Judges' Bench Guide
on the LGBTQ Community and the Law

Prepared by

QLaw Foundation of Washington

&

QLaw Association:
The LGBT Bar Association of Washington

For the

WASHINGTON STATE SUPREME COURT'S
GENDER & JUSTICE COMMISSION

Judges' Bench Guide
on the LGBTQ Community and the Law

Third Edition
Edited by Isaac Ruiz

Prepared by the QLaw Foundation of Washington &
QLaw Association: The LGBT Bar Association of Washington
for the Washington Supreme Court's Gender & Justice Commission

2017

CONTENTS

ACKNOWLEDGEMENTS

Thanks to the many people, past and present, who have contributed their time and effort in bringing the Bench Guide to publication:

QLaw Foundation
QLaw Association
Cynthia Buhr
Meredith Conley
Eleanor Doermann
Adam Eisenberg
Anne M. Enquist
E. Ross Farr
Cynthia Jones
Brian Leech
Kathleen Nacozy
Jeffrey L. Nesiba
Athan Papailiou
Niloufar A. Park
Terry Price
Aaron Pritchard
Brittany Quinn
Isaac Ruiz
Julie Shapiro
Julie Shefchik
Dan Shih
Tammy Sittnick
David M. Skover
Quita St. John
Tracy A. Thompson
Gabriel E. Verdugo
Hon. Mary I. Yu

ABOUT QLAW FOUNDATION OF WASHINGTON

The QLaw Foundation of Washington bridges the divide between the LGBTQ community and legal professionals. Together with its volunteers, the QLaw Foundation seeks to educate the public and the courts about LGBTQ legal issues and empower community members through informed access to the legal and judicial systems.

The QLaw Foundation offers, in conjunction with the King County Bar Association, the Tacoma-Pierce County Bar Association, and Rainbow Center a free legal clinic that provides free legal advice on LGBTQ issues. The foundation administers a summer fellowship program that partners with non-profit organizations to fund a summer internship position for law and graduate students working on projects that benefit the LGBTQ community and/or people living with HIV/AIDS. The QLaw Foundation also develops educational materials and presentations for the broader legal and non-legal community and works to address the needs of LGBTQ youth.

The QLaw Foundation's website is www.qlawfoundation.org.

ABOUT QLAW ASSOCIATION

QLaw Association serves as a voice for LGBTQ lawyers and other legal professionals in the state of Washington on issues relating to diversity and equality in the legal profession, in the courts, and under the law. The organization has five purposes: (1) to provide opportunities for members of the LGBTQ legal community to meet in a supportive, professional atmosphere to exchange ideas and information; (2) to further the professional development of LGBTQ legal professionals and law students; (3) to educate the public, the legal profession, and the courts about legal issues of particular concern to the LGBTQ community; (4) to empower members of the LGBTQ community by improving access to the legal and judicial system and sponsoring education programs; and (5) to promote and encourage the advancement of LGBTQ attorneys in the legal profession.

The QLaw Association's website is http://www.q-law.org.

PREFACE

This Bench Guide is designed to serve as an introduction for jurists and legal practitioners to some of the issues affecting LGBTQ people the most.

Washington is no different from the rest of the nation in continuing to see transformational changes in the law affecting the LGBTQ community. In 2006, the Washington State Legislature amended the Washington Law Against Discrimination (WLAD) to prohibit discrimination based on sexual orientation, gender expression, and gender identity.

In 2007, the Legislature created a domestic partnership registry, the effect of which was to provide same-sex couples in Washington with some but not all rights and responsibilities of marriage. In 2008 and 2009, the Legislature expanded rights and responsibilities to equal those of married heterosexual couples as far as state law was concerned. And in 2012 the Legislature passed the landmark law guaranteeing same-sex couples the right to marry in Washington. In a referendum the same year, Washington made history by approving marriage rights for same-sex couples by popular vote.

In 2015, the U.S. Supreme Court held in *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015), that other states' prohibitions on same-sex marriage were unconstitutional. *Obergefell* means that marriage equality the Law of the Land. Same-sex couples have the right to marry in, and have their marriages recognized by, every state and territory of the United States.

In 2017, in *State v. Arlene's Flowers, Inc.*, 187 Wn.2d 804, 389 P.3d 543 (2017), the Supreme Court of Washington upheld the application of the WLAD's public-accommodations protections against a flower shop owner's argument that selling wedding flowers to a same-sex couple violated her First Amendment rights to free speech and the free exercise of her religion.

LGBTQ judges now openly serve at every level of the state judiciary, including Supreme Court Justice Mary Yu. Diversity on the bench is a key component to inclusion. *See* Eric Lesh, *Out of Balance: How the Election of Judges and the Stunning Lack of Diversity on State Courts Threaten LGBT Rights*, Lambda Legal (2016).

All of this occurred against the backdrop of great societal change. In recent years, for example, the "It Gets Better Project," founded by Washingtonians Dan Savage and Terry Miller, became a cultural sensation. The website features personal videos that tell LGBTQ youth around the world that "it gets better." The videos "create and inspire changes needed to make it better for" youth. *See* It Gets Better Project, *What is the It Gets Better Project*

(accessed Sept. 6, 2016). In 2016, the National Basketball Association pulled its All Star game from Charlotte, North Carolina, because of a state law that discriminated against LGBTQ people.

The law continues to develop, and many questions that remain to be answered. For example, the administration of President Donald Trump recently rescinded guidance from the Department of Education and the Department of Justice that protected the rights of transgender students to use gender-segregated facilities consistent with their gender identities. And, as this Bench Guide goes to press, the U.S. Supreme Court is considering a case in which the owner of a cake shop argues (as the flower shop owner argued in *Arlene's Flowers*) that Colorado's nondiscrimination law violates First Amendment speech and religion protections. *Masterpiece Cakeshop LTD v. Colorado Civil Rights Comm'n*, No. 16-111 (U.S.).

CHAPTER 1. INTRODUCTION

§ 1. LGBTQ People in Washington Courts

LGBTQ people live everywhere in Washington. *See* Gary J. Gates and Abigail M. Cooke, *Washington Census Snapshot: 2010*, The Williams Institute (accessed Sept. 6, 2016). According to census analysis, 16 percent of same-sex couples in Washington are raising children. *Id.* In some counties, the percentage is significantly higher. Among counties with more than 50 same-sex couples, the highest was Cowlitz County with 42 percent of same-sex couples raising children, followed by Yakima County with 37 percent.

As more people are able to live their lives openly, Washington courts are seeing more cases involving issues touching on LGBTQ identity and relationships. Judges should be familiar with the current state of the law, and all personnel involved in the court system should strive to maintain a judicial forum that is welcoming and free of explicit or implicit bias.

Reaching the "right" decision is important, but it is not always sufficient to offset the perception of bias, especially when many decisions involve exercise of judicial discretion or weighing of evidence. Everyone entering the courtroom has the right to be treated with respect and dignity.

§ 2. Inclusive Language and Tone

What does "LGBTQ" mean?

The term "LGBTQ" refers to lesbian, gay, bisexual, transgender, and queer or questioning people. LGBTQ is a widely used and reasonably inclusive term, including those of non-heterosexual sexual orientations and transgender people.

Other shorthand terms used with some frequency include the letters "I" for "intersex," "A" for "asexual" or "ally," and possibly others.

The words used in court—whether by a judge or anyone else—matter, as does a respectful and inclusive tone. The use of pejorative terms, incorrect gender-signifying pronouns, or the use of a transgender person's former name can indicate disrespect, ignorance, or bias. It is not enough for a judicial officer to use inclusive language. The judge and all court personnel must ensure that all participants in the legal process show respect to one another.

The connotations of some terms have changed over time—and they continue to evolve—such that their usage can suggest insensitivity or bias. To stay up to date, we recommend judges consult the *Stylebook Supplement on Lesbian, Gay, Bisexual, & Transgender Terminology*, published by the National Lesbian and Gay Journalists Association.

§ 3. Reclamation

Within the LGBTQ community there has been a reclamation of some words historically used pejoratively against LGBTQ persons. For example, some in the community use "queer" and "dyke" as positive, respectful terms. Although LGBTQ people may use these terms as "insiders" of the community, others continue to use these words in a derogatory manner. Judicial officers should exercise extreme caution with respect to such words.

§ 4. The Word "Transgender" and Pronouns

"Transgender" is a broad term that includes people who may not identify with their birth sex, those who do not conform to traditional gender expression, as well as all sexual orientations. The term "trans*"—note the asterisk—can be used more broadly, rather than the term "transgender," for those who may prefer another term such as gender non-binary, gender queer, or queer. The reader should keep in mind that the issues facing transgender people are in

many instances distinct from issues of sexual orientation. Remember that gender identity and gender expression are *not* the same thing as sexual orientation.

Terminology is evolving. Again, the reader is encouraged to consult the *Stylebook Supplement on Lesbian, Gay, Bisexual, & Transgender Terminology*, published by the National Lesbian and Gay Journalists Association. Other terms related to or associated with transgender issues include drag, FTM (female to male), gender identity, gender non-binary, intersex, MTF (male to female), SRS (sexual reassignment surgery), transgender, transition, transsexual.

The following terms or associated terms should always be avoided: hermaphrodite, she-male, he-she, transvestite, tranny.

If unsure of which pronoun to use to refer to a person, ask the person, use the gender-neutral "they/them," or simply use their last name. When referring to past events of a transgender person, maintain the preferred pronouns presently in use for the historical narrative. For example, "Defendant lived with her wife until separation."

SRS, formerly known as "sex change," is a term used for the series of surgeries which physically alters a transgender person's body, including genitalia. Not all transgender people undergo part or all of SRS. There is no strict definition when the process of changing one's sex is complete. The process is often referred to as transition, of which SRS may be just a part.

§ 5. Technical or Antiquated Terms

Technical and antiquated terms, like "homosexual," should be avoided to the extent possible. The use of "gay" or "same-sex" as adjectives ought to be avoided unless directly material. For example, now that marriage is an equal right, judicial officers can and should generally refer to "marriage," not "same-sex marriage." The description of anyone as an "avowed homosexual," "practicing homosexual," "hermaphrodite," "transvestite," or any similar terms is inappropriate.

§ 6. Prohibition Against Discrimination Generally

Washington's rules governing professional conduct prohibit discrimination based on sexual orientation. In addition, some court rules forbid bias and prejudice based on sexual orientation, while others are generally understood to preclude such bias. Although the Washington Law Against Discrimination's (WLAD'S) definition of "sexual orientation" does not necessarily apply to such rules, that definition is informative, including in its embrace of protection of "gender expression or identity." The WLAD provides:

> "Sexual orientation" means heterosexuality, homosexuality, bisexuality, and gender expression or identity. As used in this definition, "gender expression or identity" means having or being perceived as having a gender identity, self-image, appearance, behavior, or expression, whether or not that gender identity, self-image, appearance, behavior, or expression is different from that traditionally associated with the sex assigned to that person at birth.

RCW 49.60.040(26).

§ 7. Code of Judicial Conduct

Judges have an obligation to foster a judicial environment free of bias, prejudice, and harassment. Canon 2 of the Code of Judicial Conduct provides: "A judge should perform the duties of judicial office impartially, competently, and diligently." Code of Judicial Conduct Canon 2. Rule 2.3 of the Code adds:

> (A) A judge shall perform the duties of judicial office, including administrative duties, without bias or prejudice.
>
> (B) A judge shall not, in the performance of judicial duties, by words or conduct manifest bias or prejudice, or engage in harassment, and shall not permit court staff, court officials, or others subject to the judge's direction and control to do so.
>
> (C) A judge shall require lawyers in proceedings before the court to refrain from manifesting bias or prejudice, or engaging in harassment, against parties, witnesses, lawyers, or others.

