HIGHTOWER
Westchester

Protecting Your Loved Ones as an LGBTQ Couple:

Estate Planning Best Practices

In the 2015 landmark civil rights case Obergefell v. Hodges, the U.S. Supreme Court ruled that the fundamental right to marry is guaranteed to same-sex couples by both the Due Process Clause and the Equal Protection Clause of the 14th Amendment.[i] Seven years have passed since this historic legal and cultural moment; however, the freedom to marry has not yet eliminated all the financial and estate planning hurdles that LGBTQ couples face.

As a member of an LGBTQ couple that wants to protect your family and other loved ones, you have unique considerations that sometimes differ from other couples. To best safeguard your lifetime goals and legacy, it's imperative to put plans in place that detail your wishes and designate the people you want to carry them out for the benefit of your heirs.

To that end, the following are top estate planning practices to consider:

01

UNDERSTAND THE WEALTH TRANSFER BENEFITS AFFORDED BY MARRIAGE

While the decision to marry involves much more than financial considerations, understanding the significant tax and liquidity implications of certain estate planning variables may be an important part of the equation.

For example, one of the most significant benefits resulting from Obergefell v. Hodges is the unlimited marital deduction for federal estate and gift taxes, a benefit heterosexual married couples have enjoyed for decades. It allows spouses to leave an unlimited amount of assets to their surviving spouse without triggering a federal estate tax if both are U.S. citizens. Likewise, same-sex spouses can also now roll over assets from their deceased spouse's retirement accounts to their account without mandatory distributions (and the taxes associated with them), allowing assets to continue growing tax free.

These benefits could have a meaningful impact on your family's financial situation after you're gone so are worth evaluating with your advisors.

02

CONSULT A FAMILY LAW ATTORNEY IF YOU PLAN TO REMAIN UNMARRIED

Seeking advice from an attorney who specializes in divorce might seem like an oxymoron when you don't plan to marry. But unmarried couples need to resolve many of the same issues that married spouses face during a divorce (e.g., dividing assets and debt). A family law attorney can also help guide you through the complicated emotional dynamics that come into play in reconciling your finances with your relationship.

Also, depending on your situation — and the state in which you live — you may need a cohabitation agreement. A family law attorney can help you review your options for this agreement, which covers issues involving property, debts, inheritances, other estate planning considerations and health care decisions.

[i] *Obergefell et al. v. Hodges, Director, Ohio Department of Health (2015). Supreme Court of the United States. https://www.supremecourt.gov/opinions/14pdf/14-556_3204.pdf. Accessed June 2, 2022.*

03

LOOK FOR ADVISORS WITH RELEVANT EXPERIENCE

While the financial and estate planning environment has improved significantly in recent years for LGBTQ couples, it still tends to favor heterosexual marriage, and state laws and protections vary considerably. As such, look for advisors (e.g., financial planners, accountants and attorneys) who have relevant experience, a creative mindset and a supportive attitude to help you navigate hurdles and implement best practices.

04

ESTABLISH A WILL

When you think of traditional estate planning, a will is likely the first thing that comes to mind. With a will, you can:

- Identify who will inherit your assets
- Establish guardianship for your children in the event something happens to you and your spouse/partner (non-biological parents should also consider adoption in the event something happens to the biological parent)
- Arrange for an adult to manage any assets that your children would inherit
- Name an executor – the individual responsible for settling your estate

You should think of your will as the foundation of your estate plan rather than its only component part because, once executed, it is inextricably linked to the future of your finances after your death. And the absence of a will could trigger your state's "default" distribution plan, which would likely direct assets to your legal spouse or, if you are unmarried, to your blood heirs (laws vary state by state).

05

ESTABLISH A TRUST IN ADDITION TO YOUR WILL

A trust is a legal vehicle in which you can place some or all of your assets for your own benefit or the benefit of others. While assets controlled by your will generally have to go through probate, trust assets usually don't.

Probate involves inventorying and appraising your property, paying debts and taxes, and distributing the remainder of the property according to your will. It can be a lengthy process with extra expenses, to the detriment of your beneficiaries. And in some instances, it can lead to conflict among family members – a scenario to which LGBTQ couples with complex family dynamics may be even more vulnerable.

