Your Guide to ...

Planning with Pride

Now that we're all "equal" ?!?!

Estate Planning Considerations and Useful 'TAG' Tips For LGBTQ+ Families

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Anna & Beth were together for 35 years. In fact, they were high school sweethearts. After high school, they planned to attend the same college, but Beth's grades weren't quite good enough to get in. Nevertheless, they moved to the same city together, and lived as roommates. After watching Anna stress and study during her first semester, Beth decided college wasn't for her after all. So, she decided to find a full-time gig while Anna pursued a nursing degree. The two created a nice life for themselves over the years. Soon after Anna's graduation from nursing school, they purchased a home and decided to expand their family. After a few rounds of IVF, Beth gave birth to their son Andrew. Both in their early 40's, they were ecstatic. While they held themselves out to the community as spouses, they never married. Even after the Defense of Marriage Act (DOMA) that previously denied marriage rights to same-sex couples was struck down as unconstitutional, even after all the mass wedding ceremonies in front of city hall that followed The June 26, 2015 U.S. Supreme Court decision in *Obergefell v. Hodges*, Anna & Beth opted not to marry.

To them, the institution of marriage was never created for them. They were already a family. They refused to allow this "victory" under the constitution to define their level of commitment to one another. They knew how they felt. They've loved each other since the age of 15! At this point, they did not feel a need to justify their commitment to their friends, families or anyone else who failed to recognize it prior to 2015.

Anna, Beth, and Andrew resided in the state of South Carolina. Anna, then a Nurse Practitioner was the bread winner, and earned significantly more than Beth, a customer service representative at a local call center. When they purchased their home years ago, Beth was unemployed. The two decided then, it would be best to list their home in Anna's name alone. They thought doing so would be best under the circumstances, because Anna had the best credit score, the steady history of income, and needed the tax benefits to offset her income more than Beth did. Anna and Beth had been estranged from their families since deciding to live openly as spouses instead of roommates. As far as they were concerned, no one could infringe on their family life. Anna and Beth had no estate plan, no will, no powers of attorney, no advance directives, no letter of last instruction. NOTHING!

Estate planning was not even a thought. They were relatively young, in good health, and as far as they knew, no one cared enough to mingle in their affairs. While attending a medical conference at Loma Linda University in California, Anna collapsed without warning. Although she had no known medical conditions, she died before Beth could make arrangements to get to California. Beth made funeral arrangements, reached out to family and friends, but was understandably devasted. What was she to do? She was now a single mother with a 10 years old son, or was she? She had an inconsistent work history, and no skill or education to fall back on. At the age of 50, she felt overwhelmed, hopeless, confused. She decided it was best to take Andrew to her friend's ranch in Tennessee. She just needed some time to be one with her thoughts and figure out what to do next. Approximately two weeks letter, Beth and Andrew returned home, to find the locks changed, and Anna's sister, whom Anna had not spoken to in more than 20 years telling Beth and Andrew that they were trespassing. Now where were they supposed to go? This was their home! To make matters worse, Anna's sister began to stare at Andrew, questioning his relationship to her sister. It took only a

few minutes for her to piece the story together. As Beth attempted to drag Andrew back to their vehicle, Anna's sister promised to fight for a relationship with her nephew. What in the world? What was Beth supposed to do now?

Without a will, Anna's family could inherit all the property that she and Beth accumulated during their lives together. Notwithstanding the fact that she was not in contact with them, Beth could spend years fighting the family for things, rights, and relationships, that are rightfully hers.
This story is courtesy of my over- imaginative brain, but this scenario plays out around the country every day! Anna and Beth, like many families, never thought about estate planning. They were regular folks, with few assets. They didn't have anything worth fighting for, or so they thought.

Estate planning is so much more than having a will or a trust. It is so much more than words on paper. It is much more than deciding what happens and who inherits from you after you die. Estate planning may include financial planning, retirement planning, insurance, Long-term care planning, real estate, guardianship, powers of attorney, special needs planning, tax planning, planning for incapacity, etc. Estate planning is about maintaining your personal autonomy. Immanuel Kant, a German philosopher and central figure in modern philosophy, defined autonomy by three themes. First, as the right for one to make their own decisions without any interference from others; Second, as the ability to make these decisions based on one's own independence and personal reflection; and Third, as an ideal way of living life freely. In this context, personal autonomy is basically a person's freewill and ability to decide what he or she wants both while living, and after death.

