LGBT-Focused Estate Planning in 2021 and the Age of COVID: Critical Considerations, Issues and Essential Documents

The National LGBT Bar Association
2021 Annual Lavender Law Conference
July 28-30, 2021

Estate Planning Workshop

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I. *Introduction*

A. *Overview: Criticality of Planning Generally*

Estate planning is an essential task for any adult – a activity no less important to the affairs of the average person than maintaining life, fire, auto or liability insurance; of monitoring and slowly building one's portfolio and base of assets; or of engaging in regular income tax planning.

Estate planning when approached properly need not be overly complicated or emotionally taxing. At essence, developing an estate plan is like every other legal exercise: a process by which a legal advisor can help the client identify their goals, concerns, and possible areas of exposure, and then focus on and present alternatives to help solve for each.

B. *General Barriers to Due Consideration.*

Notwithstanding its importance, clients (and you may be among them, in your own, individual capacity) often fail to engage in proper planning for a wide variety of reasons:

1. *Distraction.* Individuals often avoid the estate planning process like the plague (!). Few people (outside of the T&E bar) readily enjoy discussing what should happen on a person's death and its many attendant issues. Because of this psychological barrier, clients who might otherwise be highly accomplished, or highly focused on self-help, or unusually organized and ordered in their affairs and approach to daily life, are simply avoidant in this area, leaving them (and their families or most important beneficiaries) woefully unprepared and unstructured in the event of death. The author has met clients who have built billion dollar businesses or had tremendous professional and financial success and created hundreds of millions of self-made wealth due to their drive, management abilities, and organizational skills, but who had failed to put in place even the most basic dispositive documents.

2. *Delay.* Clients often will begin the process grudgingly, and then fail to conclude work to the point of signed drafts. A suggested counter on this

theme is to provide every client with whom you work with a concrete schedule of outside deadlines for execution of completed documents.

3. *Uncertainty*. The perfect is the enemy of the good; nowhere is that aphorism more relevant than in estate planning. Clients rarely will find the perfect answers or have all open issues resolved. In this practitioner's experience, it is far better to have in place a set of documents a client is 70% comfortable with and resolve the other 30% later, than wait until the final 30% is decided upon to put in place updated documents (or any documents at all!). In most cases, revised or original documents will represent a 4000% improvement over what the client have in place (including those that have nothing in place!). Do not let clients fall into this trap – push them to complete something with the promise that the documents can be massaged after first execution.

C. *LGBT Specific Planning Issues and Challenges*

Barriers to having a set of estate planning documents are many for the general population; LGBT clients often present another set of difficulties and additional layers of complexity the advisor will need to be aware of, address, and counteract to be effective in getting LGBT clients properly structured.

1. *Vast Changes in Estate Planning Landscape.* Over the last decade and a half, the planning world for LGBT individuals has been rewritten anew. Prior to *Obergefell v. Hodges*, 576 U.S. 644 (2015), 135 S. Ct. 2584; 192 L. Ed. 2d 609; 83 U.S.L.W. 4592; 25 Fla. L. Weekly Fed. S 472; 2015 WL 2473451; 2015 U.S. LEXIS 4250 ("*Obergefell*"), and the case of *United States v. Windsor*, 570 U.S. 744 (2013),133 S. Ct. 2675; 186 L. Ed. 2d 808, 2013 U.S. LEXIS 4921, 81 U.S.L.W. 4633 ("*Windsor*"), LGBT individuals faced incredible hurdles in terms of effective estate planning. Prior to *Obergefell*, the very right to marriage was not universally recognized for same-sex couples, devolving to a determination based on state laws which varied widely, conflicted with each other, and were frequently unfriendly. This in turn presented fundamental problems, including remaining inequity for couples in non-recognition states and an inability of all couples to plan with any comfort, based on the hard reality that mobility among taxpayers meant certainty of treatment could never be guaranteed.[1]

2. *Joint planning.* Joint consideration and disposition is a fundamental building block in planning as virtually all estate plans among individuals with long-term partners are largely or entirely parallel, and while some

[1] For an overview of the many (now largely historical) and difficult issues facing LGBT couples in the pre-*Obergefell* age, see, "Married Couples Living in Non-Recognition States: A Primer" in Texas Tech Estate Planning and Community Property Law Journal, Vol. 7 at 417 (2015).

aspects of this could be countered (depending on the jurisdiction) not all aspects could be easily be accomplished.

3. *Wealth transfer taxes (estate and gift taxes and, for the very wealthy, generation-skipping transfer taxes).* For those clients with means, the U.S. wealth transfer tax laws treat spouses as an unit and allow unlimited transfers between them during life (see Section 2522 of the Internal Revenue Code of 1986, as amended ("Code")) and at death (see Section 2056 and 2056A of the Code, and respective Regulations thereunder) as a result of an unlimited gift and estate tax marital deduction. In effect, spouses, including those with children (and those with children from respective prior families) got a complete exemption from tax on the first to die and could leave all assets for the use of the survivor for life without limitation if they so chose; see below section IV, page 13).

   Prior to *Windsor,* this fundamental advantage was not available to LGBT individuals involved in a same-sex partnership. In the event the first partner of the couple were to die with funds over the requisite amount at the state and Federal levels (the "credit shelter amounts" or the "exemption amounts" - basically, the "free transfer buckets" at the state and federal levels (often different) accorded to all taxpayers), often substantial estate tax would be owed and those assets lost to the family unit, often to the tune of millions of dollars and a substantial part of an individual's or couple's life savings. Indeed, *Windsor*, which invalidated the Defense of Marriage Act (DOMA), was an estate tax case the facts of which focused on this inequity to provide the context for invalidating DOMA, Justice Kennedy writing:

   > DOMA writes inequality into the entire United States Code. The particular case at hand concerns the estate tax, but DOMA is more than a simple determination of what should or should not be allowed as an estate tax refund. Among the over 1,000 statutes and numerous federal regulations that DOMA controls are laws pertaining to Social Security, housing, taxes, criminal sanctions, copyright, and veterans' benefits.

4. *Default Dispositions.* Even more important than wealth transfers taxes were the laws governing disposition of property on death in the event a person (after death, referred to as a "decedent") died without testamentary documents -- a valid Will, or a Pourover Will and Revocable Trust (see below at section III.C at page 11). In such cases, the totality of a decedent's property is disposed of pursuant to state laws of intestacy -- the state's guess at what default dispositions an individual would want if the individual had directed them. Invariably under state laws, this is defined as closest family members -- children, if any, and a spouse. But in cases where one of an LGBT couple passed without a Will in place, in a jurisdiction that did not recognize same-sex statutory or common law

marriage (or in which a domestic partnership relationship was not allowed or, if allowed, was not established or, in either case, did not provide for passage of property to the domestic partner), the surviving LGBT partner was deemed a stranger and non-existent - and bypassed as to the entire estate of the decedent. This invariably lead to truly terrible situations in the case of long-term LGBT relationships, with very little (really no) recourse for the surviving partner.