Other potential benefits of a trust include clearer communication of your wishes after your death, tax savings and privacy.

06

UPDATE BENEFICIARY DESIGNATIONS

While your will may serve as the cornerstone of your estate plan, assets in many types of common accounts — such as retirement accounts (e.g., 401ks and IRAs) and life insurance — pass by beneficiary designation. This means that if you wrote in your will that you want all your assets to pass to your spouse but forgot to update your IRA beneficiary designation, which you established 15 years ago and names your sibling, the IRA assets will go to your sibling. As such, designating beneficiaries is a step that should precede the creation of your will and can help inform your decision-making as your will — and trust, if applicable — are drafted.

07

CONSIDER RETITLING PROPERTY

If one or both of you owned property (e.g., real estate, land, etc.) before marrying — and if you live in a community property state — you may also want to weigh the benefits of retitling the property into a "tenants in common" property. The main advantage is that the property would receive a step up in cost basis if your spouse passed away and once again upon your passing (i.e., reducing future tax liabilities). However, you should recognize that this also means giving up 50% of the property to your spouse when you die. Another option in certain states is "tenants in entirety," which allows the deceased spouse's interest in the property to automatically transfer to the surviving spouse while providing some protection from creditors.

08

PREPARE ADVANCE DIRECTIVES

It's never too early to consider how you want your financial affairs to be managed if something happens to you and you are not able to exercise control over your finances. One solution is to grant power of attorney (POA) to your partner or spouse, providing them the legal right to make decisions on your behalf. There are different types of POAs, including a general power of attorney, which would provide your partner or spouse broad authorization to make medical, legal and financial decisions for you. There are also more focused POAs, including a financial power of attorney, which concentrates more specifically on financial decisions.

Additionally, there are several documents related to end-of-life care that you should consider preparing with your advisors to clearly communicate your preferences. This is particularly the case if you are unmarried, as without these documents, your partner may have limited or no rights regarding medical decision-making and treatment plans for you, especially if there has been a history of non-acceptance of the relationship by biological family members. And even if you are married, preparing advance directives is still important for minimizing undue stress or family conflict during what will likely already be a very difficult time for your loved ones.

The most important medical directive is a durable power of attorney for health care, which indicates whom you would like to make decisions for you if you are unable to. Other directives include DNR (do not resuscitate), DNI (do not intubate) and non-hospital DNRs. And to support any of the directives you provide, consider completing a HIPAA authorization form. It ensures that everyone understands your wishes about who has access to your medical records and can communicate with your providers.

09

UPDATE YOUR ESTATE PLAN OVER TIME

Your circumstances can change in unexpected ways over your lifetime. When changes occur, updating your planning documents may not be top-of-mind, but failing to do so can have significant repercussions, such as leaving your spouse, partner or child without sufficient assets or with a burdensome process to claim your assets at an already extremely stressful time.

For this reason, you should proactively review your estate plan every two to three years to ensure no changes are needed. What you uncover may surprise you. Perhaps someone you were counting on to help execute your estate has moved abroad. Perhaps you have acquired an additional property that you need to address. Or maybe you have accumulated enough money to factor charitable intentions into your plan.

In any event, best practice is to regularly review your plan, rather than waiting for a catalyst.

LEAN ON US

While the landscape has improved considerably for LGBTQ couples, the reality is that for most of history, estate planning services, boilerplate trust and will provisions, and common practices were designed for heterosexual marriages and traditional family structures. But that does not mean it's not possible to achieve optimal outcomes for fulfilling your intentions. A good place to start is with these best practices and a supportive team of advisors collaborating on your behalf.

If you need help with any of the above steps, or your financial plan more broadly, please reach out to us. We would be happy to help.

HIGHTOWER
Westchester

440 MAMARONECK AVENUE, SUITE 506
HARRISON, NY 10528
(914) 825-8630
HIGHTOWERWESTCHESTER.COM

[i] Obergefell et al. v. Hodges, Director, Ohio Department of Health (2015). Supreme Court of the United States. https://www.supremecourt.gov/opinions/14pdf/14-556_3204.pdf. Accessed June 2, 2022.