"Planning is bringing the future into the present so that you can do something about it now." ***Alan Lakein,*** **American author and Time Management Expert.**

When it comes to your family, your assets, your wishes, your legacy, and your personal autonomy, no one can assess value as well as you can. it's up to you to tell the world what each mean to you. Put [a] TAG on it! If you want to maintain your autonomy and protect your loved ones, you may want to consider the following when creating your estate plan:

1. **Will:** The most popular estate planning document or tag. I like to refer to wills as your suggested retail price tag, because wills are subject to the probate process. In many cases, (not so much if we are talking about the elderly or families with special needs), a will-based estate plan is sufficient, and will provide adequate protection for your loved ones. When properly drafted to meet your specific needs, wills can serve as effective asset distribution tools and roadmaps after your death. A properly drafted Will should clearly state what you want to happen to your valuables after your death, designate a trusted individual to carry out your wishes (*executor*), and clearly state who should inherit your valuables (*heirs*). Without a properly drafted will, your assets will go to your blood relatives under your home state "intestate succession" laws. Unless your partner is your legal spouse or is otherwise recognized under state law, "intestate succession" laws will not protect or provide for him or her in any way. On the flip side, Wills can be challenged, invalidated in whole or in part, or contested by long lost cousins. Like the retailer, the probate process could produce a brand-new tag. Sometimes, the outcome may be a

tag that doesn't match-up to the suggested retail tag, aka your will. There are some assets that are not be affected by "intestate succession" laws. They include property transferred to a living trust, life insurance proceeds, funds in an IRA, 401(k), or other retirement account, securities held in a transfer-on-death account, payable-on-death bank accounts, or property you own with someone else in joint tenancy or tenancy by the entirety. With or without a Will, these assets will pass to the surviving co-owner or to the beneficiary you named. The key of course is actually naming someone, and/or modifying designations as needed.

2. **Trust** – There are several trust options available to families who choose to take initiative to put a tag on their valuables. In most cases, their wishes and legacy remain protected. A trust can be created by or for someone who is alive, or by will after their death. A trust created by or for someone who is alive is called a living trust. A living trust can be revocable or irrevocable. A trust created by will after a person's death is called a testamentary trust. A revocable trust can be modified or revoked altogether. While there are some exceptions, an irrevocable trust usually can't be altered. A trust-based estate plan, while not appropriate for everyone, can be beneficial for a number of reasons. Unlike your Last Will & Testament, a trust can protect your wishes and your valuables if you become incapacitated. In case you did not know, your Last Will & Testament is only useful after you die. If you are unable to manage your affairs or direct someone else to manage them for you, your family will face some challenges when trying to help you. Additionally, trust-based planning may help you minimize federal estate taxes, avoid a tag assigned by the probate process, protect yours & your partner's privacy, and keep your assets from passing to family members who did not approve of your lifestyle.
3. **Powers of attorney** – Several documents fall under this umbrella, including the non-durable power of attorney, durable power of attorney, special or limited power of attorney, medical power of attorney, etc. These documents are important no matter who you are because they allow you to appoint someone to manage financial and other affairs. If you are unable to manage or direct others to manage your affairs, having the right documents makes it easier for your loved ones to take care of your business. Collectively, powers of attorney can also serve as your personal autonomy tags. With proper planning, you can decide how your business is handled, and who gets to handle it if you are incapable of doing it yourself. Most importantly, your legal relationship to that person would be immaterial, and he or she can step-in and ensure continued and orderly management of family and business affairs, without the costly and often time-consuming guardianship process. Do you want to maintain your personal autonomy? You should consider putting [a] TAG on it!
4. **Advance Medical Directives** – A number of documents fall under this umbrella, including the living will, durable power of attorney for health care /health care power of attorney, "Do Not Resuscitate" orders, Physician Orders for Life-Sustaining Treatment, etc. These documents are important to have no matter who you are. They ensure a person's wishes are protected if medical issues arise, making them incapacitated. Collectively, they are your healthcare tag. Without proper planning, your partner may not have legal authority to make decisions. Worst yet, some hospitals restrict visitation to immediate family members. If things get ugly, your partner may not even be able to visit you in the hospital. If you are unable to communicate your wishes, your advance directives serve as roadmaps for your loved ones, care-takers, and healthcare professionals. Notwithstanding your marital status, advance directives can carve out rights for your partner that may not otherwise exist if you are unmarried. If you want your partner to be