> (D) The restrictions of paragraphs (B) and (C) do not preclude judges or lawyers from making reference to factors that are relevant to an issue in a proceeding.

Code of Judicial Conduct Rule 2.3. According to the comment to Rule 2.3,

> Examples of manifestations of bias or prejudice include but are not limited to epithets; slurs; demeaning nicknames; negative stereotyping; attempted humor based upon stereotypes; threatening, intimidating, or hostile acts; suggestions of connections between race, ethnicity, or nationality and crime; and irrelevant references to personal characteristics. Even facial expressions and body language can convey to parties and lawyers in the proceeding, jurors, the media, and others an appearance of bias or prejudice. A judge must avoid conduct that may reasonably be perceived as prejudiced or biased.

Id. comment [2].

There does not appear to be any question that this rule applies to bias based on sexual orientation. The comment further provides: "Harassment … is verbal or physical conduct that denigrates or shows hostility or aversion toward a person on bases such as race, sex, gender, religion, national origin, ethnicity, disability, age, *sexual orientation*, marital status, socioeconomic status, or political affiliation." *Id.* (emphasis added).

§ 8. Rules of Professional Conduct

The Washington Rules of Professional Conduct (RPCs) provide that it is "misconduct" to discriminate based on sexual orientation:

> It is professional misconduct for a lawyer to:
>
> …
>
> (g) commit a discriminatory act prohibited by state law on the basis of sex, race, age, creed, religion, color, national origin, disability, *sexual orientation*, or marital status, where the act of discrimination is committed in connection with the lawyer's professional activities. In addition, *it is professional misconduct to commit a discriminatory act on the basis of sexual orientation if such an act would violate this Rule when committed on the basis of sex, race, age, creed, religion, color, national origin, disability, or marital status*.

RPC 8.4 (emphases added).

§ 9. Federal Court Rules

The local rules of the U.S. District Court for the Western District of Washington forbid comment or behavior that reasonably could be interpreted as manifesting prejudice or bias based on sexual orientation:

> (d) Prohibition of Bias
>
> Litigation, inside and outside the courtroom in the United States District Court for the Western District of Washington, must be free from prejudice and bias in any form. Fair and equal treatment must be accorded all courtroom participants, whether judges, attorneys, witnesses, litigants, jurors, or court personnel. The duty to be respectful of others includes the responsibility to avoid comment or behavior that can reasonably be interpreted as manifesting prejudice or bias toward another on the basis of categories such as gender, race, ethnicity, religion, disability, age, or sexual orientation.

Western District of Washington, Local Civil Rule 1.

The U.S. District Court for the Eastern District of Washington has a "Court Policy Against Discrimination" that forbids "inappropriate bias" and indicates that persons can expect to be treated with "equal respect and dignity":

> COURT POLICY AGAINST DISCRIMINATION
>
> Judges, attorneys and judicial employees shall fulfill their roles under the highest standards of professionalism. Unjustified treatment will be avoided in both language and action. All are aware of the need to act without regard to gender, race, religious or other inappropriate bias. To this end, persons appearing in court who believe they have been treated without equal respect and dignity may bring the matter to the attention of a magistrate judge and/or the chief judge. Matters brought to the attention of a magistrate judge will be discussed with the chief judge.

Eastern District of Washington, Local Rule 83.4.

CHAPTER 4. LGBTQ YOUTH

§ 10. Introduction

With increasing acceptance and understanding of LGBTQ people, people are "coming out" at younger ages. LGBTQ youth may face a multitude of problems, including homelessness, a hostile environment for those who have a home, bullying, unequal opportunities in educational programs, and even attempts to submit LGBTQ youth to "conversion therapy" to "cure" them.

§ 11. Education—Discrimination Against LGBTQ Youth in Schools

The K-12 Anti-Discrimination Law prohibits discrimination in public schools on multiple bases, including being LGBTQ. The statute provides:

> Discrimination in Washington public schools on the basis of race, creed, religion, color, national origin, honorably discharged veteran or military status, sexual orientation including gender expression or identity, the presence of any sensory, mental, or physical disability, or the use of a trained dog guide or service animal by a person with a disability is prohibited. The definitions given these terms in chapter 49.60 RCW [the Washington Law Against Discrimination (WLAD)] apply throughout this chapter unless the context clearly requires otherwise.

RCW 28A.642.010. See also Sarah Albertson, *The Achievement Gap and Disparate Impact Discrimination in Washington Schools*, 36 Seattle U.L. Rev. 1919, 1928 (2013).

The Superintendent of Public Instruction is required to develop rules and guidelines to eliminate discrimination relating to public school employment; counseling and guidance services to students, recreational and athletic activities for students; access to course offerings; and in textbooks and instructional materials used by students. RCW 28A.642.020.

A person aggrieved by a violation of RCW 28A.642.010 has a private right of action in state superior court for civil damages and such equitable relief as the court determines. RCW 28A.642.040.

§ 12. Education—Adoption of Anti-Bullying Policies

School districts are required to adopt and amend, as necessary, anti-bullying policies. Section 28A.300.285 of the Revised Code of Washington provides:

> By August 1, 2011, each school district shall adopt or amend if necessary a policy and procedure that at a minimum incorporates the revised model policy and procedure provided under subsection (4) of this section that prohibits the harassment, intimidation, or bullying of any student. It is the responsibility of each school district to share this policy with parents or guardians, students, volunteers, and school employees in accordance with rules adopted by the superintendent of public instruction. Each school district shall designate one person in the district as the primary contact regarding the antiharassment, intimidation, or bullying policy. The primary contact shall receive copies of all formal and informal complaints, have responsibility for assuring the implementation of the policy and procedure, and serve as the primary contact on the policy and procedures between the school district, the office of the education ombuds, and the office of the superintendent of public instruction.

RCW 28A.300.285(1). "Harassment, intimidation, or bullying" is broadly defined as

> any intentional electronic, written, verbal, or physical act, including but not limited to one shown to be motivated by any characteristic in RCW 9A.36.080(3), or other distinguishing characteristics, when the intentional electronic, written, verbal, or physical act:
>
> > (a) Physically harms a student or damages the student's property; or
> >
> > (b) Has the effect of substantially interfering with a student's education; or
> >
> > (c) Is so severe, persistent, or pervasive that it creates an intimidating or threatening educational environment; or
> >
> > (d) Has the effect of substantially disrupting the orderly operation of the school.
>
> Nothing in this section requires the affected student to actually possess a characteristic that is a basis for the harassment, intimidation, or bullying.

RCW 28A.300.285(2).

The reference to RCW 9A.36.080(3) refers to the criminal malicious harassment statute, which prohibits harassment on several bases, including

gender and sexual orientation. The term "sexual orientation" here carries the same meaning as in the Washington Law Against Discrimination (WLAD), which itself incorporates gender identity and gender expression. *See* RCW 9A.36.080(6)(a) (incorporating definition from RCW 49.60.040); RCW 49.60.040(26) (WLAD's definition of "sexual orientation").

§ 13. Education—Public Accommodations Protections

Chapter 7 of this Bench Guide addresses discrimination in public accommodations. Under Washington Human Rights Commission regulations, schools are places of public accommodation for purposes of the WLAD's anti-discrimination provisions. WAC 162-28-030(1) ("All public and private schools and other educational facilities in the state of Washington, except those operated or maintained by a bona fide religious or sectarian institution, are 'places of public resort, accommodation, assemblage or amusement' for purposes of the Washington state law against discrimination, chapter 49.60 RCW.").

§ 14. Education—Transgender Youth

The Office of the Superintendent of Public Instruction has issued guidance regarding discrimination in public schools. *See* State Superintendent of Public Instruction, *Prohibiting Discrimination in Public Schools* (Feb. 2012). In a lengthy discussion of gender identity and gender expression, this guidance provides:

- Transgender and gender-nonconforming students have the right to express their gender identity at school.
- Although schools maintain permanent student records including the student's legal name and legal gender, "To the extent that the school district is not legally required to use a student's legal name and gender on school records or documents, the district should use the name and gender by which the student identifies."
- School staff should not disclose information that may reveal a student's transgender status to others, including parents and other staff, unless legally required to disclose the information or the student authorized the disclosure.
- Schools should not require proof of medical treatment as a requisite for respecting a student's gender identity or expression.
- School districts should allow transgender students to use the restroom of their choice. Any student—whether transgender or not—who has a need or desire for increased privacy should be provided

access to an alternative restroom such as a staff restroom or a health office restroom.

- School districts should allow students the opportunity to participate in physical education and athletic activities consistent with their gender identity.

- "The use of locker rooms by transgender students should be assessed on a case-by-case basis, with the goals of maximizing the student's social integration and equal opportunity to participate in physical education classes and sports, ensuring the student's safety and comfort, and minimizing the stigmatization of the student. In most cases, transgender students should have access to the locker room that corresponds to their gender identity consistently asserted at school."

Id. at 29–30.

§ 15. Education—Title IX

Title IX of the Education Amendments of 1972 promises equal opportunities in education regardless of sex in schools that receive federal funds. 20 U.S.C. § 1681. Title IX does not explicitly identify sexual orientation as a protected status. Recent case law suggests that this area of the law is developing and that LGBTQ students may be entitled to bring an action to redress unlawful discrimination under Title IX. *Videckis v. Pepperdine University*, 150 F. Supp. 3d 1151, 1160 (C.D. Cal. 2015) (holding that sexual orientation discrimination is a form of sex or gender discrimination under Title IX). Moreover, the Equal Employment Opportunity Commission (EEOC) has determined that sexual orientation discrimination qualifies as sex discrimination for purposes of the analogous Title VII. *Baldwin v. Foxx*, EEOC DOC 0120133080, 2015 WL 4397641, at *1 (E.E.O.C. July 16, 2015).

With respect to transgender students, on May 13, 2016, the U.S. Department of Education and the U.S. Department of Justice issued a "Dear Colleague Letter on Transgender Students." The guidance, which applies to schools that receive federal funds, indicates that schools must not treat transgender students different from the way they treat other students of the same identity. Among other things, schools should allow a student to use the same restroom as other students of the same gender identity. U.S. Department of Education and U.S. Department of Justice, *Dear Colleague Letter on Transgender Students* (May 2016). The U.S. Court of Appeals for the Fourth Circuit affirmed this principle. *G.G. v. Gloucester County School Board*, 822 F.3d 709 (4th Cir. 2016), *vacated and remanded*, 137 S. Ct. 1239 (2017).

The Trump Administration withdrew and rescinded the Department of Education and Department of Justice's guidance with respect to transgender students in February 2017, stating that the departments would "further and more completely consider the legal issues involved." *See* U.S. Department of Education & U.S. Department of Justice, *Dear Colleague Letter* (Feb. 2017). In the meantime, the departments "will not rely on the views expressed" in the prior guidance. The Supreme Court, which had granted certiorari in *G.G. v. Gloucester County School Board*, vacated and remanded the case upon the Trump Administration's change in position. *Gloucester County School Board v. G.G.*, 137 S. Ct. 1239 (Mar. 6, 2017).

§ 16. Foster Care

LGBTQ youth in foster care face challenges. They often experience rejection and violence within their families when their sexual orientation or gender identity becomes known.

The American Bar Association Center on Children and the Law has established a project called, "Opening Doors/LGBTQ Youth in Foster Care." The purpose of this project is to provide "legal and child welfare community tools, resources and support for improving outcomes for LGBTQ young people in foster care." American Bar Association Center on Children and the Law, *Opening Doors/LGBTQ Youth in Foster Care* (accessed Sept. 6, 2016). The Opening Door program published a "Judicial Bench Card" for supporting LGBTQ youth. *See* American Bar Association Center on Children and the Law, *Supporting LGBTQ Youth: A Judicial Bench Card* (accessed Sept. 6, 2016).