5. *Medical Decision-Making.* In the event same-sex couples did not have in place medical documents, the default state laws governing health decisions, while varying in application, most often provided that the spouse was the principal default authority to make medical decisions for the affected individual, followed by various family members. In the pre-*Windsor* and pre-*Obergefell* age, this often had devastating consequences for a couple, and the social legal history is rife with examples of long-term, sometimes lifetime, LGBT partners being denied the ability to speak for their loved one because of an inability to qualify for this status.

   See, for example, New York Public Health Law, Article 29-C.

6. *Disposition of Bodily Remains.* Even things as straight-forward and essential as wishes regarding last rights and funeral/burial wishes became subjects of battle and possible anguish among LGBT individual's partners and their families, as under most state laws those rights were accorded to other members of the affected individual's family of origin.

   Thankfully, these factors have significantly attenuated since the *Obergefell* and *Windsor* decisions: importantly, married same-sex LGBT couples can be treated with equal accord as their opposite sex counterparts in terms of priority of decision-making for medical decisions and in their ability to serve as fiduciaries over the estate of an individual dying without having put documents in place. Even more critically, surviving spouses of LGBT same-sex couples now enjoy the same inheritance rights their opposite-sex counterparts have long-enjoyed, avoiding the unjust and nearly always tragic and harsh result the application of the intestacy laws previously provided. The important of *Obergefell* and *Windsor* in the estate planning arena, like so many other areas, cannot be understated.

7. *Current planning factors affecting LGBT individuals*

   Notwithstanding the marked improvement in the planning landscape for LGBT individuals, significant hurdles remain in place for affected individuals in terms of implementing effective planning.

   (i) *Incidence of Marriage*. While the figures appear slowly to be changing, the incidence of marriage among LGBT same-sex couples in long-term relationships (particularly for LGBT individuals in their 40s and above) appears to trail those of their opposite-sex counterparts.[2] While the subject is not free from disagreement, there are likely any number of factors for this, including a desire among older LGBT couples to have been distrustful of -- or philosophically against -- the legal institution of marriage, or to reject in all manner any state-based intrusion into what they consider their purely personal affairs. For older LGBT couples – notably those for whom estate planning is most critical – many survived for so long defining their relationship outside of and in defiance of a legal institution of marriage that excluded them for their formative and in many cases a majority of the adult years, sometimes for nearly the entirety of the relationship of the couple, that the concept of marriage is for them either too foreign, too passé, or simply too late from a relational point of view. Formal marriage and all the legal changes that go with it is something that is just not palatable for this cross-section of the LGBT populace.

As a result, despite the legal availability of marriage, a large subset of the LGBT population – for reasons of philosophical wishes, personal and relational history, age and/or force of habit – remain unmarried and are likely to remain so at death. Thus, the protections *Obergefell* and *Windsor* opened to such LGBT individuals are not meaningful, and proper planning becomes all the more important.

(ii) *Potential for Conflict with Family of Origin*. Acceptance of same-sex and LGBT relationships and marriage has skyrocketed in recent years[3], but the general surveys belie that a still very large segment of the LGBT population does not enjoy this improved level of support for their relationships and partnerships, either in general or in particular with respect to members of their family of origin.[4] In such cases, there are likely to be strains in the

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[2] According to a recent Pew Research Center poll, as of 2017, only 10.2% of LGBT couples were married (see https://www.pewresearch.org/fact-tank/2019/06/24/same-sex-marriage/); this trails the national average for heterosexual couples of 55.7% for those over the age of 18 (https://www.pewresearch.org/fact-tank/2019/06/24/same-sex-marriage/) (using latest census data analysis as of 2006).

[3] Current polling suggests roughly two-to-one approval rating as of 2019, compared to a two-to-one disapproval rating but 15 years earlier, see, e.g., https://www.pewforum.org/fact-sheet/changing-attitudes-on-gay-marriage/.

[4] This is most poignantly evidenced by the heightened levels of homelessness among LGBT youth - those for whom so little family support or active family antipathy existed that often they were kicked out of their home with nowhere to go, resulting in a disproportionate number of homeless youth who are LGBT, see, e.g.,

family dynamics, running from a mere lack of warmth or level of discomfort toward the spouse or partner of an LGBT individual by members of that individual's family of origin (which after death can bubble over into sharper conflict) to outright hostility or distancing (or in severe cases, estrangement) which after an individual's death or during a period of sickness can result in quite significant dispute.

(iii) *Disadvantaged Status.* It is a very unhappy fact that a segment of the LGBT population, often from a lack of family or community support and the resultant instability caused by that, especially in respect of youth LGBT individuals, is displaced or without stabilizing family structure that might otherwise be enjoyed. In such cases, while the need for estate planning documents is nearly always less critical from a tax or even financial dispositive perspective (such individuals often do not have ample financial means or appreciable savings), it remains important from a decision-making perspective (e.g., who gets to control health decisions or the administration process of the estate), personal perspective (e.g., as to control or the disposition of sentimental or personally significant items), and especially a guardianship perspective (e.g., in the event children of an individual or of the couple are involved).[5]

D. *Scope of Presentation.* This outline seeks to set forth certain estate planning fundamentals at both the basic and more advanced levels – issues, planning documents, and concepts that the advisor should be apprised of in order to adequately serve and assist the LGBT clients an advisor comes in contact with. It may be that for some of the lawyers or other advisors reviewing this outline, the concepts apply to them directly as principals and individuals; each conference attendee should consider whether additional focus on estate planning not only for clients but for himself/herself is warranted.

II. *Criticality of Timing: When Estate Planning is Required*

A. *For Clients.* Ideally, at any contact touchpoints you have as an advisor to your clients or the other service population you engage with, you should raise with the client the adequacy or depth of his or her estate planning. While a basic plan does

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https://www.covenanthouse.org/homeless-issues/lgbtq-homeless-youth#, where recent studies estimate a rate as high as 40%.

5 When rights regarding children arise within the LGBT context of same-sex couples, a host of issues exist (including establishment of parentage, and rights of the non-biological spouse upon a separation or divorce); these are beyond the scope of this outline, but see, e.g., http://www.nclrights.org/wp-content/uploads/2013/07/Legal_Recognition_of_LGBT_Families.pdf.

not seem time-critical for a majority of the population, proper planning would indicate there is never a "too early" time to put proper documents in place for the unexpected. Moreover, when the client's circumstances change in a manner that creates a time-critical need for such documents, those circumstances mitigate against getting the documents done, making proper planning far more unlikely to be accomplished as a practical matter.

B. *For Self.* The same timing windows discussed above apply equally to any advisor whose affairs are not properly covered.

C. *Areas to Cover.* Estate planning can be critical for overlapping needs : wealth (minimizing estate taxes); protection of spouse/partner; protection of children (including designation of guardians); passage of property to the "right" beneficiaries (and <u>not</u> to other state-defined beneficiaries).

III. *Estate Planning Essential Documents*

A. *Overview.* Basic estate planning documents consist of dispositive documents (either a Will or a Pourover Will/Revocable Trust combination), medical documents (including a Living Will or medical directive, a Health Care Proxy or medical power of attorney or similar delegation, and, possibly, a DNR and/or organ donation form); and one or more power of attorney forms.