treated as your next of kin, or have visitation priority if you're hospitalized, you can make that clear in your estate planning documents. Do you want life sustaining treatments until all your resources are exhausted? Do you want to be force fed if you are in a vegetative state? Do you want to go peacefully without human or technological interference? Whatever your wishes, if they matter to you, they deserve [a] TAG!

5. **Funeral Directives** – This is likely a topic you haven't or don't want to think about. What happens to your remains after you die? You can certainly add a provision in your Last Will & Testament to address this issue, but remember, it has to go through probate. If you are unmarried and live in state that does not recognize civil unions and domestic partnerships, your legally recognized "next of kin" could be an unsupportive parent, sibling or distant relative you don't even know. This means your partner could be completely excluded from decisions about your funeral. Depending on your specific circumstances, a funeral directive may be necessary to ensure your final wishes are honored.
6. **Real estate:** For most, real property is the most valuable asset. If you own a house, how you hold title will determine the complexity of closing your estate. On the flip side, you may want to think long and hard before putting a person's name on a deed, to whom you are not married. It is to your advantage to get legal advice from an attorney licensed in your state, before making these decisions. Transferring your interest in real property to a partner could turn into an expensive nightmare if things go south, because once you put a person's name on a deed, you cannot take it off unless you have the person's consent, or a court order. Such a transfer could also create undesirable tax consequences. Proper planning with an attorney could help you avoid some of these issues.
7. **Using a Domestic Partnership Agreement** is one way to assert your intentions as a couple and tell the world that you value the relationship as though you were spouses. Before the U.S. Supreme Court's 2015 decision in *Obergefell v. Hodges* acknowledged the constitutional right of same-sex couples to marry, few states allowed same-sex marriage. Others offered what I call separate and not so equal legal recognition in the form of civil unions and domestic partnerships. Today, States have different interpretations of domestic partnerships, thus the protection extended to unmarried LGBT couples vary from state to state. In one state, domestic partnerships may be available only to same-sex couples. In another state, domestic partnerships may be available to unmarried couples regardless of sexual orientation. In California for instance, at least one person in an opposite-sex domestic partnership must be over age 62 and eligible for Social Security old-age benefits. Domestic partnerships are not recognized in South Carolina. My point is, the States are all over the map...*Smile* While a Domestic Partnership Agreement is an enforceable contract similar to a pre-nuptial agreement, it may not provide adequate protection or streamlined legal processes for dividing your jointly acquired property if your relationship goes south, or in the event of death.
8. **Taxes** – By now, most people know that the Supreme Court decisions *U.S. v. Windsor* in 2013 and *Obergefell v. Hodges* in 2015 made it legal for same sex couples to get married. However, there's still some confusion about taxes, specifically, how married and domestic partners are treated by the IRS. If you are a same-sex couple, and you were married in a jurisdiction that allowed same-sex marriage at the time you were married, the IRS recognizes the marriage. However, Domestic partnerships and civil unions, even if recognized by your home state, are not

recognized marriages under federal law. It sounds simple, but it can be very confusing depending on where you live. For instance, if you are in a registered domestic partnership, and you live in the state of California, you may file as a couple married couple on your state return, but it would not be recognized on your federal return. Ultimately, tax exemptions and protection under federal law are only extended to those couples who say I do.