Showing LGBTQ Youth that the Courtroom is Safe

The following is a partial summary of the American Bar Association's Judicial Bench Card. Judges can:

- be aware that some youth coming before the court identify as LGBTQ in dependency in delinquency cases;
- speak with the youth respectfully and reflect an understanding of what the youth has had to endure;
- allow the youth to address the court;
- request that the social worker ask the youth about sexual orientation or other LGBTQ status;
- be sensitive regarding when and how to share the youth's sexual orientation or gender identity with others;

- maintain a list of placements in the community that are LGBTQ friendly;
- maintain a list of counseling services that are LGBTQ friendly; and
- ask the social worker and/or attorneys about foster parents' views on LGBTQ youth in their home.

§ 17. Conversion or Reparative Therapy

A group of 13 organizations—including the American Academy of Pediatrics and the American Psychological Association—describes conversion therapy as follows:

> Sexual orientation conversion therapy refers to counseling and psychotherapy to attempt to eliminate individuals' sexual desires for members of their own sex. … Typically, sexual orientation conversion therapy is promoted by providers who have close ties to religious institutions and organizations. Some religion-based organizations such as Focus on the Family have invested significant resources in the promotion of sexual orientation conversion therapy and ex-gay ministries to educators and young people in conferences, in advertising, and in the media.

American Academy of Pediatrics et al., *Just the Facts About Sexual Orientation and Youth* at 2 (2008).

Conversion therapy is also known as "reparative therapy." *Id.* at 5. "The most important fact about these 'therapies' is that they are based on a view of homosexuality that has been rejected by all the major mental health professions.

The Diagnostic and Statistical Manual of Mental Disorders, published by the American Psychiatric Association, which defines the standards of the field, does not include homosexuality. All other major health professional organizations have supported the American Psychiatric Association in its declassification of homosexuality as a mental disorder in 1973." *Id.* Conversion therapy is often employed in conjunction with "ex-gay ministry" or "transformational ministry," which are "terms used to describe efforts by some religious individuals and organizations to change sexual orientation through religious ministries." *Id.* at 10. Because these ministries usually hold that homosexuality is sinful, promotion "of such ministries or of therapies associated with such ministries would likely exacerbate the risk of marginalization, harassment, harm, and fear experienced by lesbian, gay, and bisexual students." *Id.*

Conversion therapy is illegal for minors in five states and the District of Columbia. *See* Movement Advancement Project, *Conversion Therapy Laws* (accessed Sept. 6, 2016). The City of Miami banned conversion therapy for minors in June 2016. In August 2016, the Seattle City Council passed a similar ban. *See* An Ordinance Related to Human Rights; and Adding a New Chapter 14.21 to the Seattle Municipal Code to Prohibit the Practice of Conversion Therapy on Minors (signed into law Aug. 3, 2016). Among other things, the Seattle ban states: "It is a violation for any provider to provide conversion therapy or reparative therapy to a minor, regardless of whether the provider receives compensation in exchange for such services." *Id.* § 14.21.040.

§ 18. Marriage—Washington State Law

In 2012, the Washington State Legislature passed SB 6239, which made marriage equal in Washington. The Governor signed the bill, which was challenged by Referendum 74. The voters approved the referendum in November 2012, and the law went into effect in December 2012. Washington was the seventh state to attain marriage equality but the first to pass it through the Legislature and a vote of the people.

Chapter 26.04 of the Revised Code of Washington governs marriage. The law provides:

- Marriage is between two persons. The bill removed the requirement that marriage be between a man and a woman. RCW 26.04.010(1) specifies only that marriage be between two persons who have attained 18 years of age and who are otherwise capable of entering into the state of marriage.

- Terms are now gender-neutral. RCW 26.04.010(3) states that in order to implement this change, any statute, rule or law that specifies "husband" or "wife" shall be construed to mean "spouse" and include same-sex spouses.

- Before marriage equality, Washington citizens sometimes traveled to other jurisdictions (like Canada) for legal unions or marriages. Chapter 26.04 addresses that situation, providing that a marriage is permitted to people in a pre-existing legal union that is substantially like marriage. RCW 26.04.020(4).

- A religious officiant is not required to perform a same-sex wedding. RCW 26.04.010(4) provides wide leeway for religious officiants (defined very broadly) who do not want to "solemnize or celebrate" a same-sex wedding to opt out of such weddings. This includes immunity from civil claims and state and local agency penalties for refusal.

A religious institute is not required to provide services or other accommodations for same-sex weddings. Under RCW 26.04.010(5), a religious organization may decline use of its "accommodations, facilities, advantages, privileges, services or goods" to celebrate or solemnize a same-sex wedding. Section 26.04.010(6) of the Revised Code of Washington immunizes a religious

organization from a civil claim or a claim under the WLAD for refusal to celebrate or solemnize a same-sex wedding. *See* RCW 26.04.020(6).

Unlike the immunity granted to religious officiants and religious organizations with respect to performing marriage ceremonies, the marriage equality statute grants no immunity to private individuals who refuse to provide goods or services for use in a same-sex wedding, regardless of whether the refusal is on religious grounds. Such a refusal violates the WLAD, which prohibits discrimination in public accommodations based on sexual orientation, gender identity, or gender expression. The WLAD's provisions regarding nondiscrimination in places of public accommodation are discussed in Chapter 7 of this Bench Guide.

Recent Dates on the Road to Marriage Equality

2007. Washington first recognizes registered domestic partnerships.

2009. The domestic partnership statute is amended to include "everything but marriage" for state law purposes.

2012. Washington becomes the seventh state to approve marriage equality, but these marriages are not yet recognized at the federal level.

2013. In *United States v. Windsor*, 133 S. Ct. 2675 (2013), the Supreme Court strikes the federal law limiting the definition of marriage to one man and one woman, making federal retirement, medical, and disability benefits—among other federal benefits—available to same-sex spouses in Washington.

2015. In *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015), the Supreme Court holds (1) that the Fourteenth Amendment to the U.S. Constitution guarantees couples of the same sex the fundamental right to marry and (2) that states must recognize lawful same-sex marriages performed in other states.

§ 19. Marriage—Federal Law

In *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015), the Supreme Court held (1) that the Fourteenth Amendment to the U.S. Constitution guarantees couples of the same sex the fundamental right to marry and (2) that states must recognize lawful same-sex marriages performed in other states. At the time *Obergefell* was decided, Washington had already enacted marriage equality and recognized same-sex marriages (or relationships substantially like marriage) performed in other states. Thanks to *Obergefell*, however, Washington married couples may now travel or move without fearing that their marriages will be deemed invalid under a particular state's laws.

The case law from the Supreme Court in some ways reflects the changing attitudes of the nation with respect to LGBTQ rights. In 1986, Chief Justice Burger wrote in a concurring opinion in *Bowers v. Hardwick,* 478 U.S. 186 (1986), where the issue was whether a statute criminalizing sodomy was unconstitutional under the Fifth and Fourteenth Amendments:

> Blackstone described "the infamous *crime against nature*" as an offense of "deeper malignity" than rape, a heinous act "the very mention of which is a disgrace to human nature," and "a crime not fit to be named." 4 W. Blackstone, Commentaries *215. The common law of England, including its prohibition of sodomy, became the received law of Georgia and the other Colonies. … To hold that the act of homosexual sodomy is somehow protected as a fundamental right would be to case aside millennia of moral teaching.

Id. at 197 (Burger, C.J., concurring). Thirty years later, in *Obergefell*, Justice Kennedy wrote for the majority in a much different tone:

> No union is more profound than marriage, for it embodies the highest ideals of love, fidelity, devotion, sacrifice, and family. In forming a marital union, two people become something greater than once they were. As some of the petitioners in these cases demonstrate, marriage embodies a love that may endure even past death. It would misunderstand these men and women to say they disrespect the idea of marriage. Their plea is that they do respect it, respect it so deeply that they seek to find its fulfillment for themselves. Their hope is not to be condemned to live in loneliness, excluded from one of civilization's oldest institutions. They ask for equal dignity in the eyes of the law. The Constitution grants them that right.

135 S. Ct. at 2608.

§ 20. Registered Domestic Partnerships—History

In 2006, in *Andersen v. King County*, 158 Wn.2d 1, 138 P.3d 963 (2006), the Washington State Supreme Court in a 5-4 decision reversed two superior court decisions recognizing the right of same-sex couples to marry. That decision was followed by a series of incremental steps on the road to equality.

The next year, in 2007, the Washington State Legislature established a domestic partnership regime in which couples could register with the Secretary of State to obtain certain limited legal protections. The legislation created a new chapter in the Revised Code of Washington, RCW 26.60, for the state registered domestic partnerships. This status was available to same-sex

couples of any age and to opposite-sex couples in which one of the members was at least 62 years old.

The Legislature added rights and obligations for state-registered domestic partnerships in 2008 and 2009. The 2009 bill was referred to as "Everything but Marriage" because it provided state-registered domestic partnerships with every state right, benefit, and obligation given to married couples, but without the status of "marriage." *See, e.g.,* RCW 4.24.900 (chapter construction includes state-registered domestic partnerships). The "Everything but Marriage" bill was subject to Referendum Measure 71 in November 2009 and was approved by the voters.

§ 21. Registered Domestic Partnerships—Transition to Marriage

In 2012, when the Legislature passed and voters approved marriage equality, the law changed the nature of state-registered domestic partnerships. All couples—same-sex or not—could create or continue in a state-registered domestic partnership so long as one member was 62 years or older. RCW 26.60.030.

As for everyone else in a state-registered domestic partnership, they were given until June 30, 2014, to either marry or dissolve the domestic partnership; by doing nothing, the State of Washington would merge the partnership into marriage by operation of law. "For purposes of determining the legal rights and responsibilities involving individuals who had previously had a state registered domestic partnership and have been issued a marriage license or are deemed married under the provisions of this section, the date of the original state registered domestic partnership is the legal date of the marriage." RCW 26.60.100(4). But, "Nothing in this subsection prohibits a different date from being included on the marriage license." *Id.*

§ 22. Committed Intimate Relationships—Availability of Protections

Separate from couples who have legal status through marriage or registration, other couples have some property rights through the common law doctrine of "committed intimate relationships." Originally referred to as "meretricious relationships"—which carried negative connotations—the Supreme Court of Washington adopted the term "committed intimate relationships" in *Olver v. Fowler*, 161 Wn.2d 655, 168 P.3d 348 (2007).

Washington case law established that provisions of RCW 26.09.080 (property division upon dissolution) and community property principles apply when distributing assets of committed intimate relationships. *Connell v. Francisco*, 127 Wn.2d 339, 898 P.2d 831 (1995). Division III of the Court of Appeals upheld the application of this doctrine to same-sex couples. *Gormley v. Robertson*, 120 Wn. App. 31, 83 P.3d 1042 (2004); *see also In re Domestic*

Partnership of Walsh v. Reynolds, 183 Wn. App. 830, 335 P.3d 984 (2014) (Division II case recognizing equity relationship of lesbian couple prior to domestic partner registration). Division II of the Court of Appeals did not uphold the application to same-sex couples in *Vasquez v. Hawthorne,* 99 Wn. App. 363, 994 P.2d 240 (2000), but that opinion was reversed and vacated on other grounds by the Supreme Court of Washington, *Vasquez v. Hawthorne*, 145 Wn.2d 103, 33 P.3d 735 (2001).

It is generally presumed that same-sex couples who meet the definition of committed intimate relationships have the same rights and benefits as opposite-sex couples who are otherwise in the same position.

§ 23. Committed Intimate Relationships—Factors for Determining Existence

Connell described the "meretricious" relationship as a "stable, marital-like relationship where both parties cohabit with knowledge that a lawful marriage between them does not exist." 127 Wn.2d at 346. Resolving an equitable claim based on the existence of a committed intimate relationship follows three steps:

- determining whether there is a committed intimate relationship;
- evaluating the interest each party has in the property acquired during the relationship; and
- effectuating a just and equitable division of that property.

