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ADVISORY

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CLIENT ALERT: KEY CONSIDERATIONS IN ESTATE PLANNING FOR LGBTQ+ INDIVIDUALS AND COUPLES

Following up on an advisory we published a year ago on LGBTQ+ Family Estate Planning (click **here** to read), and as many celebrate Pride Month during June, we offer this update on recent developments in state and federal laws that may have meaningful implications on estate planning strategies for LGBTQ+ individuals and couples.

First, by way of background, on June 26, 2015, the U.S. Supreme Court legalized same-sex marriage across the country in the landmark case *Obergefell v. Hodges*. This decision made clear that same-sex couples have the same rights and benefits as opposite-sex couples under federal law, including the law governing federal estate tax. This allowed for joint estate planning and estate tax benefits for same-sex couples. Many states and municipalities have enacted similar laws.

Other states, however, have introduced bills in recent years that would roll back existing protections in a manner that could affect estate planning for LGBTQ+ people. For example, in 2020, Tennessee passed a law that allows businesses and organizations to deny service to LGBTQ+ people based on religious or moral objections. Although this type of law does not alter the estate tax regime, it potentially could affect access to services such as funeral arrangements or end-of-life care, and therefore could be a relevant consideration in estate planning for LGBTQ+ individuals and couples.

Given the changes in state and federal laws related to LGBTQ+ individuals and couples, it is important to carefully consider how these changes may impact the estate planning process. Here are some key considerations:

1. **Legal Marriage**: If you are in a same-sex marriage, it is important to ensure that your estate planning documents reflect your legal status. This includes updating your will, revocable ("living") trust, and other estate planning documents to reflect your spouse as your legal partner.

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2. **Domestic Partnerships and Civil Unions**: If you are in a domestic partnership or civil union, it is important to understand the legal protections and benefits available to you. Depending on the state where you live, you may have access to certain benefits or protections that are not available to unmarried couples. However, you may not have the full access and rights of a legal marriage, including for estate tax purposes or in the event of a medical emergency, and it is critical to understand the limitations of a civil union.

3. **Beneficiaries**: Ensure that your beneficiary designations reflect your wishes. This includes naming your spouse, partner, or other loved ones as beneficiaries of your retirement accounts, life insurance policies, and other assets.

4. **Medical Decision-Making**: Consider executing advance medical directives, also known as a health care proxy or power of attorney for health care, to ensure that your wishes related to medical treatment are respected. This is especially important for couples in domestic partnerships, civil unions or other long-term relationships, but who are not married, because they may not have the same access to information and the ability to make medical decisions that married couples have. Executing a health care proxy or similar document may not provide full health care access, however; for example, it may not grant the same access to a hospital for a domestic partner. Therefore, its limitations should be discussed and considered.

5. **Surrogacy and Other Family Planning Options**: Surrogacy laws vary from state to state, and it is important to speak with an estate planning attorney about properly addressing the terms of the agreement under the estate plan. For example, the inclusion of a specific authorization of an executor to satisfy the gestational surrogacy agreement can protect the resulting child, the gestational surrogate, and the executor.

6. **Pronouns and Name Changes**: Pronoun use should match an individual's gender and not necessarily their sex. Similarly, an individual may choose a name that aligns with their gender, which could be different from their birth name, or "deadname." Using a deadname in a legal document, even if unintentional, can have detrimental effects on inheritance. For example, it could fuel a will contest, bringing into question the testator's intention in referring to the individual's deadname and not their chosen name. Deadnaming an individual may also require the individual to relive and publicly describe their transition experience. One way to address this concern is to regularly review existing estate plans and update them with changes in family make-up. Another way is to reduce gender-specific references or broaden definitions under the plan to be more inclusive.

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7. **Estate Tax Planning**: Work with a qualified estate planning attorney to ensure that you are taking advantage of all available tax benefits and protections. Other than setting up your will and revocable trust, this may include establishing irrevocable trusts, lifetime gifting strategies, and other advanced planning techniques to minimize your tax liability and ensure that your assets are distributed according to your wishes.

The estate planning process can be complex, especially for LGBTQ+ individuals and couples, in light of recent changes in state and federal laws. Special consideration should be paid to medical decision-making and financial management for a same-sex partner during life, as well as estate tax planning that facilitates your wishes after death. Therefore, it is important to work with an estate planning attorney who understands the unique needs and challenges of the LGBTQ+ community.

Please consult with a Wiggin and Dana attorney to address your specific needs and formulate an estate plan that respects your wishes and preserves your family legacy. By taking proactive steps, you can achieve peace of mind and protect your legacy for future generations.