B. *Testamentary Disposition: Wills and Revocable Trusts*

1. *<u>Purpose</u>.* Wills (and the joint Pourover Will plus Revocable Trust combination) dispose of all the client's probate property owned at death.. For many clients, this is most of everything they own, and it is a catch-all general disposition involving many different kinds of assets. A client's "probate estate" excludes certain kinds of assets, however, which are not subject to probate, and which may include certain large blocks or a majority or all of client's assets in certain cases. Non-probate assets include the following:

Jointly titled assets, such as joint bank or brokerage or checking accounts, and jointly titled real estate assets (titled as "Joint", "Jointly", "JTWROS" or "joint with right of survivorship", or, in New York as to real estate owned between spouses, "tenants by the entireties").

(i) Note that in most states, property titled between spouses is presumed to be jointly held. See, e.g., New York Estates Powers and Trusts Law ("NY EPTL") § 6-2.2(b).

(ii) Property designated as "tenants in common" or "TIC" – even if shared 50/50 between spouses or other co-owners, is *not* jointly held and does pass pursuant to probate, as ownership by tenants in common is considered a separate and distinct, individually-owned ownership interest that simply represents a proportionate part of a commonly-held property (and may be any shared percentage of such property).

Life insurance policies, regardless of type (term, whole life, universal or variable life insurance, etc.)

Retirement assets, such as 401(k) plans, 403(b) plans, individual retirement accounts (IRAs), qualified profit-sharing plans, SIMPLE retirement accounts, and the like, all are non-probate assets. These pass exclusively by beneficiary designation (including via a plan's default designations in the absence of an affirmative designation by the participant or account holder) and not to the estate (unless the estate itself is designated as the beneficiary of the plan or account).

Other assets with a beneficiary designation, such as commercial annuities, generally are contractually agreements and pass pursuant to the beneficiary designation recorded on file or, if none, pursuant to the plan's default beneficiaries. Like retirement assets, these would be non-probate assets unless the estate itself is designated as the beneficiary.

NOTE: It is critical in representing LGBT clients (or considering your own situation), that you help put in place not only the "basic" package of documents set forth below, but also attend to these non-probate assets which, in certain circumstance, can constitute the bulk of the client's assets and important or valuable property class.

As a planning measure, clients also invariably are incorrect about the status of such assets, being fallible far more than not in terms of what they believe there documents actually say. The best and only safeguard practice against this human fallibility is to <u>insist</u> that clients provide you with photocopies or written confirmation of the status of these assets, such as written records confirming actual beneficiary designations (which may very well then require changing).

2. *Types.* Wills may be either "stand-alone" or "Pourover" coupled with a "Revocable Trust."

Standalone Will. A "Standalone Will" is self-contained, and typically includes all provisions involving the disposition of property (including provisions for trusts for any family member or other beneficiaries and related appointment of Trustees). A Standalone Will is used typically for smaller estates that do not involve trusts, for clients of more modest means; for clients with extremely simple dispositive plans (all to spouse/partner, all to charity); or clients in a jurisdiction without a problematic probate court system.

Pourover Will/Revocable Trust. A "Pourover Will" is an abbreviated form of Will used with a coupled "Revocable Trust." The Will typically contains only minimal provisions regarding the appointment of Executors, the appointment of Guardians, and, depending on the drafting style of the estate planning attorney, possibly dispositions regarding tangible personal property and real property. It can be a very short document ranging in length (depending on the boilerplate of the attorney and scope of the estate) from 5-10 pages to 20-30 pages.

A "Revocable Trust" is an inter vivos trust -- a trust established during the life of the creator (who may be called alternatively a "grantor", "donor" or "settlor") -- that is fully amendable and revocable by the creator until death. It accomplishes no independent estate planning benefit (such as tax savings or creditor protection) and is designed to work with the Pourover Will and to receive property from it. In fact, most Pourover Wills do only one thing from a dispositional vantage - they give everything the testator owns to the Trustees of the Revocable Trust - and all real dispositive provisions for the client are contained in the Revocable Trust. In this context the Will does very little and the real workhouse document is the Revocable Trust, which is the functional Will.

3. *Key Provisions and Considerations.* The Will and Will-Revocable Trust combination is the key document for estate planning purposes. Key provisions are as follows:

Fiduciaries - Role. Fiduciaries are the key decision-makers and guardians of the assets of the estate and, for minor beneficiaries, the in loco parentis decision-makers and guardians of the person for minor children left behind. In any estate plan, it is critical that such decision-making individuals be selected with extreme care - more than any other decision, it is this that is essential to the smooth functioning of an estate.

Fiduciaries - Types. The following is a summary of the types and primary responsibilities of the fiduciaries typically involved in basic estate planning:

(i) <u>Executors</u>. Individuals (or bank or trust company) named in Will, whose appointments are confirmed by the probate court, who are in charge of estate. Primary duties: collection of assets; payment of debts/settlement of claims; safeguarding and investment of estate property; filing of tax returns; distribution of property to beneficiaries (individuals, charities or trusts for both).

(ii) <u>Trustees</u>. Individuals (or bank or trust company) named in Will (for testamentary trusts) or trust agreement (for lifetime or *inter vivos* trusts). Only testamentary trust trustee appointments must be confirmed by the probate court; trustees of lifetime trusts act on their acceptance alone. Primary duties: investment of trust assets; following terms of trust, most often making distributions as provided by creator or in their discretion.

(iii) Guardians. Those in charge of minor beneficiaries such as young offspring. Appointment effective only if neither parent is living and if confirmed by Court using best-interests-of-child test as guideline. May separate guardian of the *person* from guardian of the *property*: the former makes the *in loco parentis* decisions, such as how a child might spend his or her summer; the latter controls any property that otherwise would pass to the child outright until the child reaches majority.

(iv) NOTE: Most often, clients will appoint the same individuals to these roles -- deciding whom they most trust among their trusted circle. But different individuals can fulfill different roles. For example, one trusted friend might be a whiz at business, management and investment decisions but not so terrific at parental-type interactions (he or she could be appointed as Executor and, possibly, Trustee); another might ooze warmth and support and connection with kids but be less comfortable with investment or management skills (he or she might be appointed as Guardian rather than Executor or Trustee). Of the various fiduciary roles, the Trustee position is most hybrid and potentially long-lasting; if one person is not the obvious choice for business/management/investment and parental decisions, a group of individuals can be appointed as Co-Trustees to balance each other, or the draftsperson can employ a *Special Trustee* or *Limited Trustee* concept to allocate separate roles to separate individuals.

Finally, note that if trusts are employed and Guardians are named for minor children, and if assets are left in trust for beneficiaries, it is important that the Trustee and Guardians, if differently persons, get along and agree in a decision-making process, as the personal decisions will be made by the Guardian of the person, but the Trustee in such case will hold the financial purse-strings.

