

GENDER IDENTITY IN FAMILY TRUSTS

STEP CONFERENCE, GUERNSEY

James Lister

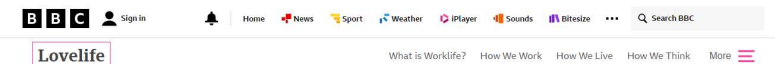
Head of Private Wealth Disputes

GENDER IDENTITY



Whitehall goes woke: Civil Service recognises more than 100 genders, forces staff to have a 'non-binary network', ditches 'mother' and 'father' in emails, and holds a Trans Day of Remembrance

- Whitehall civil servants implored to use gender-neutral pronouns in emails
- Misgendering prompts sanction; one senior official described token promotion
- Staff sent to 'gender non-conforming book club' to mark Non-Binary Aware Week
- The liberal measures come despite government's touted 'war on woke'



The invisible obstacles of non-binary dating

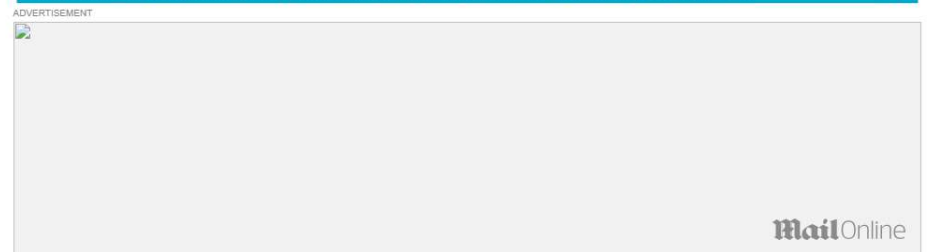


(Image credit: Getty Images)

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Trans women cyclists who used to compete as men take first and second place in new 'non-binary' race - leaving young mother in third

- The independent race aimed to be inclusive for trans and non-binary people
- It was won by Emily Bridges who was pictured on the podium on social media
- It comes amid a heated row about trans rights in elite sports such as cycling

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SLIDO

#STEPGSY22

SLIDO

#stepgsy22

- How many legally recognised genders are there in the UK?
- A. Two
 - B. Three
 - C. Seven
 - D. No conclusive number

The Slido logo is displayed in a bold, green, lowercase sans-serif font. The letters are thick and rounded, with a slight shadow effect behind them, giving it a three-dimensional appearance. The 'i' has a solid green dot.

SLIDO

- How many gender identities are there?
 - A. Two
 - B. Three
 - C. Seven
 - D. No conclusive number

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SLIDO

- How many Gender Recognition Certificates have been issued in the UK?
 - A. 600
 - B. 1200
 - C. 6,000
 - D. 12,000
 - E. 60,000

The logo for Slido, featuring the word "slido" in a bold, green, lowercase sans-serif font.

SLIDO



- When Liz died in 1976, she left a Will in the following terms:

“My Trustees shall hold my estate for my eldest son, Charles, to pay the income of my estate to my said son from the date when he attains the age of 21 years during his lifetime, and subject thereto my Trustees shall hold my estate and the income thereof upon trust for the first and every other son of Charles born before the Vesting Date successively according to seniority in tail male”

SLIDO

- Charles dies in 2004. He leaves behind three children: Charlotte (32), William (29) and Harry (23)
 - Charlotte (who was born female) has been diagnosed with gender dysphoria, and wishes to transition to being male, Charlie. Can Charlie inherit what would otherwise be William's share of Liz's estate?
- A. Yes
- B. No

GENDER IDENTITY



Government Equalities Office estimates 200,000 – 500,000 transgender people in the UK (2018) “tentatively”. Stonewall puts their “best estimate” at 1% of UK population as transgender (i.e. 600,000+)

Of those, not all will seek a Gender Recognition Certificate – tiny proportion so far

Very little robust data (2021 UK Census asked about sex and gender as separate questions)

WHAT DOES THE ACT SAY?