Id. at 349. Whether relationships are characterized as "committed intimate relationships" depends on the facts of each case. The court should consider:

- whether there has been continuous cohabitation;
- the duration of the relationship;
- the purpose of the relationship;
- the intent of the parties; and
- whether there was a pooling of resources and services for mutual benefit.

Id. at 346; *see also In re Marriage of Pennington*, 142 Wn.2d 592, 14 P.3d 764 (2000).

§ 24. Committed Intimate Relationships--Limits

Connell and subsequent decisions have held that property that would be considered separate property in a marriage dissolution is beyond the scope of division in a committed intimate relationship proceeding until the Legislature makes a statutory change. *Connell*, 127 Wn.2d at 350. By analogy, maintenance and attorney fees are not available in a committed intimate relationship proceeding because they are a statutory component of dissolution of marriage and state-registered domestic partnerships.

§ 25. Parentage

Washington's Uniform Parentage Act (UPA) statute, Chapter 26.26 RCW, was substantially amended in 2011 to conform with gender-equality language in the previous years' domestic partnership bills. Washington's UPA therefore treats same-sex partners and opposite-sex partners equally in matters of parentage. Unlike Washington, other states may not have updated their versions of the UPA, even though marriage is now equal across the nation.

§ 26. Parentage—Establishment of Parent-Child Relationship

Per RCW 26.26.101, a parent-child relationship is established between a child and a man or woman by:

> (1) The woman's having given birth to the child, except as otherwise provided in RCW 26.26.210 through 26.26.260;
>
> (2) An adjudication of the person's parentage;
>
> (3) Adoption of the child by the person;
>
> (4) An affidavit and physician's certificate in a form prescribed by the department of health wherein the donor of eggs or surrogate gestation carrier sets forth her intent to be legally bound as the parent of a child or children born through assisted reproduction by filing the affidavit and physician's certificate with the registrar of vital statistics within ten days after the date of the child's birth pursuant to RCW 26.26.735;
>
> (5) An unrebutted presumption of the person's parentage of the child under RCW 26.26.116;
>
> (6) The man's having signed an acknowledgment of paternity under RCW 26.26.300 through 26.26.375, unless the acknowledgment has been rescinded or successfully challenged;

(7) The person's having consented to assisted reproduction by his or her spouse or domestic partner under RCW 26.26.700 through 26.26.730 that resulted in the birth of the child; or

(8) A valid surrogate parentage contract, under which the person asserting parentage is an intended parent of the child, as provided in RCW 26.26.210 through 26.26.260.

RCW 26.26.101.

§ 27. Parentage—Marital Presumption of Parentage

Per RCW 26.26.116, within a marriage or domestic partnership, a person may be presumed to be the parent if:

(1) In the context of a marriage or a domestic partnership, a person is presumed to be the parent of a child if:

(a) The person and the mother or father of the child are married to each other or in a domestic partnership with each other and the child is born during the marriage or domestic partnership;

(b) The person and the mother or father of the child were married to each other or in a domestic partnership with each other and the child is born within three hundred days after the marriage or domestic partnership is terminated by death, annulment, dissolution, legal separation, or declaration of invalidity;

(c) Before the birth of the child, the person and the mother or father of the child married each other or entered into a domestic partnership with each other in apparent compliance with law, even if the attempted marriage or domestic partnership is, or could be, declared invalid and the child is born during the invalid marriage or invalid domestic partnership or within three hundred days after its termination by death, annulment, dissolution, legal separation, or declaration of invalidity; or

(d) After the birth of the child, the person and the mother or father of the child have married each other or entered into a domestic partnership with each other in apparent compliance with law, whether or not the marriage or domestic partnership is, or could be declared invalid, and the person voluntarily asserted parentage of the child, and:

> (i) The assertion is in a record filed with the state registrar of vital statistics;
>
> (ii) The person agreed to be and is named as the child's parent on the child's birth certificate; or
>
> (iii) The person promised in a record to support the child as his or her own.

RCW 26.26.116(1). A challenge to this presumption must be brought through the adjudication procedures in RCW 26.26.500 to .630.

§ 28. Parentage—Holding Out Provision

The 2011 amendments restored the "holding out" provision, which had inadvertently been removed in the 2002-enacted version. The statute states, "A person is presumed to be the parent of a child if, for the first two years of the child's life, the person resided in the same household with the child and openly held out the child as his or her own." RCW 26.26.116(2). A challenge to this presumption must be brought through the adjudication procedures in RCW 26.26.500 to .630.

§ 29. Parentage—De Facto Parentage

In the case of *In re Parentage of L.B.*, 155 Wn.2d 679, 122 P.3d 161 (2005), a lesbian couple split up after 12 years and had a child who was six years old. One of the women, Mian Carvin, was neither the biological or adoptive parent. The question to the court was whether she had standing to seek parentage. The Court determined that it had equitable power to recognize a *de facto* parentage, where the non-adoptive, non-biological former partner could seek parentage rights and assume the corresponding obligations. The test for *de facto* parentage was as follows:

> (1) the natural or legal parent consented to and fostered the parent-like relationship, (2) the petitioner and the child lived together in the same household, (3) the petitioner assumed obligations of parenthood without expectation of financial compensation, and (4) the petitioner has been in a parental role for a length of time sufficient to have established with the child a bonded, dependent relationship, parental in nature.

Id. at 708. The first prong, that the legal parent consented to and fostered the relationship, demonstrates that the state is not interfering with parenting, but rather enforcing the relationship that the legal parent put in place. *Id.* at 712. "In addition, recognition of a *de facto* parent is 'limited to those adults who

have fully and completely undertaken a permanent, unequivocal, committed, and responsible parental role in the child's life.'" *Id.* at 708 (quotation omitted).

De Facto Parentage Cases

Washington appellate courts have permitted or restricted the de facto parentage in the following cases. Overall, the cases demonstrate substantial court support for non-traditional families forming legal relationships with children.

- *In re Parentage of J.A.B.*, 146 Wn. App. 417, 191 P.3d 71 (2008) (mother's ex-boyfriend was a de facto parent);
- *In re Custody of A.F.J.*, 179 Wn.2d 179, 314 P.3d 373 (2013) (mother's former lesbian partner, who was also child's foster parent when mother relapsed, was de facto parent);
- *In re Custody of B.M.H.*, 179 Wn.2d 224, 315 P.3d 470 (2013) (child's former stepfather could be de facto parent);
- *In re Custody of M.J.M.*, 173 Wn. App. 227, 394 P.3d 746 (2013) (acknowledged father could become de facto parent, even where there were two parents available);
- *In re Parentage of J.B.R. Child*, 184 Wn. App. 203, 336 P.3d 648 (2014) (de facto parentage could extend to stepfather even though child had two legal parents).
- *But see In re Parentage of M.F.*, 168 Wn.2d 528, 228 P.3d 1270 (2010) (de facto parentage did not extend to stepparent, who already had a legal remedy); *In re Custody of M.W.*, 185 Wn.2d 803, 374 P.3d 1169 (2016) (de facto parentage did not extend to grandparent who was seeking visitation of child in the non-parental custody of the maternal grandmother).

§ 30. Surrogacy

Compensated surrogacy (a contract for surrogacy services where compensation is provided) is not permitted in Washington. Any compensated surrogacy contract is void as against public policy. RCW 26.26.230, .240. It is also a gross misdemeanor to enter into such a contract. RCW 26.26.250. If a child is born of such a contract, and there is a custody dispute, the party having physical custody of the child may retain the custody until the court orders otherwise. RCW 26.26.260.

Washington's prohibitions against compensated surrogacy do not prevent parties from entering into a surrogacy arrangement where the woman

acting as surrogate provides her services without compensation (commonly a good friend or family member). Some limited expenses may be reimbursed if they are incident to the surrogacy, such as attorney fees for reviewing a surrogate parentage agreement on behalf of the surrogate, medical expenses, and some limited living expenses. RCW 26.26.260 would likely apply to any custody dispute that arises in that situation. That provision of the UPA reads:

> If a child is born to a surrogate mother pursuant to a surrogate parentage contract, and there is a dispute between the parties concerning custody of the child, the party having physical custody of the child may retain physical custody of the child until the superior court orders otherwise. The superior court shall award legal custody of the child based upon the factors listed in RCW 26.09.187(3) and 26.09.191.

RCW 26.26.260.

Because of Washington's prohibitions, many Washington residents go to other states, including Oregon or California, for surrogacy services. Those states permit a birth certificate with the intended parents' names to be filed either before birth (California) or at birth (Oregon). The parties can go to court in those states prior to the birth for an order addressing the intended parents' rights. The legal procedures that are necessary will depend on the state in which the surrogacy took place.

§ 31. Parenting Time

Parenting plans serve three functions: to designate parenting time between the parties, to determine decision-making authority, and to establish an alternative dispute resolution mechanism prior to additional court action. Criteria for establishing a permanent parenting plan are governed by RCW 26.09.187. The court shall use the "best interests of the child" standard in allocating all parenting responsibilities. RCW 26.09.002. Parenting plans are generally negotiated between the parties, and only in rare instances (less than 5 percent) does the court rule on the parties' parenting time or decision-making. The courts treat parenting plans between LGBTQ partners/spouses the same as those for other couples.

§ 32. Parenting Time—Case Law

The Washington Supreme Court has held that a parent's sexual preference in and of itself is not a bar to custody (which is the former term for parenting time) or reasonable rights of visitation. *In re Marriage of Cabalquinto*, 100 Wn.2d 325, 669 P.2d 886 (1983). The court noted the trial judge's strong antipathy to lesbian, gay, and bisexual persons. This case provides a telling example of how important it is for the judge to remain

neutral and to make decisions based on law and not personal feelings. *See id.* at 328. On remand, the trial judge authorized the child to visit the father in California, but only if the father did not associate with his gay companion at those times. The Court of Appeals struck down that provision on appeal. *In re Marriage of Cabalquinto*, 43 Wn. App. 518, 718 P.2d 7 (1986). The court of appeals wrote: "Parents come in all shapes and sizes. It is a wonder of the human race that, as a general proposition, children love their parents and are better off with them than without them. There are some restraints society places upon parents, of course, but they are few in number and sexual preference is not one of them." *Id.* at 519 (citations omitted).

In the case *In re Marriage of Black*, 188 Wn.2d 114, 392 P.3d 1041 (2017), the trial court considered the mother's sexual orientation (she came out as a lesbian) when designating the father as the primary residential parent and granting the father sole decision-making authority regarding the children's education and religious upbringing. The guardian ad litem assigned to the case also "made several problematic statements suggesting she was biased against" the mother, such as calling the mother's sexual orientation as a "lifestyle choice." *Id.* at 133. The Supreme Court observed that the guardian ad litem "is unlike a typical witness" in that she acts as "an arm of the court" and is "afforded quasi-judicial status." *Id.* at 134. The Supreme Court held that the trial court abused its discretion when it considered sexual orientation; adopted many of the guardian ad litem's biased recommendations; and favored the husband's religious beliefs.

Washington courts have also held that being transgender is not a basis for determining parenting time. *In re Marriage of Magnuson*, 141 Wn. App. 347, 170 P.3d 65 (2007).

§ 33. Parenting Time—Modification of Parenting Plan

RCW 26.09.260 governs modification of a parenting plan and requires (1) a showing of adequate cause prior to proceeding, and (2) that the existing plan stay in place unless there has been a substantial change of circumstances in the nonmoving party or child that was unknown to the court at the time of entry of the original parenting plan. Custodial changes are presumed to be highly disruptive to the child and thus disfavored. *See In re Marriage of Taddeo-Smith & Smith*, 127 Wn. App. 400, 110 P.3d 1192 (2005). Although there is no specific Washington case where a party moved for modification because the ex-spouse/partner subsequently "came out," presumably the *Cabalquinto* and *Magnuson* reasoning would control and require that the decision be made with determination of the needs of the child and not the parent's LGBTQ status.