Fiduciaries in Context of Dispute or Distance. Selection of fiduciaries is critical with any estate plan (and particularly so in the event much discretion is employed in the plan and the fiduciary has broad latitude to determine, for example, the timing and amount of distributions). However, this is even more the case in the event the client in the same-sex relationship does not enjoy a close relationship with his or her family of origin or in the event the partner of the same-sex relationship client is not accepted by the client's family, or if the client himself or herself does not enjoy the support of his or her family of origin due to his LGBT status. Any potential problem areas will be more likely to increase after the death of the client and will be magnified in the event of open dispute or hostility with the family of origin or -- human beings being generally what they are -- as the net value of the estate left behind by the client increases. In such cases, it is critical for the client to not only carefully select his or her fiduciary, but to provide context to the fiduciary in anticipation of future challenges.

Key Dispositive Provisions. A typical dispositive document separately addresses the following key areas of assets:

(i) *Tangibles*. Generally, physical objects - anything you can see or touch. Clients may wish to leave certain items of personal or emotional significance to their partner, close friends, or various family members.

(ii) *Real Property*. Any residential real property is often separately disposed of, again most often to a surviving spouse or partner if not already jointly owned.

(iii) *Cash Legacies*. Dollar amount gifts to individuals.

(iv) *Credit Shelter Bequest*. If the client has assets of an amount in excess of the exemption (or free-of-tax) amounts, often a trust is created to hold this amount. (See below, section IV at page 13).

(v) *Residue*. The balance of property is called the "residue" or "residuary," and is most often given entirely to the surviving spouse (certainly as to amounts in excess of exemption amount, in order to be able to defer estate tax until the death of the survivor) or partner, or split between any surviving spouse or partner and descendants, or other family members or friends.

C. *Testamentary Dispositions: Intestacy*

1. *Intestacy.* In the event an individual dies without a Will, state law will supply the terms of disposition. This means that anyone without a Will at their death *has* decided what to do with her or her property – they have decided that the default state law division is acceptable.

2. *Hardly ideal.* Leaving things to default state law is hardly desirable, whether the client is LGBT or not. Any number of disadvantages accrue: the choice in fiduciary is not guaranteed; if the client is of sufficient means, potentially significant tax that could be avoided or delayed will accrue; all dispositions pass outright and only to those individuals the law selects as the client's presumed favorite choice in default - with no amounts passing to anyone else. The fiduciaries who do serve typically will have less flexibility, less power and fewer options than would be the case if a document were drafted. The arrangement will be wholly insufficient to provide benefit to beneficiaries and provide credit protection. And that's just to start.

3. *LGBT Clients - Intestacy Potentially Disastrous.* In the event your LGBT client is married in the post-*Windsor*, post-*Obergefell* world, all the disadvantages to the surviving spouse and family listed above still accrue, but at least the surviving spouse has protection with the benefits now recognized as to marital status. However, in the event the client is *not* married, but is partnered, the result is potentially disastrous as the surviving partner will NOT be entitled to any benefits, and will NOT have priority under state law to even serve as an Executor. In this sense, the client is putting the surviving spouse at the mercy of the deceased partner's family. While the universe of in-law jokes will attest to universal degree of some tension between one partner and family of origin of the other partner in the couple, this is often compounded in the case of LGBT couples, especially among certain demographic groups. It is critical for LGBT clients who are partnered in any meaningful or long-term relationship, especially if it is a spousal equivalent, to have in place a valid and up-to-date Will.

D. *Medical Documents*. A basic estate planning package for a client not only includes testamentary dispositive documents, but also (i) a Health Care Proxy, and (ii) a Living Will.

1. *Health Care Proxy.* Also called a medical power of attorney or appointment of health care surrogate, this document provides that if the principal is ever unable to form or to communicate his or her own views regarding medical treatment or decision making, an agent (a health care proxy or medical power of attorney) will have the power to make such decisions for the principal. It is an agency delegation solely for medical decision making, and is always fully revocable.

2. *Living Will.* Also called a health care directive, this document is not an agency delegation but merely a statement of intent regarding desired provision of or withholding of medical treatment under certain circumstances, with the goal of memorializing that intent in the event future decisions need to be made. Of all estate planning documents, this is perhaps the most purely personal and least "legal" -- clients should

manifest their own wishes based on their own priorities, beliefs and personal/religious background and convictions. Expressions can range from "pull the plug under all circumstances" to "make valiant efforts for 30 days, then let me go" to "life is precious so keep my body alive at all costs, regardless of my mental function or state" -- and every permutation in between. Similarly, this is the toughest document to discuss with clients and the one in which a planner often experiences the greatest degree of discomfort and mental "push-back" -- but this document is critical to have not only to ensure the carrying out of the client's wishes but also for surviving loved ones who will anguish at the choices they face in the absence of knowing what the client's views and intent on such difficult and personal areas really is. If the client will not do it for himself or herself, tell the client he or she *must* execute one for the psychological well-being of those he or she leaves behind.

E. *Powers of Attorney.*

1. *In General*. A power of attorney is an agency delegation to another person or persons (agents) providing them with legal powers to act for an on behalf of the client (principal). Powers of attorney can be effective with respect to most powers of legal action but are not effective as to medical decision making, which generally are reserved to a specific health care proxy or medical power of attorney. The power of attorney can be general or limited (and if limited, as to any scope, matter, power or time period desired), and may be given to one or more individuals, or a series of one or more individuals, all as desired by the principal. While powers "coupled with an interest" (generally, used in business transactions) can be irrevocably given, powers of attorney when used in estate planning are invariably revocable at will by the client.

IV. *Tax-Related Considerations.*

A. *Overview.* For clients with sufficient means, adequate estate planning not only involves making sure the dispositive wishes of the client are met, but in minimizing what is a very significant estate tax hit -- amounts running to the millions of dollars, and which in some cases comprise a full one-half of the client's entire net worth (with rates in the past 20 years running as high as 55%, with a current 40% rate at the Federal level with some state levels running an additional 9.6%).

B. *Federal System: Federal and State Level Taxes.* We live in a federal system of government, and in the estate tax world (like many other areas of the law) that means we need to consider both Federal and state-level considerations when planning for the estate tax. Prior to 1998, this system was comparatively more simple -- the Federal government imposed an estate tax on assets owned at death, and then virtually all states abandoned their own separate tax system and adopted a "soak-up" or "sop up" tax system, whereby they simply accepted as their state-level based estate tax a fixed slice (generally, 16%) of the Federal estate tax. Thus, while estate taxes were a concern, *state* estate taxes were not -- an estate planner simply focused on minimizing the total amount of tax, and there really were virtually no state considerations and nothing that altered the total amount of tax.

