

## Transgender equality in wills and inheritance

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*Private Client analysis: Transgenderism remains an area of ambiguity with regards to inheritance and the potential difficulties in the wording of modern wills. Mark Lindley, partner at Boodle Hatfield specialising in wills and trust, discusses how using gender-neutral pronouns in wills and the introduction of Gender Recognition Certificates (GRCs) improve clarity regarding inheritance issues.*

### **How is transgenderism currently defined in legal terms? Are there any ambiguous areas surrounding the legal definition of transgenderism?**

There is no legal definition of the term 'transgender'. In practice, it appears to operate as an umbrella term for individuals whose gender identity or expression falls outside of gender norms, ie where the birth sex (attributed based on physical characteristics at birth) does not correspond to the individual's gender identity or expression.

It may therefore be used to describe someone who intends to, or who has, undergone gender reassignment (transsexuals), those who do not identify with a particular gender or those who, for example, cross-dress intermittently for a variety of reasons.

'Transgender' and 'transgenderism' are probably useful, in general terms, in being inclusive rather than exclusive. Any attempt at a legal definition would be difficult and potentially counter-productive. However, it does mean that care is needed when drafting legal documents which might refer to an individual's gender.

A good example of this is a gift in a will which is gender specific, ie 'I leave 75% of my residuary estate to my daughters in equal shares and 25% to my sons in equal shares'. If a daughter or son changes gender before the death of testator, in this example, then the disposition of the estate may be affected.

### **To what extent has the introduction of GRCs improved clarity when determining someone's legal gender? What is the current framework of GRCs in the context of inheritance?**

The [Gender Recognition Act 2004 \(GRA 2004\)](#) established a regime for individuals to apply for a GRC. Prior to [GRA 2004](#), there was no means for an individual to have a change of gender recognised in law. An individual may therefore have undergone treatment to alter physical characteristics, and identify and express themselves in accordance with the opposite gender to their birth sex. However, in law they would be regarded as male or female according to their birth certificate.

Under [GRA 2004, s 1](#), a person of either gender aged over 18 can apply for a GRC on the basis that they live in the other gender, or have changed gender under the law of a country other than the UK. If an individual satisfies the various conditions, the Gender Recognition Panel grant the application for a GRC, which entitles an individual to full recognition of their acquired gender (save in certain circumstances where the individual is, at the time of the decision, a party to a marriage or civil partnership).

Where an individual has a GRC, they can be then regarded as male or female for all legal purposes going forwards. The certificate is not generally retrospective in effect, but [GRA 2004, s 15](#) provides (in relation to succession) that:

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'The fact that a person's gender has become the acquired gender...does not affect the disposal or devolution of property under a will or other instrument made before the appointed day.'

For wills dated before 4 April 2005 containing a gender-specific gift, therefore, the disposition of the estate is not affected by the acquisition of a different gender. In our example, a daughter who has acquired a male gender will still be a beneficiary of the gift of 75% of the estate, rather than 25%. However, this means that in wills made after that date, such a gift would take effect in accordance with the acquired gender, the daughter by birth would be treated as a son for succession purposes.

[GRA 2004, s 17](#) provides protection for trustees and personal representatives who distribute property without regard to whether a full GRC has been issued or revoked. Finally, [GRA 2004, s 18](#) enables the court to alter the disposition of the estate as it sees fit, where the disposition of any property under the will (or other instrument) is different from what it would have been as a result of a person's gender has become their acquired gender under [GRA 2004](#).

### **The Gender Identity (Protected Characteristic) Bill 2016–17 failed to pass through the Commons due to the general election. What would be the legal impact of making gender identity a protected characteristic under Equality Act 2010 (EqA 2010)? How would this impact inheritance?**

The aim of the Bill was to make 'gender identity' a protected characteristic under [EqA 2010](#), in place of one of the current protected characteristics of 'gender reassignment'. [EqA 2010](#) presently makes it clear that it is unlawful to discriminate by reason of that fact that a person is:

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

It seems to be understood that the 'other attributes of sex' can include someone identifying and expressing (perhaps through dress and other means of expression) as the opposite to their birth sex.

