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# LGBTQ+ FAMILY ESTATE PLANNING

Despite recent legislative advancements, including the 2015 historic Supreme Court decision in *Obergefell v. Hodges* to make same-sex marriage legal in all 50 states, lesbian, gay, bisexual, transgender and queer (LGBTQ+) individuals and their families still face unique challenges when ensuring their intentions and directives are respected and met, particularly after their death. Whether you or a family member identifies as LGBTQ+, it is important to recognize these challenges and understand how to overcome them.

## PRONOUNS, GENDER AND DEADNAMING CONSIDERATIONS

In the estate planning context, it is always important to specifically refer to individuals so as to remove any doubt as to who the intended named person is. This occurs when naming fiduciaries in various roles or when naming beneficiaries. Historically, we use pronouns and an individual's name as identifying features.

Pronoun use should match an individual's gender and not necessarily that individual's sex. "Sex" refers to a person's biological status and is typically assigned at birth. "Gender identity" refers to how one perceives themselves—male, female, both male and female, or neither—and "gender expression" is how one expresses their gender identity, such as masculinity and femininity. Based on our gender identity, many of us have preferred pronouns, such as "she/her/hers," "he/him/his," and/or "they/them/theirs." The pronouns associated with one's sex do not always match with that person's preferred pronouns.

Another area where a disconnect is possible is with an individual's name. We see name changes frequently in cases of marriage and divorce, but this also comes up when an individual selects a name that aligns with that person's gender and not necessarily the name assigned at birth. Such a change could be made officially through a legal process or informally without any official record. In either case, this person's birth name is considered their "deadname" and using a deadname, even if unintentional, in a legal document can have detrimental effects.

**For example**, assume you would like to give an outright bequest of $100,000 to each child of yours upon your death. You refer to each child by his or her birth name and identify the child as your son or daughter, using the gender and pronouns you ascribed to them at birth. Imagine years later at your death, one of your children self-identifies with different pronouns and legally changed their gender and name from how you identified them in your estate plan. Not only may that child feel hurt or uncomfortable that you failed to update your documents accordingly,

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but it could also jeopardize the child's right over their inheritance in some jurisdictions. Even if a court uses its tools to allow the bequest to your child, doing so may require the child to relive and publicly describe the child's transition experience.

Therefore, it is important to consider the impact of the use (or misuse) of pronouns, gender and deadnaming can have in crafting your estate plan. One way to mitigate issues around the misuse of pronouns, gender and deadnaming, is to regularly review your existing estate plan with your estate planning attorney to keep your estate plan up to date with changes in your family make-up. Another way is to reduce gender-specific references or broaden definitions under your plan to be more inclusive. Wiggin and Dana has reviewed our processes and eliminated the use of gendered pronouns.

## SURROGACY AND OTHER FAMILY PLANNING

Although surrogacy is not specific to LGBTQ+ families, it is vitally important to consider the various ways LGBTQ+ individuals and couples grow their families using genetic and gestational surrogacy, as surrogacy laws vary state to state. New York, for example, now legalizes gestational surrogacy and provides a means to establish legal parental rights for parents who rely on assisted reproductive technology (ART) to have children through the passage of The Child-Parent Security Act (CPSA) which went into effect on February 15, 2021. Similarly, Connecticut recognizes gestational surrogacy agreements (GSA) per Sec. 7-48a of the Connecticut General Statues.

When entering into a surrogacy agreement, it is important to speak with your estate planning attorney about properly addressing the terms of the agreement under your estate plan.

**For example**, if you were to die during the surrogacy process, the inclusion of a specific authorization of your executor to satisfy the GSA further protects the resulting child, the gestational surrogate and the executor. The executor is protected from potential claims that certain payments should or should not have been made. Additionally, the gestational surrogate and the resulting child are protected in that the authorization ensures the intended payments and other obligations are satisfied. New York also amended the "Inheritance by non-marital children" section of the Estates, Powers and Trust Law to clarify the inheritance rights of a non-marital child born via gestational surrogacy. To read more about this decision, **click here**.

Your estate planning documents could also deal with the disposition of your genetic material after you have children.

## ADVANCE MEDICAL DIRECTIVES

In addition to planning for after your death, there are decisions you should make regarding medical treatment during your life. For LGBTQ+ people, it is especially critical to execute medical directives (also known as a health care proxy or power

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# LGBTQ+ FAMILY ESTATE PLANNING

*This publication is a summary of legal principles. Nothing in this article constitutes legal advice, which can only be obtained as a result of a personal consultation with an attorney. The information published here is believed accurate at the time of publication, but is subject to change and does not purport to be a complete statement of all relevant issues.*

of attorney for health care) naming your partner or other trusted individual as your agent. If no such document exists, the hospitals and courts will look to your closest biological family member to make health care decisions for you, and your partner or friend will have no legal right to make such decisions. We therefore strongly encourage you to speak with your estate planning attorney regarding these choices to ensure your wishes are carried out.

## GIFTING

Paying the health and medical costs of a loved one is an effective way to transfer wealth without incurring a gift tax or the use of your gift tax exemption.

When considering gifts to individuals who are undergoing sex reassignment surgeries, special consideration should be given to what qualifies as deductible medical expenses and what is cosmetic surgery. As of February 2, 2010, the U.S. Tax Court concluded in *O'Donnabhain v. Commissioner of Internal Revenue* that sex reassignment surgeries qualify as deductible medical expenses under IRS code § 213, reversing a previous IRS position that had denied transgender people the ability to list expenses for medical services related to sex reassignment as tax deductions. The ruling holds that gender identity disorder is considered a "disease" within the meaning of § 213(d)(1)(A) & (9)(B) and that hormone therapy and sex reassignment surgeries are recognized treatments for disease within the meaning of § 213(d)(1)(A) & (9)(B), and thus not "cosmetic surgery" excluded from the definition of deductible "medical care" by § 213(d)(9)(A). To read more about this ruling, **click here**.

## FUTURE PLANNING CONSIDERATIONS

Whether you or someone you love identifies as a part of the LGBTQ+ community, you have special considerations to make when formulating your estate plan. Recognizing that each family is unique, the decisions you make under your plan can have lasting and unintended consequences if not properly handled. Please consult with your Wiggin and Dana attorney on structuring your estate plan to address the specific needs of your family now and in the future with the respect and thoughtfulness your family deserves.