Beginning in 1998, around the time of the first significant increase in the Federal exemption amount, certain states began to move in the opposite direction. Fearing a loss of revenue base as the exemption amount increased and fewer and fewer estates would be subject to estate tax, states began to "de-couple" from the Federal system -- limiting their exemption amounts to levels lower than the Federal amount or lower than a fixed amount -- effectively imposing their own system of estate tax. This complexity increased further when in 2001 the Economic Growth and Tax Relief Reconciliation Act of 2001 (EGTRRA) did away with the state death tax credit amount (the pie-sharing mechanism that simply divided a fixed pie between the Federal and state slices via apportionment) which was repealed in a power-grab by the Federal government, with the credit amount (a dollar for dollar offset) being replaced by a deduction (resulting in only a marginal tax rate benefit, not dollar for dollar) the ultimate effect of which was to increase the total tax by imposing not only Federal but *also* state level tax. Further complicating the picture was the fact that state tax systems diverged and were inconsistent in certain respects -- and one could never plan for certain with a client as the state systems as a whole were changing more frequently than the Federal one and a planner could never be certain in which state the client would die domiciled -- you could plan for your client as a life-long resident of New York against New York's system, but they might move to New Jersey or Connecticut to be with family in their later years -- or to Florida, or Arizona, or California for weather-related concerns, etc. etc. - Planning accordingly became much more difficult.

C. *Exemption Amounts and Incidence of Taxation.* Against this increased complication is a welcome fact. At least at the Federal level, only a tiny fraction of the population ever is subject to estate tax. Over the past 20 years, exemption amounts have been markedly increased. Set forth below are the Federal "credit shelter amounts" - now called the applicable exclusion amount -- which is the amount of property covered by the Federal estate tax credit each taxpayer is allowed:

Year	**Exemption Amount**
1997	**$600,000**
1998	**$625,000**

1999	**$650,000**
2000	**$675,000**
2001	**$675,000**
2002	**$1,000,000**
2003	**$1,000,000**
2004	**$1,500,000**
2005	**$1,500,000**
2006	**$2,000,000**
2007	**$2,000,000**
2008	**$2,000,000**
2009	**$3,500,000**
2010	**$0 or $5,000,0000**
2011	**$5,000,000**
2012	**$5,120,000**
2013	**$5,250,000**
2014	**$5,340,000**
2015	**$5,430,000**
2016	**$5,450,000**
2017	**$5,490,000**
2018	**$11,180,000**
2019	**$11,400,000**
2020	**$11,580,000**
2021-2025, with annual inflation adjustments	**$11,700,000**

2026	**$5,000,000 (adjusted for inflation)**

Accordingly, as of today, only the tiniest slither of the general population pays an estate tax -- estimated currently at 0.1% -- and thus Federal considerations only come into play with a very wealthy subset.

However, your clients may be in this rarified subset, in which the tax considerations are substantial and can run into the millions. Even if your client is not among the 0.1% of the population, it is currently the law that absent further legislative action the Federal exemption amount will decrease after 2025 back to $5 million per person (adjusted for inflation). Given current Democratic control of the White House and Congress, it was expected that the President's tax proposals could have decreased this expanded amount earlier than 2025 (and that is still always a risk), but to the surprise of many in the field, an earlier "sunset" of the expanded exemption amount was not included in the proposals. It is surmised that the President and his team chose not to expend political capital on this aspect of the tax law given the sunset already built into the law (due to reconciliation passage of the original legislation) and chose instead to focus on other revenue-generating areas. A rollback of an exemption rate even lower than $3.5 million remains a theoretical possibility but at this point appears less likely.

Moreover, while not the 50% hit that is the Federal estate tax, state estate tax exemption amounts are noticeably lower:

State	Exemption Amount
Connecticut	**$7,100,000**
District of Columbia	**$4,000,000 (*down* from $5,762,400 in 2020)**
Hawaii	**$5,490,000**
Illinois	**$4,000,000**
Maine	**$5,870,000**
Maryland	**$5,000,000**
Massachusetts	**$1,000,000**
Minnesota	**$3,000,000**

New York	**$5,930,000**
Oregon	**$1,000,000**
Rhode Island	**$1,595,156**
Vermont	**$5,000,000**
Washington	**$2,193,000**

In New York, for example, the situation is even worse. Under current New York estate tax law, there is in place something called the estate tax "cliff" which changes what most folks believe would be the normal operation of an exemption amount that "exempts" or protects all amounts below it from tax. Instead, in the event total assets at death exceed just a tiny fraction of the exemption amount (5%), New York steeply increases its marginal rate to phase out the exemption amount, resulting (for estates over 105% of the exemption amount) with a flat tax of 16% *on the entire estate*.

D. *Basic Techniques to Reduce Potential Estate Tax*

1. *Lifetime Gifts.* Each year, each taxpayer can gift up to the annual gift tax exclusion amount ($10K per year, adjusted for inflation - for 2020, $15,000) per person, to an unlimited number of individuals, without gift tax and without reducing or "eating into the taxpayer's combined lifetime and at-death exemption amount.

2. *Medical and Tuition Payments*. In addition to the annual gift tax exclusion amount, each taxpayer can transfer *unlimited* amounts to cover unreimbursed medical and tuition expenses for an unlimited number of individuals (such payments must be made directly to the medical or educational provider, and <u>not</u> to the individual being provided those services).

3. *Utilize Exemption Amounts Prior to Reduction*. Current exemption amounts are significant but are scheduled to sunset in 2026 absent further legislation (and could sunset earlier depending on the results of the next election). The IRS has indicated a current position that it will not "clawback" gifted amounts that exceed a subsequently reduced exemption -- so there will be no estate tax penalty for utilizing the increased amounts, and a "freebie" to lose, and without penalty.

E. *Advanced Techniques to Reduce Potential Estate Tax*

1. *Grantor Trusts*. Grantor Trusts are trusts that are separate entities for property and estate tax purposes but which are considered *not* separate

from the grantor or creator of the trust for income tax purposes. This means that while all income and growth of the trust accrues in full to the benefit of the beneficiaries and remains with them, all income tax obligations of the trust fall on the grantor who pays all the income taxes of the trust. Over time this is a powerful technique that can be used to allow estate-tax free transfers of the amount paid in income tax by the grantor whose economic benefit accrues to the beneficiaries.

2. *Loans to Grantor Trusts.* Where the client has sufficient means, amount is grantor trusts can be leveraged via the process of providing loans to the grantor trusts which will in effect increase the amount "at work" in the technique. Typically, a grantor will gift or "seed" a grantor trust with a fixed amount of money. Thereafter, pursuant to a written promissory note executed in connection with the loan and made with interest rates that comply with the minimum rates required by Section 7872 of the Code, a grantor will loan additional amounts to the trust. While there are no technical caps on the amount of the loan, the general thinking is that such amounts must correspond to amounts that would track business or commercial aspect of such loans, with a rule of thumb being no more than a 10:1 debt-to-capital ratio (though conservative planners will use a lower ratio).

3. *Qualified Personal Residence Trusts (QPRTs).* This technique is most effective in high-interest rate environments (not the one currently in place) and is fairly inflexible once put in place, but can be helpful for the LGBT client who owns a family, vacation, or weekend home they are fairly certain they wish to keep in the family over the long term. This technique involves the creation of a trust to which the donor transfers property owned by the client, retaining an income (the right of use of the property) interest for a term of years. After the expiration of the term, the property in the trust will pass for the benefit of the next generation. If the donor wants to remain in the property, the donor will have to rent the property back from the trust. The technique works because, for property that the LGBT client wishes to retain long-term, with this technique the "retained" use by the client over the term of the trust is given "credit" for estate tax purposes, with only the remainder value being subject to tax. (If held by the client until death, the value of the entire property is included and subject to estate tax). Note there are several limitations this technique has: (i) once in place, it is inflexible and cannot be adjusted; (ii) there can be no guarantee of retained right to use the property after the term of the trust; (iii) the remainder beneficiaries control the property after the term, and (iv) the technique will only complicate the client's life and result in no tax benefits if the client dies during the trust term.