§ 34. Parenting Time—LGBTQ Parent's Rights Against Interference

The case of *Troxel v. Granville*, 530 U.S. 57, 120 S. Ct. 2054 (2000), originated in Skagit Valley, Washington. The father committed suicide and the grandparents gradually lost visitation time with their grandchildren. The Supreme Court of the United States held that the statute, which gave *any person* the right to petition for visitation *at any time* was overly broad and unconstitutionally interfered with the mother's right to care, custody, and control of her children. *Id.* at 72. There also had been no allegation of parental unfitness, and the Court stated that "so long as a parent adequately cares for his or her children (*i.e.,* is fit), there will normally be no reason for the State to inject itself into the private realm of the family to further question the ability of that parent to make the best decisions concerning the rearing of that parent's children." *Id.* at 68–69.

The implication for LGBTQ families is clear: Unless there is a showing of unfitness, or unless a parent meets the high standard required to be considered a de facto parent, a third-party cannot interfere with a parent's fundamental right to parent the child.

§ 35. Adoption and Assisted Reproduction

Adoption is governed by RCW 26.33. LGBTQ families adopt children through a variety of approaches, including those available generally such as private, international and foster-to-adopt agency adoption. For second parent and step-parent adoption, consent by an existing legal parent may be required for the adoption to be completed by the non-biological parent spouse and partner. Consent to adoption may be revoked if received by the agency or person seeking the consent within the first forty-eight hours after birth. RCW 26.33.160.

In some cases, consent to the adoption technically may not be required. Many LGBTQ couples have children through assisted reproduction. "Assisted reproduction" is defined as "a method of causing pregnancy other than sexual intercourse," including donation of eggs, and a Donor is defined as "an individual who contributes a gamete or gametes for assisted reproduction." Pursuant to RCW 26.26.705, "a donor is not a parent of a child conceived by means of assisted reproduction, unless otherwise agreed in a signed record by the donor and the person or persons intending to be parents of a child conceived through assisted reproduction." It is common for intended parents and known donors to execute contracts memorializing their intent for their arrangement and specifically recognizing that the donor is not a parent.

LGBTQ status is not a barrier to second-parent adoption (sometimes called co-parent adoption). For many years, Washington courts have permitted adoptions for LGBTQ parents. Couples can and should do a second parent adoption for a non-biological, non-legal parent if they are not married. Specific married couples may feel safer with a second-parent adoption to secure their relationship with their children, including in certain cases involving an out-of-state surrogacy agreement or involving traditional surrogacy.

There is currently discussion whether second parent adoptions are necessary for non-biological parents in married couples now that marriage equality has spread throughout the country (and is spreading internationally) due to the presumption of parentage associated with children born to those couples during a marriage. There will likely still be jurisdictions where non-biological, non-legal parents in married couples will be more protected in their relationship with their children if they formally adopt. For the time being, most attorneys are still recommending that the most risk-averse course of action is for non-biological parents secure second-parent adoptions regardless of their already existing legal status.

§ 36. Domestic Violence

Domestic violence protection is governed by RCW 26.50.

Although experts estimate that the level of domestic violence in the LGBTQ community is the same as in the general population, it is much less discussed and recognized than with opposite-sex couples. Also, there may not be LGBTQ-specific resources for persons in domestic violence relationships. In 2012, the National Coalition for Anti-Violence Programs issued a report noting that "LGBTQ youth, people of color, gay men, and transgender women were more likely to suffer injuries, require medical attention, experience harassment, or face anti-LGBTQ bias as a result of IPV [intimate partner violence]." National Coalition of Anti-Violence Programs, *Lesbian, Gay, Bisexual, Transgender, Queer, and HIV-Affected Intimate Partner Violence, 2013 Release Edition* at 9 (accessed Sept. 2, 2016).

A domestic violence protection order can be obtained if the parties are in a "family or household member" relationship, defined as:

> spouses, domestic partners, former spouses, former domestic partners, persons who have a child in common regardless of whether they have been married or have lived together at any time, adult persons related by blood or marriage, adult persons who are presently residing together or who have resided together in the past, persons sixteen years of age or older who are presently

> residing together or who have resided together in the past and who have or have had a dating relationship, persons sixteen years of age or older with whom a person sixteen years of age or older has or has had a dating relationship, and persons who have a biological or legal parent-child relationship, including stepparents and stepchildren and grandparents and grandchildren.

RCW 26.50.010(6). The "family or household member" definition is broad and includes current and former partners, and current and former persons residing together. Even if there was a question about the nature of the relationship of two LGBTQ persons, this definition is a wide umbrella that includes many possibilities.

If the parties do not fit the definition of "family or household member" for a domestic violence protection order, they may nevertheless qualify for a different type of protective order, such as a sexual assault protection order, RCW 7.90, or a stalking protection order, RCW 7.92, a restraining order in the context of a family-law case, or an anti-harassment order.

§ 37. Introduction

Washington is an at-will employment state. At-will employees may be terminated for any reason or no reason, so long as it is not an illegal reason. *Thompson v. St. Regis Paper Co.*, 102 Wn.2d 219, 223, 685 P.2d 1081 (1984). LGBTQ claimants must demonstrate that adverse employment action has been taken against them that violated federal, state or local law, contravened public policy, or constituted breach of contract.

In 2006, Washington State's Law Against Discrimination (WLAD), RCW 49.60, was amended to prohibit discrimination based on sexual orientation in employment (as well as in public accommodation, housing, and credit). That said, federal employment discrimination laws do not expressly prohibit discrimination based on sexual orientation, gender identity, or expression. As a result, LGBTQ litigants who rely on federal statutes are forced to frame their claims as "sex discrimination."

§ 38. Employment Discrimination—WLAD

The WLAD applies to employers with eight or more employees, and prohibits employment discrimination based on sexual orientation. RCW 49.60.040(11), (12), (16), 49.60.180, 49.60.190, 49.60.200. This includes decisions to hire, terminate or advertise for job openings. RCW 49.60.180(1), (2), (3). Similar rules apply to labor unions and employment agencies. RCW 49.60.190; RCW 49.60.200.

The WLAD is administered and enforced by the Washington Human Rights Commission.

To prevail on a discrimination claim, a plaintiff must prove that (1) the plaintiff suffered an adverse employment action; and (2) the plaintiff's sexual orientation or gender identity or expression was a substantial factor in the employment decision. Washington Pattern Jury Instruction, Civil 330.01. A plaintiff must show that the employer's articulated reasons are unworthy of belief or are a mere pretext for a discriminatory purpose. *Grimwood v. University of Puget Sound, Inc.*, 110 Wn.2d 355, 364, 753 P.2d 517 (1988).

§ 39. Employment Discrimination—Implied Contract

Courts may see claims that discharge based on sexual orientation, gender identity, or gender expression constitutes breach of an implied contract. Increasingly, private-sector employers are modifying their non-discrimination

policies and employment handbooks to prohibit employment discrimination on the basis of sexual orientation. To prevail on a claim for wrongful discharge under this theory, an employee must show that: (1) the employer created an atmosphere of job security and fair treatment with promises of specific treatment in specific situations and (2) the employee justifiably relied on those promises. *E.g.*, *Thompson v. St. Regis Paper Co.*, 102 Wn.2d 219, 229, 685 P.2d 1081 (1984).

§ 40. Employment Discrimination—Sexual Orientation Discrimination as a Form of Sex Discrimination under Title VII

Title VII of the Civil Rights Law of 1964 (Title VII) prohibits discrimination based on race, color, religion, sex, or national origin. Title VII is administered and enforced by the Equal Employment Opportunities Commission (EEOC). 42 U.S.C. § 2000e-1.

Title VII prohibits discrimination in any employment-related action against any person because of that person's sex. Some courts have held that Title VII does not bar discrimination based on sexual orientation or gender expression. Recently, however, the EEOC determined that sexual orientation discrimination qualifies as sex discrimination for purposes of Title VII. *Baldwin v. Foxx*, EEOC DOC 0120133080, 2015 WL 4397641, at *1 (E.E.O.C. July 16, 2015).

§ 41. Employment Discrimination—Sex Stereotyping Claims Under Title VII

In *Price Waterhouse v. Hopkins*, 490 U.S. 228, 109 S. Ct. 1775 (1989), the U.S. Supreme Court recognized that an employer who acts on the basis of a belief that a woman should not be aggressive has acted on the basis of gender. After *Price Waterhouse*, an employer who discriminates against a woman because, for instance, she does not wear dresses or makeup, is engaging in sex discrimination because the discrimination would not occur but for the victim's sex. It follows that employers who discriminate against men because they do wear dresses and makeup, or otherwise act femininely, are also engaging in sex discrimination. *Smith v. Salem*, 378 F.3d 566 (6th Cir. 2004). This is the theory of "sex stereotyping" discrimination under Title VII.

Under recent guideline changes, the EEOC announced it has begun investigating complaints of alleged discrimination against transgender individuals based on gender identity discrimination. *See* U.S. Equal Employment Opportunity Commission, *What You Should Know about EEOC and the Enforcement Protections for LGBT Workers*. In addition, lesbian, gay, and bisexual individuals alleging sex stereotyping state a sex discrimination claim under Title VII. *See id.* ("While Title VII of the Civil Rights Act of 1964 does not explicitly include sexual orientation or gender identity in its list of protected bases, the Commission, consistent with Supreme Court case law

holding that employment actions motivated by gender stereotyping are unlawful sex discrimination and other court decisions, interprets the statute's sex discrimination provision as prohibiting discrimination against employees on the basis of sexual orientation and gender identity.").

§ 42. Harassment Claims under WLAD

Harassment motivated by an employee's sexual orientation, gender expression or identity, or HIV status may rise to the level of illegal discrimination. To prevail on a hostile work environment claim, an employee must allege facts proving harassment was: (1) unwelcome; (2) because the employee is a member of a protected class; (3) so pervasive or severe that it affected the terms and conditions of employment; and (4) imputable to the employer. *Davis v. Fred's Appliance, Inc.*, 171 Wn. App 348, 359, 287 P.3d 51 (2012).

Because the WLAD does not protect against employment discrimination based on *perceived* sexual orientation, any activity opposing such discrimination is not a protected activity in context of a retaliation claim. *Id.*

Harassment is imputed to an employer in two ways: (1) if the harasser is an owner, partner, corporate officer, or manager; or (2) if the harasser is the plaintiff's supervisor or co-worker and the employer "authorized, knew, or should have known of the harassment and ... failed to take reasonably prompt and adequate corrective action." *Glasgow v. Georgia-Pacific Corp.*, 103 Wn.2d 401, 407, 693 P.2d 708 (1985).

§ 43. Gender-Segregated Facilities and Dress Codes

With regard to restrooms, the WLAD requires employers who maintain gender-specific restrooms to permit a transgender employee to use the restroom that is consistent with his or her gender identity. Washington Human Rights Commission, *Guide to Sexual Orientation and Gender Identity and the Washington State Law Against Discrimination* at 5 (2014).

With regard to dress and grooming codes, the WLAD may not interfere with an employer's right to establish dress and grooming guidelines, so long as the guidelines are reasonable and serve a legitimate business purpose. However, employers must permit an employee to comply with the dress code provisions consistent with his or her gender identity or expression. *Id.* at 4–5.