9. **Insurance** – There are a number of insurance companies that market to the LGBT community and provide joint policies. You and your partner can get insurance coverage for many things, including insurance for temporary or permanent disability, life, health, car, homeowner's, renter's, and long-term care insurance. You should not just assume that everyone in your home is covered simply because you have a policy. If you take a close look at your policy, you will find that it lists a "named insured." Typically, the "named insured" is the vehicle or homeowner. If jointly owned, there may be two names listed on the policy. If you are married and living together, your spouse is automatically covered under your homeowners and auto policy, even if he or she is not specifically named in the policy. If you are in a civil or domestic partnership however, the level of protection extended to your partner will depend on whether or not your relationship is recognized by the state. Lastly, it may seem silly for me to mention this, but it is also very important that you name primary and contingent beneficiaries on all life insurance policies. If you don't, you could inadvertently create probate assets, and such assets may be distributed to family members you don't know or care for.
10. **Retirement assets** – Your retirement portfolio may a private pension, 401(k), Individual Retirement Accounts, Stocks, Bonds, etc. Make sure to review your beneficiary designations each time you have a life changing event. You may also want to consider "transfer on death" designations for your stocks and bonds. If you don't, your hard-earned assets may not go to your partner or intended beneficiary.
11. **Children** – It's true, changes in the law have made easier for LGBTQ couples to expand their families. Today, couples in legally recognized same-sex relationships can petition for step-parent/second-parent adoption, but only a few states* allow second-parent adoption when the couple is unmarried. Generally, a child cannot be formally adopted until the rights of the biological parent(s) have been terminated. In contrast, second-parent adoption is a legal process, by which a same-sex parent, regardless of marital/relationship status, can adopt his/her partner's biological or adoptive child, without changing the partner's legal status as a parent. It's important to note that Family Law is complex and varies significantly from state to state. To ensure your family is adequately protected, it is very important that you consult a Family Law attorney in your state, who is familiar with LGBTQ issues, to help you navigate through all of this. With so many changes in reproductive technology, family dynamics, etc., the law can't keep up. There are still a number of issues & potential issues without clear solutions. That said, it is wise for non-biological parents to get an adoption or parentage judgment to protect their parental rights, and to avoid the possibility of having their child placed through a government agency if the unexpected happens. Even if you are married, or in a recognized civil union or domestic partnership, your family may not be adequately protected if you move or travel. If nothing else, you should prepare a written co-parenting agreement or a custody agreement with your partner. Although the courts are not required to abide by your

agreement, your intentions will be clear to the court in case of incapacitation or custody dispute. Lastly, I want to highlight another issue that could also turn into expensive, time-consuming, psychological nightmare. As previously mentioned, Family Law varies significantly from the state to state. This doctrine is not recognized in every state, but it is important to consider before bringing a partner into your child's life:

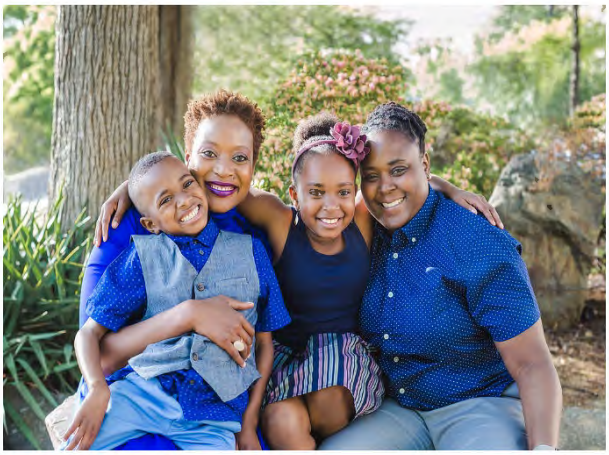
The De Facto Parenting Doctrine

Black's Law Dictionary defines a psychological parent as: [a] person who, on a continuing and regular basis, provides for a child's emotional and physical needs. The psychological parent may be the biological parent, a foster parent, a guardian, a common-law parent, or some other person unrelated to the child. A 1995 Wisconsin Supreme Court[1] case determined that the right to custody or visitation is based on "relationships," rather than marriage, biology, or adoption. Thus. the *de-facto parenting doctrine* has been used to grant some or all parental rights to an adult who is neither the biological or adoptive parent of the child. Depending on your circumstances, that could be re-assuring, or alarming.

In South Carolina, the family court can award custody or visitation to anyone who meets the definition of a "de facto custodian". S.C. Code § 63-15-60 defines a "de facto custodian" as someone who can prove by clear and convincing evidence that he/she has: 1. Been the primary caregiver; 2. Supported the child financially; 3. Resided with the child for a period of six months or more if the child is under three years of age; OR 4. Resided with the child for a period of one year or more if the child is three years of age or older.