4. *Grantor Retained Annuity Trusts (GRATs).* Grantor Retained Annuity Trusts, or "GRATs", are trusts established for a particular term by a donor who transfers property to the trust, retaining an annual annuity payment of

a pre-determined amount from the trust. In the event property remains in the GRAT after the termination of the term (due to outperformance of investments held in the trust), any such property can pass to beneficiaries without gift or estate tax consequence (but with generation-skipping transfer tax consequence). Under current law, this technique is highly favorable as the donor has the opportunity to transfer property potentially at reduced or near-zero tax cost with comparatively little difficulty or limitations or cost, as compared with other tax planning techniques.

V. *Practical Planning Ideas for the LGBT Client*

A. *Ensure the Basic Documents are Executed.* It is critical that the LGBT client, especially the unmarried LGBT client, have in place the essential planning documents noted in Section III above, which are even more appropriate in the age of COVID:

1. *Will/Pourover Will & Revocable Trust.* Without this:

(a) An unmarried LGBT client's surviving partner is not guaranteed ANY disposition of property and is a legal stranger to the estate, and generally will receive <u>nothing</u>. Surely this is not what any client would desire.

(b) The family of origin of the deceased client will have priority as Executor of the estate of the deceased client, and will be in full control property upon the client's death. This could put the surviving partner of the client completely at the mercy of the family of origin and, depending on the facts and particular assets owned, this could be disastrous. Consider the client whose family disapproves of their child's so-called "lifestyle" or "life choice" and has had little connection with child over the years and has little or no contact with the child's long-term partner, with whom the child has been living for years in a common home and whom the family dislikes from the partner's mere position as such. Imagine the client and his or her partner's residence (e.g., their primary house or apartment where the two have lived together for more than a decade) is owned in title by the client, a not uncommon occurrence. Now imagine the client is suddenly killed in a tragic accident or otherwise dies completely unexpectedly. Within a mere matter of weeks from such unexpected death, the client's family of origin can kick out the child's partner as a squatter and trespasser, with no legal rights to the property or to continued presence whatsoever, despite the fact that it was the partner's home for years. The surviving partner loses the property no matter what; but also being at the mercy of a potentially very unfriendly Executor who can make life miserable for the surviving partner adds incredible insult to already unjust injury.

2. *Medical Documents.* Without these:

(a) *Health care proxy:* should the client ever be in an accident, or get ill, or otherwise need medical care, and be unable to form or communicate with respect to a medical decision, the client's partner, if unmarried, again in virtually all states will be a legal stranger with no right to make medical decisions or judgment calls as to the care of the client or to voice and support what he or she knows are the client's wishes with respect to certain procedures or medical situations. Even more than the complete disinheritance of a surviving partner, this can be utterly devastating -- as the partner could be pushed aside only to watch members of the client's family of origin, and sometimes even complete emotional strangers to the client themself -- take over and take control of all medical decisions and sometimes the very fate of the client at the end of such client's life, all while the surviving partner looks on powerless, sometimes even as the family demands decisions and treatment paths the surviving spouse knows to be utterly against the client's wishes.

(b) *Living Will.* Without this document, the client's wishes regarding medical treatment may not be respected. Worse, in the event the client has a particular wish regarding delivery of or withholding of care he or she has expressed to the partner, but the family of origin has different ideas, the partner will be powerless, forced to watch the family impose something the partner knows the client did not wish. This document can be a single page, even downloadable off the internet - there is NO excuse for every person not to have this document.

3. *Powers of Attorney*. Without these:

(a) If no one has any power, then the difficulties of accessing assets, attending to a business, claiming benefits, and conducting financial transactions all increase greatly.

(b) Where transactions or legal arrangements must take place, a guardian of the property will need to be appointed -- this is time consuming and can cost thousands or tens of thousands of dollars (mostly in legal fees).

(c) Where the client and his or her partner are involved in a small business, or otherwise are involved in a joint venture or activity, and/or hold assets in a joint manner, and there exists tension between the partner and the client's family of origin, if the family of origin acts (by virtue of a prior power of attorney or through being appointed as guardian of the property), obvious difficulties could arise.

B. *Fund Revocable Trust During Life.* A client using the Pourover Will-Revocable Trust option has the option to fund the trust during life or at death. No funding is necessary for the device to work as intended; in certain circumstances, however, additional benefits accrue when funding the trust with assets during life.

1. *Consequences of Funding.* Because the trust remains revocable by the creator at all times prior to death, all property transferred to the trust in funding can be re-vested in the creator at will at any time by decision of the creator alone. Hence, the creator is not really transferring assets away from themself in a dispositive sense but more shifting assets from one pocket to another. Due to the ability to revoke or modify the trust at any time, funding a revocable trust also is a non-event for estate and gift tax purposes as the creator has not relinquished "dominion and control" necessary for a transfer to crystalize to the stage of a taxable transfer.

2. *Non-LGBT Reasons to Fund.* There are plain vanilla reasons any client might want to fund a revocable trust during life. These include:

(a) *Avoidance of Probate*. In certain states (California being salient) the probate process is extraordinarily difficult and intrusive; for this reason, clients in these states often are counseled always to use the revocable trust device and to fund their revocable trusts with all their individually-held assets in an effort to bypass the probate process entirely, or as much as possible.

(b) *Access to Assets.* Upon a client's death, their surviving family often must wait weeks and more often months for the probate process to be completed -- this involves meeting with lawyers, getting a probate petition together and submitted, sometimes using formal process to serve interested parties, sometime supplementing the petition, and always waiting for the probate court to render its decision. During such time, both final expenses of the decedent (expenses of last illness, final credit card and utility charges, other obligations, etc.) and also first expenses of the estate (lawyer and probate filing fees, funeral and memorial expenses, etc.) must be paid and, pending probate, family members will need to go out of pocket to fund such expenses. This sometimes can prove financially difficult. If, instead, there is a funded revocable trust in place, then <u>immediately</u> upon death a decedent's family members, through the Trustees of the Revocable Trust, have instant access to all funds in the Revocable Trust and can utilize such funds to pay such immediate expenses.

(c) *Lifetime Benefit - Management of Incapacity.* Similar to a power of attorney that allows for an agent to have legal authority upon a client's incapacity, having a funded Revocable Trust in place greatly increases the ability of designated individuals (here, Trustees) to seamlessly manage property and assets and investments, and in many cases powers given to Trustees under a trust agreement are far more broad, and much easier to implement, than powers given to an agent under a Power of Attorney designed to be used for the same purpose.