§ 44. WLAD Protections

The WLAD is a broad remedial statute, the purpose of which is to prevent and eradicate discrimination on the bases articulated in the statute. *Fraternal Order of Eagles v. Grand Aerie of Fraternal Order of Eagles*, 148 Wn.2d 224, 237, 59 P.3d 655 (2002). "The Act recognizes that the right to be free from such discrimination is a civil right enforceable in private civil actions by members of the enumerated protected classes." *Id.* (citing RCW 49.60.030). The WLAD states:

> The right to be free from discrimination because of race, creed, color, national origin, sex, honorably discharged veteran or military status, sexual orientation, or the presence of any sensory, mental, or physical disability or the use of a trained dog guide or service animal by a person with a disability is recognized as and declared to be a civil right.

RCW 49.60.030(1).

The statute protects transgender individuals by including them in its definition of "sexual orientation." According to the WLAD,

> "Sexual orientation" means heterosexuality, homosexuality, bisexuality, and *gender expression or identity*. As used in this definition, "gender expression or identity" means having or being perceived as having a gender identity, self-image, appearance, behavior, or expression, whether or not that gender identity, self-image, appearance, behavior, or expression is different from that traditionally associated with the sex assigned to that person at birth.

RCW 49.60.040(26) (emphasis added).

§ 45. Public Accommodations Protections

The right to be free from discrimination includes the "right to the full enjoyment of any of the accommodations, advantages, facilities, or privileges of any place of public resort, accommodation, assemblage, or amusement"; and the "right to engage in commerce free from any discriminatory boycotts or blacklists." RCW 49.60.030(1). A person whose rights under the WLAD are violated has the right to bring a civil action "to enjoin further violations, or to recover the actual damages sustained by the person, together with the cost of

suit including reasonable attorneys' fees or any other appropriate remedy authorized by this chapter ...." RCW 49.60.030(2).

In 2017, in *State v. Arlene's Flowers, Inc.*, 187 Wn.2d 804, 389 P.3d 543 (2017), the Supreme Court of Washington unanimously upheld the application of the WLAD's public-accommodations protections against a flower shop owner's argument that selling wedding flowers to a same-sex couple violated her First Amendment rights to free speech and the free exercise of her religion. The Supreme Court stated:

> The State of Washington bars discrimination in public accommodations on the basis of sexual orientation. Discrimination based on same-sex marriage constitutes discrimination on the basis of sexual orientation. We therefore hold that the conduct for which Stutzman [the flower shop owner] was cited and fined in this case—refusing her commercially marketed wedding floral services to Ingersoll and Freed because theirs would be a same-sex wedding—constitutes sexual orientation discrimination under the WLAD. We also hold that the WLAD may be enforced against Stutzman because it does not infringe any constitutional protection. As applied in this case, the WLAD does not compel speech or association. And assuming that it substantially burdens Stutzman's religious free exercise, the WLAD does not violate her right to religious free exercise under either the First Amendment or article I, section 11 because it is a neutral, generally applicable law that serves our state government's compelling interest in eradicating discrimination in public accommodations. We affirm the trial court's rulings.

Id. at 855–56.

As this Bench Guide goes to press, the U.S. Supreme Court is considering a case in which the owner of a cake shop argues (as the flower shop owner argued in *Arlene's Flowers*) that Colorado's nondiscrimination law violates First Amendment speech and religion protections. *Masterpiece Cakeshop LTD v. Colorado Civil Rights Comm'n*, No. 16-111 (U.S.).

§ 46. Place of Public Accommodation Broadly Defined

The WLAD contains a lengthy section concerning places of public accommodation. RCW 49.60.040(2) states:

> "Any place of public resort, accommodation, assemblage, or amusement" includes, but is not limited to, any place, licensed or unlicensed, kept for gain, hire, or reward, or where charges are

> made for admission, service, occupancy, or use of any property or facilities, whether conducted for the entertainment, housing, or lodging of transient guests, or for the benefit, use, or accommodation of those seeking health, recreation, or rest, or for the burial or other disposition of human remains, or for the sale of goods, merchandise, services, or personal property, or for the rendering of personal services, or for public conveyance or transportation on land, water, or in the air, including the stations and terminals thereof and the garaging of vehicles, or where food or beverages of any kind are sold for consumption on the premises, or where public amusement, entertainment, sports, or recreation of any kind is offered with or without charge, or where medical service or care is made available, or where the public gathers, congregates, or assembles for amusement, recreation, or public purposes, or public halls, public elevators, and public washrooms of buildings and structures occupied by two or more tenants, or by the owner and one or more tenants, or any public library or educational institution, or schools of special instruction, or nursery schools, or day care centers or children's camps: PROVIDED, That nothing contained in this definition shall be construed to include or apply to any institute, bona fide club, or place of accommodation, which is by its nature distinctly private, including fraternal organizations, though where public use is permitted that use shall be covered by this chapter; nor shall anything contained in this definition apply to any educational facility, columbarium, crematory, mausoleum, or cemetery operated or maintained by a bona fide religious or sectarian institution.

The examples in this section are not exhaustive. Section 49.60.040(2) says that places of public accommodation include but are not limited to the examples given. As part of the WLAD, courts are required to construe RCW 49.60.040(2) liberally in order to accomplish the statute's remedial purposes. *Fraternal Order of Eagles*, 148 Wn.2d at 247 ("The WLAD requires liberal construction of its provisions in order to accomplish the purposes of the law and states that nothing contained in the law shall 'be construed to deny the right to any person to institute any action or pursue any civil or criminal remedy based upon an alleged violation of his or her civil rights.'" (quoting RCW 49.60.020)). "The Legislature mandated not only a liberal interpretation of the WLAD, it also intended a liberal reading of what constitutes a 'public accommodation.'" *Id.* at 255 (citing RCW 49.60.020).

The case of *Apilado v. North American Gay Amateur Athletic Alliance*, 792 F. Supp. 2d 1151 (W.D. Wash. 2011), illustrates the breadth of term "place of public accommodation." The *Apilado* case arose when the North American

Gay Amateur Athletic Alliance (NAGAAA) disqualified a team from the Gay Softball World Series on the basis that the team had too many "non-gay" players. *Id.* at 1155. The disqualified plaintiffs successfully moved for summary judgment holding that the NAGAAA was a place of public accommodation under the WLAD. *Id.* at 1160. The district court first held that the NAGAAA was a "place" despite the fact that the NAGAAA lacked a fixed business location. *Id.* at 1158. Turning to the definition of "public accommodation" under RCW 49.60.040(2), the Court stated that

> the factors for the Court to consider are whether or not NAGAAA (1) charges for admission, (2) accommodates those seeking recreation, (3) sells goods and merchandise, (4) operates where food or beverages of any kind are sold for consumption on the premises, (5) offers sports and recreation activities, and (6) operates where the public gathers for amusement or recreation.

Apilado, 792 F. Supp. 2d at 1158.

A plaintiff does not have to show that all six factors exist. The court observed that NAGAAA argued "that while food, alcohol, and merchandise were sold and teams were charged admission to play, NAGAAA did not profit from these sales." Responded the court: "These are quibbles; the statute does not require profit from food, alcohol, or merchandise. Regardless, NAGAAA does not dispute that *at least one criterion is met*." *Id.* (emphasis added). The court ruled that there was no genuine issue of material fact and entered summary judgment holding that NAGAAA was a place of public accommodation. *Id.* at 1159.

§ 47. Washington Human Rights Commission Guidance

The Washington State Human Rights Commission has published a *Guide to Sexual Orientation and Gender Identity and the Washington State Law Against Discrimination* (accessed Sept. 6, 2016), which includes a section on public accommodations. The guide provides:

> **What is considered to be a place of public accommodation?**
>
> Generally, any place that sells goods, offers food or drink for charge, is a place of entertainment, recreation or assembly, or is for the lodging of guests is included in the definition of place of public accommodation, as are schools, government buildings, libraries, museums, medical offices, public conveyances, and theatres.

Are there exclusions to what is considered to be a place of public accommodation?

Groups that are distinctly private are not included in the definition of place of public accommodation. Examples would be some fraternal organizations with limited outside activity and groups such as book clubs that meet in members' homes. In addition, a church or other religious entity in the activity of conducting worship services is not a place of public accommodation, and neither are religious educational institutions. However, other church sponsored activities, such as a soup kitchen or public bake sale, might be considered a place of public accommodation.

Are businesses such as wedding planners and wedding photographers able to limit their services to heterosexual couples?

No, these are places of public accommodation and must provide their services on a nondiscriminatory basis to all couples.

Can religious officiates refuse to marry same sex couples, and can churches refuse to rent equipment or space for weddings?

Yes, Referendum 74, the 2012 law related to marriage, allows clergy to refrain from marrying same sex couples, and allows churches to refrain from providing marriage related services to same sex couples. This would not be a violation of the Law Against Discrimination.

Id. at 7–8.

§ 48. Introduction

The issues addressed in this Chapter are increasingly common as transgender people become more visible and laws change to reflect that visibility and the needs of an underserved and often stigmatized minority. An estimated 0.3% of American adults identify as transgender. Gary J. Gates, *How Many People Are Lesbian, Gay, Bisexual, and Transgender?*, The Williams Institute (Apr. 2011). The current legal system assumes individuals identify as one of two genders, either male or female. *Id.* This Bench Guide recognizes that many people do not identify as the gender assigned at birth, the one that conforms to their biological sex. A person may express or identify as a specific gender, both genders, or neither gender. ACLU of Washington, *The Rights of Transgender People in Washington State* (May 2016).

For information regarding the term "transgender" and other related terms, see Chapter 2 of this Bench Guide.

§ 49. Medical and Other Studies

The medical community has not determined the scientific reasons for the desire to alter one's biological sex or to express a gender different from, or non-conforming to, the one assigned at birth. Persons born with ambiguous genitalia are "intersexed" and assigned one sex or the other at birth. The medical diagnosis for transgender persons is "gender identity disorder" or "gender dysphoria." Although not required in Washington to grant an order for name change, in order to change a gender marker or name on a birth certificate, the Washington State Department of Health currently requires a letter from a physician stating the person's new name and that the person has received appropriate clinical treatment. A diagnosis of gender identity disorder is not necessary. Washington State Department of Health, *Gender Change on a Birth Certificate* (Jan. 2015).

§ 50. Anti-Discrimination Laws—Washington Law Against Discrimination

The Washington Law Against Discrimination (WLAD) prohibits discrimination based on sexual orientation. RCW 49.60.030. "Sexual orientation" under the WLAD is defined to mean "heterosexuality, homosexuality, bisexuality, and gender expression or identity." RCW 49.60.040(2). "Gender expression or identity" means "having or being perceived as having a gender identity, self-image, appearance, behavior, or expression, whether or not that gender identity, self-image, appearance, behavior, or expression is different from that traditionally associated with the

sex assigned to that person at birth." RCW 49.60.040(26). This extends protections against discrimination in places of public accommodation, housing, employment, insurance transactions and extensions of credit.

§ 51. Anti-Discrimination Laws—Local Laws

At least five Washington cities have laws prohibiting discrimination based on gender identity or expression in public accommodation, housing, employment and/or education: Burien, Seattle, King County, Tacoma, and Olympia.

§ 52. Anti-Discrimination Laws—Housing

In 2012, the U.S. Department of Housing and Urban Development declared that discrimination based on gender nonconformity violates the Fair Housing Act. Department of Housing and Urban Development, *Equal Access to Housing in HUD Programs Regardless of Sexual Orientation or Gender Identity*, 77 Fed. Reg. 5661 (Feb. 3, 2012).