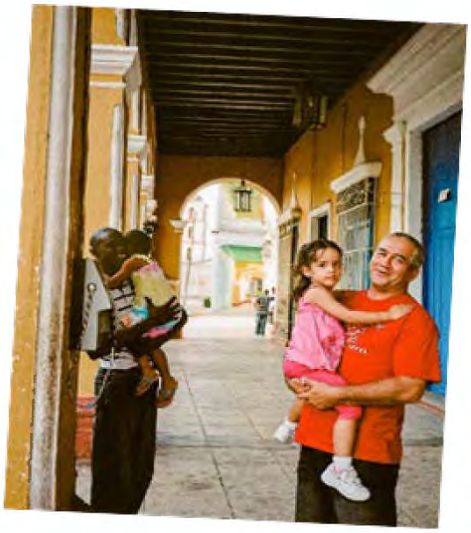
*California[2], Colorado[3], Connecticut[4], District of Columbia[5], Idaho[6],. Illinois[7], Indiana[8], Maine[9], Massachusetts[10], Mississippi[11], New Jersey[12], New York[13], Oklahoma[14], Pennsylvania[15], Vermont[16].

[1] 193 Wis.2d 649, 533 N.W.2d 419
[2] Sharon S. v. Superior Court, 73 P.3d 554 (Cal. 2003).
[3] COLO. REV. STAT. ANN. §§ 19-5-203(1), 19-5-208(5), 19-5-210(1.5), 19-5-211(1.5).
[4] CONN. GEN. STAT. ANN. § 45a-724(a)(3) (providing that "any parent of a minor child may agree in writing with one other person who shares parental responsibility for the child with such parent that the other person shall adopt or join in the adoption of the child").
[5] 4 M.M.D. v. B.H.M, 662 A.2d 837 (D.C. 1995).
[6] In re Adoption of Doe, No. 41463, 2014 WL 527144 (Idaho Feb. 10, 2014).
[7] In re Petition of K.M. & D.M., 653 N.E.2d 888 (Ill. App. Ct. 1995).
[8] In re Adoption of M.M.G.C., 785 N.E.2d 267 (Ind. Ct. App. 2003); In re Adoption of K.S.P., 804 N.E.2d 1253 (Ind. Ct. App. 2004). See also In re Infant Girl W. 785 N.E.2d 267 (Ind. App. 2006) (same-sex couple may jointly adopt).
[9] Adoption of M.A., 2007 ME 123 (Me. 2007).
[10] In re Adoption of Tammy, 619 N.E.2d 315 (Mass. 1993).
[11] Matter of Adoption of D.D.H., No. 2016-CA-01530-SCT, 2018 WL 372381, at *1 (Miss. Jan. 11, 2018).
[12] In re the Adoption of Two Children by H.N.R., 666 A.2d 535 (N.J. Super. Ct. App. Div. 1995).
[13] In re Jacob, In re Dana, 660 N.E.2d 397 (N.Y. 1995).
[14] Eldredge v. Taylor, 2014 OK 92 (2014).
[15] In re Adoption of R.B.F. & R.C.F., 803 A.2d 1195 (Pa. 2002).
[16] In re Adoption of B.L.V.B. & E.L.V.B., 628 A.2d 1271 (Vt. 1993); VT. STAT. ANN. tit. 15A, § 1-102(b) (providing that, if family unit consists of parent and parent's partner, partner of parent may adopt child without terminating parent's rights)).



Whether your family looks like ours…

This one…



THIS ONE…

This one…

Or This one…

Planning is a must!!!

What We Want to Avoid

- Leaving the home & family unprotected.
- Leaving hard earned assets to unsupportive/unknown family members
- Leaving the fate of our estate at the mercy of the probate process.

The Goal

- To live our lives without fear of the unknown
- To protect our loved ones
- To age with dignity.
- To access the best care possible.
- To take control over who will manage finances if we are unable to and under what circumstances.
- To leave the legacy WE choose!

The Next Step

If you or a loved one would like to discuss how to protect your valuables and loved ones, contact us or an Estate Planning Attorney of your choosing. We would be honored to serve you and your family!