3. *LGBT Reasons to Fund*. All of the above benefits of funding a Revocable Trust accrue to the LGBT client as well, but there are significant additional benefits to the LGBT client in funding in the event there is any tension or open hostility between the client (or his or her partner) and the client's family of origin:

(a) *Immediate Transfer of Asset Ownership*. In the event of tension or hostility with the client's family of origin, a concern of LGBT clients is always for the security of their surviving partner against challenges after death of the client. Were the family of origin to be successful in a Will contest or in the event there is no Will, the surviving unmarried partner of a client would not receive any of the client's property, which rarely matches the wishes of clients in relationships. While there are ways to challenge a lifetime transfer by the client to a trust revocable by the client, the bases are few and the risks of any challenge are greatly diminished (especially if the transfer is done some time prior to death). Rather than hope a testamentary plan to take place under a Will goes through without challenge, property already in a Revocable Trust at the time of death will already vest in a vehicle providing what the client wants, subject only to a possible challenge that, if made, is much less likely to succeed. Possession being 9/10th of the law, this is an infinitely better position for the LGBT client's surviving partner to be in. Similarly, if the client becomes incapacitated, the partner may have instant access to such assets if the trust terms so provide (and they should); where the LGBT client is the breadwinner or source of funds, this may be essential to the economic well-being of the partner.

(b) *Immediate Control of Assets Post-Death or Incapacity*. In the event the LGBT client dies or becomes incapacitated, the survivor partner is put at risk in another way: not only do they not have assets, but they do not have control over those assets and in any challenge may not be awarded control until after a prolonged and expensive fight. In contrast, the terms of the Revocable Trust may provide that at the moment of death (or incapacity), the client's partner (or other desired control person) is vested with immediate control, avoiding problems, assertions or power struggles with the client's family of origin at the moment of death and decreasing likelihood of control interruption.

(c) *Decreased Likelihood of Challenge*. In the event the client's health declines toward the end of their life, in any challenge by the client's family of origin, the client's mental status may be challenged as a grounds for upsetting the client's Will. A lifetime transfer by the client, well ahead of any physical or mental health issues, is a near certain deterrent to any possible challenge along these lines.

4. *Mechanics of Funding*

(a) Funding a Revocable Trust is easy from a mechanical perspective. A client simply needs to transfer assets to the trust, which can be accomplished easily by: (i) establishment of a bank or brokerage account in the name of the trust and the transfer of assets to the account; (ii) retitling an existing bank or brokerage account from individual name to the name of the trust; (iii) retitling or registering other assets (e.g., car or safe deposit box) in the name of the trust; or (iv) with respect to tangible personal property, executing a general assignment instrument that conveys such property to the Trustees.

C. *Own in Joint Title.* For the client with more modest means, the same immediate transfer of control on death can occur by titling assets in joint name, which provides full ownership of and rights to the property in the names of both the client and partner. Compared with the Revocable Trust approach, several differences exist:

1. *Ease.* Purchasing or retitling property in joint name is much easier and avoids the difficulty and costs of establishing the Revocable Trust.

2. *Incapacity.* While a Revocable Trust can provide for an immediate transfer of control to the partner on a client's incapacity, joint title of property while one co-owner (the client) during any period of possible incapacity of the co-owner is more problematic, as banks and other counterparties may require all co-owners to sign or evidence action, and may require as a result an official determination of incapacity and appointment of a legal guardian of the property to act for the incapacitated person. A Revocable Trust is more flexible by vesting control in the co-Trustees upon incapacity without need for formal determination - the determination of what constitutes incapacity, the triggering mechanism, and even any reinstatement of powers all can all be determined under the trust instrument.

3. *Creditor Protection.* Joint property held in trust generally provides little protection from creditors of one co-owner. There are exceptions; for example, a non-debtor spouses of real property held as tenants by the entireties in New York enjoy some creditor protection during the period of joint ownership from the creditors of the creditor spouse (and all creditor rights vary under and are determined by state laws). But generally speaking little or no creditor protection is provided. In contrast, a revocable trust can provide the non-creator spouse or partner with near complete access to trust funds, substantial control over investments, meaningful dispositive powers over the trust assets during life and at death -- all while providing near complete creditor protection if the trust is a "spendthrift trust" which is easy to structure with the inclusion of certain form language.

4. *Tax Benefits.* A Revocable Trust can establish a family or "credit shelter" trust that provides the surviving spouse with substantial access to and control over assets but which, for tax purposes, does not pass to the spouse or qualify for the marital deduction and thus will utilize the federal and state exemption amounts (or "free buckets") that can provide the family with tax savings. All joint property vests in the survivor immediate on the death of the co-owner; for spouses, the property is entitled to an unlimited estate tax marital deduction, but that is only a *deferral* and not avoidance of the potential tax until the death of the surviving spouse. While portability (the carrying over of unused exemption from the first-to-die to the survivor) was introduced at the Federal level since 2011, it does not exist at the state level of many states and does not apply for generation-skipping transfer tax purposes; see Section IV at page 13 for more on tax considerations.

5. *LGBT Clients with non-married and non-U.S. Partners.* In the event an LGBT client is not married to their partner, or even if married if the partner is not a U.S. citizen, establishing joint ownership may result in a gift of one-half of the value of the property that will not be subject to the marital deduction and thus could create substantial transfer tax. Using a Revocable Trust at least postpones this and can more easily avoid the imposition of such tax altogether. Results can be even more punitive for non-resident, non-citizen donors or decedents who generally have a vastly reduced gift and estate exemption amount of only $60,000.

D. *Attend to Definitional Issues of Descendants.* LGBT couples who have children most often employ one or more forms of assisted reproductive technology (ART) to help produce their offspring. This often means that both spouses/partners may not be biologically related to each child. In such case, it is essential to get advice both before and after the children are born from local counsel specializing in this area to take whatever measures are necessary to insure inheritance rights. At the generation immediately above the child (i.e., each parent in the couple), this is easily addressed (see Section VI.D at page 27), but note it is still essential to address in estate planning for any family where inheritance can be expected from any family member other than the parents.

E. *Engage in Tax Related Planning*.

1. *LGBT Married Couples*. Post *Obergefell* and *Windsor*, married LGBT clients are positioned for Federal and state estate tax purposes in all respects the same as opposite-sex married individuals. Married LGBT clients may avail themselves of the unlimited marital deduction to pass any amount of property to their same sex spouse without imposition of estate tax until the death of the surviving spouse. However, as with opposite-sex married couples, this represents only *deferral* of estate taxes; for those couples whose combined net worth exceeds the exemptions of both (and for state planning purposes, even lower), tax planning is still necessary.

2. *LGBT Unmarried Couples*. The reality is that a large number of LGBT clients remain unmarried; for these couples, *Obergefell* and *Windsor* do not change anything and the tax exposure for them is increased. ,Affected clients should engage in basic and/or advanced estate tax planning techniques as noted above in Section IV.D and IV.E beginning at page 17.