§ 53. Anti-Discrimination Laws—Education

With respect to transgender students, on May 13, 2016, the U.S. Department of Education and the U.S. Department of Justice issued a "Dear Colleague Letter on Transgender Students." The guidance, which applies to schools that receive federal funds, indicates that schools must not treat transgender students different from the way they treat other students of the same identity. Among other things, schools should allow a student to use the same restroom as other students of the same gender identity. U.S. Department of Education and U.S. Department of Justice, *Dear Colleague Letter on Transgender Students* (May 2016). The U.S. Court of Appeals for the Fourth Circuit affirmed this principle. *G.G. v. Gloucester County School Board*, 822 F.3d 709 (4th Cir. 2016), *vacated and remanded*, 137 S. Ct. 1239 (2017).

The Trump Administration withdrew and rescinded the Department of Education and Department of Justice's guidance with respect to transgender students in February 2017, stating that the departments would "further and more completely consider the legal issues involved." *See* U.S. Department of Education & U.S. Department of Justice, *Dear Colleague Letter* (Feb. 2017). In the meantime, the departments "will not rely on the views expressed" in the prior guidance. The Supreme Court, which had granted certiorari in *G.G. v. Gloucester County School Board*, vacated and remanded the case upon the Trump Administration's change in position. *Gloucester County School Board v. G.G.*, 137 S. Ct. 1239 (Mar. 6, 2017).

§ 54. Changing Name and Gender Markers in State Documents

Changing one's name in Washington is a uniform process across all counties and requires a signed "Order for Name Change." A person requesting a name change must file a "Petition for Name Change" and pay the filing fee in state district court. One question a judicial officer should consider when reviewing a petition is whether it is necessary to state in open court the reason for name change. Instead of asking for details that require oral disclosure of private information in a public courtroom, a judge or commissioner can ask the petitioner if the name change is for the reason stated in the petition. This practice protects the privacy of the petitioner from other court users as well as from unnecessarily adding information to the court record, which is already available on the petition itself.

The change of assigned gender on a birth certificate for those born in Washington State is a simple administrative process but requires a certified copy of a court order that states the person's name, date of birth, gender currently listed on birth record, and new gender, *or* a letter from the person's physician stating that the person has received the appropriate clinical treatment, and the person's new gender. Washington State Department of Health, *Gender Change on a Birth Certificate* (Jan. 2015).

Changing gender markers on birth certificates in other states may be more difficult. Some states do not allow a change of sex on birth certificates. Other states will allow a change of sex on a birth certificate if the state receives a court order from the state in which the court user resides stating that sexual reassignment surgery is complete and that the birth state should change the sex on the certificate.

Changing a gender marker on Washington State Driver's License is a simple administrative process with a form available on the Washington State Department of Licensing website. Washington State Department of Licensing, *Change Your Gender Designation: Driver Licenses and ID Cards*.

§ 55. Child Custody

In Seattle, many guardians ad litem do not discriminate based on the gender identity or expression of one parent. Usually the child's best interest is analyzed exclusive of the birth parent's sex or transition stage. Although many states have upheld parental rights, some states have terminated or limited the ability of transgender parents to visit or maintain custody of their children. At least one Washington court has upheld a trial court's consideration of the impact of a parent's impending gender transition in determining primary residency. ACLU of Washington, *Protecting the Rights of Transgender Parents and Their Children* at 7 (April 2013) (citing *Magnuson v. Magnuson*, 141 Wn. App. 347, 170 P.3d 65 (2007)).

§ 56. Incarceration

The U.S. Department of Justice issued final regulations implementing the Prison Rape Elimination Act (PREA) across the country, which contain protection standards for transgender inmates in federal, state, and local facilities. *See generally* Washington State Department of Corrections, *Prison Rape Elimination Act (PREA)*. The Washington State Department of Corrections has adopted revised rules establishing an initial screening of all prisoners within 72 hours of intake to assess risk of sexual victimization and abuse. These assessments take into account gender identity and expression.

In some cases, transgender inmates are not administered hormones in prison and may be placed with their birth-sex population. Best practices suggest that transgender persons who are undergoing hormone treatment and/or sexual reassignment surgery prior to commitment be allowed to continue to receive treatment during incarceration. Once a person has undergone sexual reassignment surgery, it is medically necessary for them to continue to receive hormones.

The King County Department of Adult and Juvenile Detention, Adult Divisions has a General Policy Manual section addressing transgender inmates. General Policy Manual § 6.03.007. This policy provides protocol and guidelines for proper treatment by all jail staff and volunteers, including definitions in terminology, admission procedures, strip searches, anti-harassment and discrimination procedures, medical and health guidelines. This includes instructions not to search or physically examine an inmate for the sole purpose of determining the inmate's genital status and the noting of an inmate's preference with gender identity and expression. Housing is determined on a case-by-case basis where an inmate's own views with respect to their safety is given significant weight when considering housing assignments.

§ 57. Immigration

A transgender immigrant may be granted asylum for being persecuted at home because of their failure to conform to cultural gender roles and/or sexual orientation. Transgender people qualify as a "particular social group" entitled to the protection of asylum laws. U.S. Citizenship and Immigration Services, *Guidance for Adjudicating Lesbian, Gay, Bisexual, Transgender, and Intersex (LGTBI) Refugee and Asylum Claims* (Nov. 2011). Although direct issues of immigration may not arise in state courts, judges should remain aware of these issues and complications.

CHAPTER 9. LGBTQ ELDERS

§ 58. Introduction

By 2020, one in five Americans will be over age 65. Between two and seven percent identify as LGBTQ, with some data showing that identification as LGBTQ declines with age. *See* Gary J. Gates, *LGBT Parenting in the United States*, The Williams Institute (Feb. 2013). The population of LGBTQ elders in the United States reflects the same diversity as the general population with respect to race, culture, religion, education, socioeconomics, geography, and physical ability, with social, health, and economic differences between the lesbian, gay, bisexual, and transgender subgroups.

Elder law encompasses a variety of legal issues faced by older adults as well as some younger disabled persons. Anyone reaching old age faces the vulnerability that comes with depending more on others during the later years of life. This vulnerability enters the equation for elders who are also LGBTQ as they decide whether to reveal their sexual orientation or gender identity to others. The current generation of elders came of age in a time of extreme homophobia and transphobia, deeply ingraining the practice of non-disclosure and careful vetting of whom to confide in. Some LGBTQ people who have lived openly for most of their life decide to return to the closet for perceived and actual safety reasons in their elder years. This creates special challenges requiring informed sensitivity when advocating for their legal needs.

§ 59. Challenges Facing LGBTQ Elders

Little data about the lives of LGBTQ elders has existed until recently. Most surveys and studies of seniors did not ask about sexual orientation or gender identity, and if they did, many survey participants did not identify themselves. This is beginning to change. *See* Karen I. Fredriksen-Goldsen et al., *The Aging and Health Report: Disparities and Resilience Among Lesbian, Gay, Bisexual, and Transgender Older Adults*, Institute for Multigenerational Health, University of Washington (2011). Recent research has revealed the following:

- Negative health disparities exist between LGBTQ elders and their demographically matched heterosexual counterparts. LGBTQ elders have higher rates of disability and mental distress than heterosexual elders. Forty-seven percent have a disability. Half of those living with HIV in the United States are now over the age of 50. *Id.* at 22–28.

- These negative health disparities are the consequence of lifetime experiences of discrimination and victimization. Eighty-two percent of

LGBTQ older adults report having been victimized at least once, and 64 percent report experiencing victimization at least three times in their lives, as a result of their actual or perceived sexual orientation or gender identity. Forms of victimization include discrimination in housing and employment, verbal insults, threats of physical violence, hassles by police, having objects thrown at them, property destruction, physical assault, threat with a weapon, sexual assault, and threat to 'out' the individual. *Id.* at 19.

- LGBTQ elders face greater economic insecurity than their heterosexual counterparts. LGBTQ elders are more likely to live in poverty. *See* M.V. Lee Badgett et al., *New Patterns of Poverty in the Lesbian, Gay, and Bisexual Community* at 15, The Williams Institute (2013). A Harris Poll survey showed that LGBTQ elders are far more concerned than non-LGBTQ elders about their financial security in retirement. Robert Espinoza, *Out & Visible* at 15 Services and Advocacy for GLBT Elders (2014).

- LGBTQ elders are at increased social risk. According to the *Aging and Health Report,* LGBTQ elders are (1) less likely to have a life partner, regardless of legal marital status, with 40 percent of study participants reporting these relationships; (2) more likely to live alone, with gay and bisexual men more likely to live along than lesbian or bisexual women; (3) more likely to be estranged from legal/blood family; (4) less likely to have care available from adult children; and (5) more likely to depend on public resources for long-term care. Fredriksen-Goldsen, *supra*, at 49.

- LGBTQ elders have had less access to health care than their heterosexual counterparts. Thirteen percent report that they have been denied healthcare or received inferior healthcare because of their sexual orientation or gender identity. More than 20 percent do not disclose their sexual orientation or gender identity to their primary care physician. Fifteen percent fear accessing healthcare outside the LGBTQ community.

- Along with these negative disparities, the LGBTQ community has a strong tradition of resilience and self-reliance. The majority (89 percent) of LGBTQ elders feel positive about belonging to the LGBTQ community, and being "out" is correlated with better mental health. *Id.* at 51. The LGBTQ community has a strong community tradition of caregiving, with roots in the early years of the HIV/AIDS epidemic when gay men and lesbians were the main, and sometimes only, caregivers for their friends and loved ones. More than one quarter (27 percent) of LGBTQ elders are themselves caregivers to a partner, spouse or friend. *Id.* at 45. LGBTQ elders are more likely than their heterosexual

counterparts to attend spiritual or religious services and activities. *Id.* at 17. Having faced and coped with adversity, some LGBTQ elders may be better prepared that their heterosexual counterparts to deal with the new adversities of aging.

§ 60. Impact of Marriage Equality

Legal recognition of same sex marriage has brought increased social, legal and economic security to some LGBTQ elders by giving them access to federal spousal benefits. As discussed in the Family Law section of this guide, marriage equality is now the law in all 50 states. Due to the incremental process in reaching this point in history, however, discrepancies will continue to exist for LGBTQ elders who may have been partnered for many years prior to marriage equality, where eligibility for spousal benefits or determination of community property depends on duration of legal marriage. Going forward, these discrepancies should fade, but uniformity will not be immediate.

Marriage equality does not address all of the legal needs of LGBTQ elders because only 40 percent of LGBTQ elders have a partner, legally recognized or not. Fredriksen-Goldsen, *supra*, at 49. Also, many long-term established couples in marriage equality states have not taken the step of getting married. Because legal marriage has not been an option to consider until recently, many may not understand the importance and benefits of "making it legal."

§ 61. Caregiving and the Importance of "Chosen Family"

Apart from whether the law recognizes a person's relationship to their primary partner, it is common in the LGBTQ community for social support networks to be based on peer and friendship connections rather than statutory and common law definitions of family of origin. Many LGBTQ elders receive their main social support from accepting and supportive friends, relying heavily on those of same or similar age who are often disabled themselves. In one recent study, nearly two thirds of LGBTQ seniors say they consider these friends to be "chosen family." Although the law now recognizes same-sex marriages, it does not have a way to account for these other alternative support networks and their significance may go unrecognized in the legal setting. In addition, there may be limits in the ability of friends to provide care over the long-term, especially if decision-making is required. Fredriksen-Goldsen, *supra*, at 45.

§ 62. Powers of Attorney

For decision-making purposes, many LGBTQ elders name a friend as durable powers of attorney, but often encounter difficulty getting providers and financial institutions to honor them. Washington's Informed Consent Statute,

RCW 7.70.065, prioritizes persons who are authorized to give informed consent as follows: appointed guardian, durable power of attorney for health care decisions, spouse or registered domestic partner, adult children, parents, and adult brothers and sisters. This may result in a health care provider accepting authorization for services and giving information only to biological family while excluding LGBTQ chosen family and caregivers.

§ 63. Guardianship—Appointment

Washington State adult guardianship statutory regulations are addressed in RCW 11.88 through 11.92.