- Legal gender not changed without GRC
- Person:
 - Must be over 18;
 - Must be “living in the other gender” for at least two years;
 - Have gender dysphoria;
 - Intend to continue to live in their acquired gender for life
 - Medical report required
 - Treatment/surgery not sufficient in absence of medical report

WHAT DOES THE ACT SAY?

- Where GRC issued:
 - Person's gender becomes "for all purposes" their acquired gender
 - No retrospective effect
 - No effect on "disposal or devolution of property under a will or other instrument made before the appointed day" (s.15)
 - NB the "appointed day" is 4 April 2005

WHAT DOES THE ACT SAY?

- Trustees & PRs
 - NO duty “to enquire, before conveying or distributing any property, whether a full gender recognition certificate has been issued to any person or revoked (if that fact could affect entitlement to property)”
 - NOT “liable to any person by reason of a conveyance or distribution of the property made without regard to whether a full gender recognition certificate has been issued... IF the trustee or personal representative has not received notice of the fact before the conveyance or distribution”

WHAT DOES THE ACT SAY?

- Trustees & PRs (cont)
- However – a beneficiary’s rights to “follow the property...into the hands of another person who has received it” are preserved (save for bona fide purchasers for value)
- So NB that beneficiary claims vs trustees and recipients to trace property are still possible, even if the trustee is not liable for/has not committed any default

WHAT DOES THE ACT SAY?

- Defeated expectations
 - Where disposition of property different because of GRC..
 - Any adversely affected person can apply to Court...
 - For any order that the Court thinks “just”

SCENARIO

Anastasia has four children: Alexandra, Olga, Alexander and Nicholas. Her sons are spendthrift layabouts, with whom she rarely speaks. Her daughters, on the other hand, are attentive, hard-working and all round excellent human beings.

In January 2006, Anastasia makes a simple Will. In light of her feelings about her children, it provides as follows:

“I leave my estate as follows: as to 90% between such of my daughters as survive me and if more than one in equal shares, and as to 10% between such of my sons as survive me and if more than one in equal shares”

SCENARIO

- What if:
 - Anastasia hadn't created absolute interests, but instead had provided for a discretionary trust, with a LOW saying:

"I would ask you to prefer the interests of my daughters to those of my sons, to the extent that it is my wish that my daughters would receive up to 90% of the income and capital of the trust, with my sons receiving no more than 10%"

SCENARIO

- What if:
 - Anastasia hadn't left a Will at all, but expected her estate to be dealt with under Sharia principles?

INTERPRETATION

- GRA provides re mothers and fathers – but not sons and daughters. Does daughter mean “female child”?
- Notes to GRA say in terms that “eldest daughter” would include son who has transitioned
- Testator intentions? Extrinsic evidence and circumstances?
- Other jurisdictions’ views e.g. US

PRE-MARCH 2014 MARRIAGES



- Marriage defined as being between two different sexes (prior to 2013 Act)
- No GRC without divorce/annulment of marriage
- S.12(1)(g) & (h) Matrimonial Causes Act 1973
- Resolved by Marriage (Same Sex Couples) Act 2013

SO WHAT?



- April 2005 now >17 years ago;
- Campaigns for transitioning to be easier between sexes
- Campaigns for recognition of different genders (or at least no gender)
- No reported cases

CHANGES AFOOT?

“Non-binary gender recognition: law and policy” – 31 March 2022 HMG Consultation Paper

2021 UK Census data – first data released 28 June 2022, including gender identity

Consultation on obtaining GRC without stringent requirements set out in Act

Current government position – “no changes to GRA needed”

IN PRACTICE



INTERPRETATIVE STANCE
FROM E.G. US MOST LIKELY?



CLARITY ON DRAFTING

IN PRACTICE

- Practical points:
 - Contact point with clients/beneficiaries/settlors
 - Tax treatment concerns re e.g. spouse status
 - No guidance about what “on notice” means – assume cautious approach
 - There are no answers....

QUESTIONS?



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SPEAKER DETAILS



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