It is unclear, therefore, precisely how an amendment of the protected characteristic to 'gender identity' would alter the interpretation and effect of [EqA 2010](#). In its 'Report on transgender equality' published on 16 January 2016, the Women and Equalities Committee stated that the terms currently used in [EqA 2010](#) were outdated and misleading. It may also not deal adequately with someone identifying with neither gender.

In England and Wales an individual has, as a starting point, complete testamentary freedom. They can, in that sense, discriminate, ie by leaving their property to their sons rather than daughters, or disinherit a child because they disapprove of their lifestyle choices etc. The disappointed beneficiary (unless the testamentary document can be challenged on other grounds) may be able to bring a claim under the [Inheritance \(Provision for Family and Dependents\) Act 1975 \(I\(PFD\)A 1975\)](#). However, testamentary freedom is not limited, as such, by anti-discrimination legislation.

### **How do practitioners distinguish identity between the pre-transitional and the post-transitional individual? What are some of the obstacles inheritance practitioners face?**

First, there is the practical difficulty of discussing the subject fully with a client, ie finding out if they want to make gender-specific gifts, or to actively differentiate between male and female heirs, exploring their views on gender identity, acquisition of a different gender by a child, and the like.

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Otherwise, if appropriate and possible, in order to avoid distress and disputes in the future over a will which unnecessarily creates distinctions based on gender, a practitioner should ideally use gender-neutral expressions as far as possible, ie 'my child', instead of 'my son/daughter'.

A gift referring to 'my son X' may not actually fail even if it does use that terminology—if it is clear who the testator was referring and that individual can still be identified as the same person. The question is perhaps whether the testator intended the reference to a son, rather than daughter, as a precondition to inheritance, rather than an aid to identification. This is perhaps more likely to be the case where, as in my example, the beneficiaries are treated unequally by reference to their gender. The remedies of interpretation and construction by the court of wills that are ambiguous, or rectification where a will does not in fact reflect the intentions of the testator, may assist in these circumstances.

The other difficulty is where a name and gender have changed since the will was made. Again, the use of 'children' and 'issue' is gender neutral, but difficult to apply where specific or unequal provision is contemplated.

An issue may also arise for executors or administrators dealing with UK situs assets which pass under the law of the deceased's domicile, where the deceased's estate passes by reference to Sharia law principles (which, in certain circumstances, do provide that male heirs receive greater shares of an estate than female heirs). Ditto, practitioners making an Anglo-Welsh will in relation to such assets, trying to replicate a Sharia law division—how would the testator want such a will to be interpreted?

### **Can conditions on inheritance affect transgender individuals?**

The position is unclear. As part of the notion of testamentary freedom, a testator can certainly include whatever conditions they want to any gifts contained in their will.

However, under Anglo-Welsh law a condition can be void, fail to take effect or the beneficiary might reasonably be excused from performing a condition, while still taking the benefit of the gift.

A condition may be void by being against public policy, illegal, repugnant to the interest given to a beneficiary, impossible to perform or uncertain. What is against public policy falls to be interpreted by a judge in any given case. The application of this rule is best demonstrated by examples—conditions inciting a beneficiary to commit a crime, separate from their spouse, restrain them (unreasonably) from marriage, requiring a change of religion have been found to be contrary to public policy.

A gift conditional on either a person altering their gender identity from their birth sex to the opposite sex, or reversing such an alteration, would likely be found to be against public policy and void, in light of the protections afforded by law to reduce and prevent the discrimination against individuals on the grounds of their gender. A testator who writes one of their children out of their will, by reason of their acquiring a different gender, for example, has not done anything unlawful. As noted, however, that child may have recourse under [I\(PFD\)A 1975](#), or the actual beneficiaries of the will could choose to remedy matters themselves by, for example, making a deed of variation altering the disposition of property under the will.

*Interviewed by Samantha Gilbert.*

*The views expressed by our Legal Analysis interviewees are not necessarily those of the proprietor.*

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