LGBTQ elders are more likely to have a guardian appointed for them. Karen L. Loewy, *Avoiding Guardianship for LGBT Elders Through Advance Planning*, American Society on Aging (Feb. 13, 2014). In general, courts tend to give guardian appointment preference to the individual's spouse or other legal relatives, even if the relationship with those relatives is strained or hostile. Because courts are empowered to seek information at the appointment hearing, there is an opportunity for the court to inquire regarding the existence of a committed intimate relationship or even important "chosen family" members.

The court may also inquire about the cultural competency of a mediator appointed pursuant to RCW 11.02.070, or a potential guardian ad litem regarding LGBTQ issues. Potential guardians, mediators, caregivers, and service providers may not be neutral regarding LGBTQ issues and may go so far as to refuse to accept wishes and documentation of the incapacitated person.

§ 64. Guardianship—Pre-Need Designation

Some LGBTQ older adults may have put in place a Pre-Need Guardian Designation naming the person to be appointed Guardian.

§ 65. Guardianship—"WINGS"

In 2011, the National Guardianship Network made a key recommendation for change in the current guardianship system, calling for coordinated state court-community partnerships known as Working Interdisciplinary Networks of Guardianship Stakeholders, or WINGS. The Washington State Supreme Court has sponsored a WINGS pilot project in Washington which features the use of a supported decision making model identifying the important people in a person's life to provide the resources to help people make their own decisions to the extent of their capacity. This model could work very well for LGBTQ seniors. *See* National Guardianship Network,

WINGS Tips: State Replication Guide for Working Interdisciplinary Networks of Guardianship Stakeholders (2014).

§ 66. Housing and Long-Term Care—Aging in Place

LGBTQ elders are very concerned about whether they will encounter caregiver bias in their long-term care setting at either an institutional or individual level.

Many older adults want to age in their own homes. For LGBTQ elders who depend on peer and friend networks, this may not be enough as the elder's needs increase, requiring professional caregiver services. Therefore, LGBTQ elders may face caregiver bias in the home setting as well as in a long-term care setting.

§ 67. Housing and Long-Term Care—Long Term Care

Data shows that LGBTQ elders are more likely than their heterosexual counterparts to require long-term care in a nursing facility. Despite this, many long-term care facilities believe that they have no LGBTQ residents. A 2010 survey showed that "out" elderly LGBTQ adults in nursing homes faced the following forms of discrimination:

- Verbal and physical harassment by staff and other residents;
- Abrupt discharge not based on medical status;
- Refusal to honor a resident's power of attorney;
- Refusal to use the resident's preferred first name or pronoun; and/or
- Refusal to provide basic services and proper medical care.

National Senior Citizens Law Center et al., *LGBT Older Adults in Long-Term Care Facilities: Stories from the Field* (2010). Eighty-five percent of service providers in the study believed that LGBTQ elders would not be safe coming out in a long-term care facility, and that both staff and other residents would discriminate against them if they did.

In the five years since this study was performed, there has been sweeping change in general societal attitudes regarding sexual orientation and gender identity, and some long-term care providers have made great strides in providing inclusive, welcoming, and culturally competent care for LGBTQ elders. At the same time others have not addressed the issue. Therefore, an LGBTQ elder with the time and ability to "shop around" for LGBTQ-supportive long-term care can find it, but placement choices are often constrained by time,

financial, geographic, and availability concerns, such that this choice is not a reality for many.

The Washington Department of Social and Health Services (DSHS) has developed a caregiver training curriculum for LGBTQ cultural competence in conjunction with LGBTQ community organizations. This curriculum has identified barriers between our region's paid caregiver population, many of whom are immigrants from countries and cultures with harsh negative views towards homosexuality, and the LGBTQ elder population needing their services, many of whom have anti-immigrant biases. Washington State Department of Social & Health Services, *2014-2016 Cultural Competence Action Plan, Aging and Long-Term Support Administration* at 5 (July 2014).

An LGBTQ elder who is subjected to discrimination in a long-term care setting has several avenues of redress.

Remedies	Source Materials
Report to facility	• See the facility's established complaint procedures and inquire with the facility's management.
Report to outside entities	• Contact the Washington State Long-Term Care Ombudsman • Call the DSHS Complaint Hotline, 1-800-562-6078 • Contact the State Department of Health • Contact the Federal Centers for Medicare and Medicaid Services (CMS), 1-800-537-7697 • Contact Adult Protective Services • Contact local law enforcement
Pursue state law claims	• Common law causes of action include negligence and intentional tort • There is a statutory action under the Vulnerable Adult Protection Act, RCW 74.34 • RCW 70.129 deals with long-term care resident rights • RCW 70.127 deals with in-home services agencies • RCW 70.128 deals with adult family homes • RCW 18.20 deals with assisted living facilities

Remedies	Source Materials
Pursue federal law claims	• The Nursing Home Reform Act (NHRA) of 1987 defines rights of all nursing home residents. It does not explicitly cover LGBTQ rights, but it does guarantee the right to be free from abuse, to privacy, to receive visitors of one's choosing, to participate in activities, to be treated with respect, to participate in one's care, and to have an individualized care plan which maximizes each resident's physical, mental, and psychosocial well-being. *See* National Long-Term Care Ombudsman Resource Center et al., *Residents' Rights and the LGBT Community: Know Your Rights as a Nursing Home Resident* (accessed Sept. 4, 2016). • Section 1557 of the Affordable Care Act (ACA) prohibits discrimination in health care programs on the basis of race, color, national origin, sex, sex stereotypes, gender identity, age, or disability, and gives the Department of Health and Human Services Office for Civil Rights authority and obligation to investigate potential violations. 42 U.S.C. § 18116; *see also* HHS.gov, *Section 1557 of the Patient Protection and Affordable Care Act* (accessed Sept. 4, 2016). It also provides new nursing home transparency provisions to bolster the complaint process, including a standardized on-line complaint form and a complaint resolution process designed to protect residents and their representatives from retaliation, required publication of consumer complaint information on its Nursing Home Compare website at www.medicare.gov, and a mandatory requirement that nursing homes and its employees report suspected crimes against residents to law enforcement. It is important to note that increased transparency and fortified complaint mechanisms are helpful to residents who have advocates able to access them. The majority of complaints about nursing home care in general are filed by children of residents, and LGBTQ elders are less likely to have such family support. If they do, it is more likely to be from a partner or friends of similar age, often with their own health issues and often without complete legal authority to act on their behalf. *See*

Remedies	Source Materials
	LongTermCare.gov, *Long-Term Care Considerations for LGBT Adults* (accessed Sept. 4, 2016).

§ 68. Abuse and Neglect

LGBTQ elders are at increased risk of abuse, which can be physical, financial, emotional and sexual. The National Center on Elder Abuse has information about signs and symptoms of neglect and reporting guidelines. The Vulnerable Adult Protection Act, RCW 74.34.005, is intended to protect all vulnerable adults from "abuse, neglect, financial exploitation, or abandonment." LGBTQ older adults are vulnerable to the same types of abuse and victimization as non-LGBTQ elders. In addition, LGBTQ elders may face forms of abuse and exploitation specifically related to their sexual orientation or gender identity. For example:

- Abusers may threaten to disclose an elder's LGBTQ status to family or others, serving to keep the victim from seeking help. If an abuser outs an LGBTQ elder to unsupportive adult children, LGBTQ grandparents may lose access to their grandchildren.

- LGBTQ elders sometimes have been told over their lifetime that they will end up alone, making them particularly vulnerable to "sweetheart scammers," who become lovers or friends specifically to gain access to their financial resources.

- An LGBTQ elder who has internalized the belief that an abusive situation is the best they can expect is far more likely to put up with being abused, neglected, or exploited.

- An LGBTQ victim may be easier to isolate because family members may already be estranged and many LGBTQ elders do not feel comfortable in senior settings that predominately cater to non-LGBTQ people.

- LGBTQ elders may have a history of self-reliance and fear of authorities as a survival tactic developed over a lifetime, setting them up for self-neglect when physical and/or mental capacity declines. *See* National Resource Center on LGBT Aging & FORGE Transgender Aging Network, *A Self-Help Guide for LGBT Older Adults and Their Caregivers & Loved Ones: Preventing, Recognizing, and Addressing Elder Abuse* (accessed Sept. 4, 2016).

§ 69. Special Probate Concerns—Committed Intimate Relationships

Committed Intimate Relationship (CIR) status, which is discussed in the Family Law section, also affects distribution of a person's estate at death. RCW 11.02.070 addresses the disposition of community property at death to a "surviving spouse or domestic partner" but does not address a CIR. An LGBTQ elder who dies intestate may have been in a CIR that the partner is asking the court to recognize. Washington State case law affecting parties in a CIR at death includes:

- *Peffley-Warner v. Bowen,* 113 Wn.2d 243, 252, 778 P.2d 1022 (1989): A "surviving partner in a 'meretricious' relationship does not have the status of widow with respect to intestate devolution of the deceased partner's personal property. The division of property following termination of an unmarried cohabitating relationship is based on equity, contract or trust, and not on inheritance."

- *Vasquez v. Hawthorne*, 145 Wn.2d 103, 114–15, 33 P.3d 103 (2001). "[E]quitable claims are not dependent on the 'legality" of the relationship between the parties, nor are they limited by gender or sexual orientation of the parties."

- *Olver v. Fowler*, 161 Wn.2d 655, 670–71, 168 P.3d 348 (2007). The court stated in a case involving simultaneous death within a CIR: "[T]he death of one or both partners does not extinguish that right [to an undivided interest in the couple's jointly acquired property]; [the deceased's] estate merely steps into [the deceased partner's] shoes."

- *Witt v. Young*, 168 Wn. App. 211, 217, 275 P.3d 1218 (2012). The court stated, in a case involving intestate rights of the surviving partner of a CIR, that the surviving partner "potentially has property rights in the property that [the cohabitees] acquired over the course of their relationship."

§ 70. Special Probate Concerns—Multiple Marriages or Legal Partnerships

Problems may need to be resolved regarding marriages, domestic partnerships, and civil unions from multiple states with the same or different partners due to moving, a patchwork of marriage laws or an inability to get a divorce pre-*Obergefell* in a state of residence that did not recognize same-sex marriages.

§ 71. Special Probate Concerns—Property Agreements

Courts may be called upon to address property agreements entered into by LGBTQ couples prior to marriage equality that conflict with current law of intestacy and probate.

§ 72. Special Probate Concerns—Ancillary Probate

Ownership of real property in other states where same-sex marriage previously was not recognized may create problems for LGBTQ elders because of the way they had to hold title to property. The choice-of-law question arises as to whether the law of that state or Washington state will govern the determination of real property distribution.

§ 73. Special Probate Concerns—Adult Adoption

Washington State allows adoption of an adult. RCW 26.33.140; *In re Marshall*, 27 Wn. App. 895, 621 P.2d 187 (1980). In the past, some LGBTQ people used adult adoption is to ensure a partner's inheritance rights and protect an LGBTQ partner's intent of estate distribution from disapproving family members.

§ 74. Special Probate Concerns—Trust and Estate Dispute Resolution Act (TEDRA)

TEDRA provides for "nonjudicial methods for the resolution of matters, such as mediation, arbitration and agreement. [This] chapter also provides for the judicial resolution of disputes if other efforts are unsuccessful." RCW 11.96A.010. A potential problem can occur when this is combined with the instruction that when courts and others concerned interpret a will, the "true intent and meaning of the testator," is controlling. RCW 11.12.230. Parties and beneficiaries may be able to frustrate the testator's intent through agreements, mediations, or arbitrations under TEDRA. Persons or agencies that are disapproving of an LGBTQ relationship could use these nonjudicial methods of resolution to usurp the testator's intent.