be kept in the client's file).

D. Will Execution Ceremony:

The requirements of a Will execution are set forth in EPTL § 3-2.1. However, just following the bare requirements may not be sufficient to protect your client's will from possible objections in the future probate of her Will. The following is the general "recommended practice" for Will execution ceremonies, which if followed should adequately protect your client's will execution from objections at a later date:

1. Check your client's capacity. Make sure you client is thinking clearly and not taking any medications that may be clouding her judgment.
2. Review the Will with your client alone. You will have made prior drafts and sent them to your client for review, before setting up the appointment for the Will Execution. Read over the document paragraph by paragraph, summarizing ones that have lots of legalese in them, and make sure that this are your client's wishes as to her estate. Make any necessary changes. If your client insists on having someone with her, it should not be anyone who is benefiting under her Will.
3. Staple the Will to the Will Back.
4. Invite in the Witnesses. You will need two or more attesting witnesses. These witnesses should not be beneficiaries if at all

possible. (See EPTL 3-3.2, Capacity of Attesting Witnesses.) If you are not a notary, you will need to have a notary present as well.

5. Have a Short Conversation with Witnesses and Testator. Talk about a current event, or have the Testator describe her background briefly. This is to establish for the attesting witnesses that your client is of sound mind and memory.

6. Do the Ceremony. Have your client hold up her Will and ask her:

a) Is this your Will?

b) Have you read this Will and does it correctly express your wishes?

c) Would you like these people to witness you signing your Will?

7. Sign the Will. Have your client sign and date the Will. If your Will has initial spaces, initial at the same time.

8. Read the Attestation Clause aloud.

9. Have the attesting witnesses sign the Will. The attesting witnesses should sign and put their address. If the signatures are messy, ask the witnesses to print their names under their signatures. If initial spacing is provided, they should also initial at this time.

10. Have the witnesses sign the Affidavit of Attesting Witnesses. Notarize the signatures at this time.

E. Post-Execution Responsibilities.

1. Explain to the client that she should never take out the staples of the Will now that it is executed. It could potentially invalidate the Will.

2. Explain to the client that the Will should be kept in a safe place, but one that your executor knows and potentially has access to. Recommend against putting the Will in a safe deposit box if it can be avoided, because there is an additional

court procedure necessary to open the safe deposit box for the Will, and you may not want to delay your probate proceeding for various reasons. Your client may file her Will with the Surrogate's court for a \$45.00 fee.

3. Make a copy of the Will for your client, and one of your files. You can also make copies for the nominated executors if your client wishes. Recommend to your client that she inform her executors of the existence of her Will and where it will be kept.

4. Explain to your client that she can always change her Will, but if she does so she should destroy the old one. If it is a contentious Will, you may actually recommend periodic revisions to show a consistent testamentary plan.

5. Make note regarding the will execution ceremony for your files. There are various opinions regarding how detailed these notes should be; however, you should at least state that you reviewed the will with your client, she approved the final copy, and that the will execution ceremony was preformed with all the statutory formalities.

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