VI. *Related Planning Areas Not Covered Here*

Not all of life falls neatly into little boxes, and LGBT clients face many issues in the estate planning process that are not covered here and may or may not be in the domain of competence of the typical estate planner, but which are highly relevant to the client's overall family planning and which are important to address. These include:

A. *Marital Property Rights.* Marriage by its very nature creates rights of spouses to property of the other. Most states limit complete freedom of testamentary disposition in the case of a married individual. Virtually all states provide the spouse of any individual with a "forced" share at death, typically called an "elective share" that is in the range of one-third of all probate assets of the individual, plus (varying somewhat by state) certain "testamentary substitutes."

In addition to testamentary rights, marital status also vests each spouse in certain property rights of the other upon dissolution of the marriage prior to death. These rights vary across states and are dependent as a first threshold whether or not the state is a community property state, and whether the state follows "common law" versus "equitable distribution" rules. For example, an equitable distribution state might consider the following among the factors governing division of property:

Assets in hand prior to the marriage ("separate property"), whether as a result of the person's own efforts or as received by a person as a result of a gift or inheritance.

Assets acquired during the marriage ("marital property").

The contribution of one spouse as to growth and appreciation in value of separate property.

The relative level of wealth of each spouse.

The relative earning capacity of each spouse.

The degree to which past, current and future earning capacity of a spouse has been effected by the role such individual assumed in the marriage, as well as the degree to which his or her efforts affected the same in the other spouse.

The circumstances attending the dissolution of the marriage.

A court in an equitable distribution state will balance all of these and other factors in considering what division of property it believes is fair based on equitable principals (see, e.g., New York Domestic Relations Law § 236-B) and, in fact, in certain states such as New York, the division of property itself is called "equitable distribution."

Both the marital rights that vest by operation of law in a spouse on death ("elective share" or "intestacy" rights) and the marital rights that vest in a spouse upon dissolution of the marriage prior to death ("equitable distribution" or the equivalent) can be altered by the couple prior to the effective event by legal agreement, often a pre-nuptial or post-nuptial agreement. The standards for enforceability of such agreements and their operative effect, as well as the specific state rights that must be accounted for and negotiated, should be addressed by counsel competent to do so - sometimes a trusts and estates lawyer, but most often by a matrimonial counsel best versed in such agreements.

B. *Non-Marital Property Rights.* In the case of LGBT couples for whom, for all the reasons mentioned before, marriage (even with its availability post-*Obergefell)* is simply not an option, the myriad issues involving a fair division of property are just as fraught. They can arise when, for example, the parties change their economic position based on a functional marriage or family arrangement, or when assets of one party may be utilized to start a new venture or business endeavor owned by the other partner. In such cases, the same key driver for estate planning professionals applies -- the ordered, structured division of property and the preserved intent of the parties -- but it is even more essential that the parties come to contractual or and ownership arrangements that reflect their agreed upon intent as to the fair and appropriate division of all assets upon conflict or the dissolution of the relationship. Often such arrangements can be constructed from one or a combination of use agreements, contractual property sharing agreements, buy-sell agreements, equitable structuring of equity ownership (including shifting ownership or conversion or purchase rights upon certain events), and the like.

Whether with respect to marital property rights or non-marital property rights, in addressing such rights it is essential to include comprehensive approach to all possible scenarios, full disclosure of facts and assets (in the case of pre- and post-nuptial agreements), and representation of each party by separate and fully independent counsel.

C. *Familial Rights of Children in LGBT Families.* A host of issues can arise with respect to offspring in LGBT families upon separation of the parents or dissolution of the relationship of the couple -- ones that overlap in large measure with those experienced in families headed by heterosexual couples, but these often occur without the protections that would be afforded a genetic parent of the offspring. It is the case in a majority of situations that the offspring of LGBT families will not be genetically related to both parents -- and in some cases not to either.[6] Issue produced by IVF, surrogacy, third-party surrogacy, or other reproductive assistance techniques may or may not be considered by the law of the governing state as "issue" (descendants) of both parents, having significant ramifications in the event of such a separation of the couple or complete dissolution of the relationship. Neither *Windsor* nor *Obergefell* addressed the status of the rights of a married couple with respect to the offspring who constitute the children of the couple. Familial rights in such complicated situations should be addressed expressly by agreement and memorialization of the realities of the relationship and the family that exists. In the event of separation or dissolution, all rights of the couple vis-à-vis the children will be addressed by a family court based on equitable grounds, but the rights of any non-genetic parent may be severely disadvantaged unless some measures have been taken consistent with that state's laws to establish parentage (see next paragraph).

D. *Inheritance and Definitional Rights of Children in LGBT Families*. The same difficulties in terms of definition of offspring vis-à-vis families rights also present in questions of property disposition. Fortunately, however, in contrast to family rights issues, issues of property disposition are more easily addressed. To the author's knowledge, no state other than Louisiana (with its French legal influence, employing concepts of civil law)[7] requires any forced heirship or disposition of

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6 Advances in the area of reproductive technology of late are dizzying, and in fact it is even genetically possible to have offspring with *three* genetic parents. For an overview of the issues involved with the range of assisted reproductive technology issues and how they intersect with other legal considerations, including definitions of family for purposes of estate planning and other considerations, see Concurrent Session B, August 7 2-3pm outline materials (Lavender Law 2019); *see also,*, *e.g.*, "Legal Recognition of LGBT Families," produced by the National Center for Lesbian Rights and available here: https://gateway.zscaler.net/auD?origurl=http%3A%2F%2Fwww%2enclrights%2eorg%2fwp-content%2fuploads%2f2013%2f07%2fLegal_Recognition_of_LGBT_Families%2epdf&_ordtok=H4k3WVZLRFZmHWLWFQksrkDQQH,; GLAD Legal Advocates and Defenders publications under "Parenting" at www.glad.org; Human Rights Campaign, "Second Parent Adoption" at www.hrc.org/resources/second-parent-adoption.

7 Property disposition laws of territories of the U.S. may be different and contain exceptions: for example, the author believes that under the laws of Puerto Rico, surviving children are guaranteed a "forced share" or

property to issue, who can thus be completely disinherited – but that is rarely the client's wish and, rather, protection of guaranteed disposition is desired. Pending the establishment of parental rights, if possible (see next paragraph) there is fortunately an easy fix: (i) ensuring that the client indeed does have a Will (or Will/Revocable Trust) in which they specify the dispositions they wish, and (ii) the express inclusion of the desired definition of offspring (or "issue") in the Will, which generally should then be effective to include such offspring in all dispositions made by class, such as dispositions made under the Will or Revocable Trust to "children" or "issue" or "descendants" by group.

Examples:

> "Issue, Children, Child" For all purposes hereunder the words "issue", "descendant", "child", "children" and words of similar import shall include [Name1], [Name2], and [Name3], and with respect to a reference to children or descendants or issue, shall include all issue (i) born to, or produced with the genetic material of, such individual and/or his or her long-term partner, and (ii) who are raised by such individual as a child of theirs.

> "Issue, Children, Child" For all purposes hereunder the words "issue", "descendant", "child", "children" and words of similar import[, when used with respect to me,] shall include [Name1] and [Name2] and any other child, whether marital or non-marital, natural or adopted, and with or without express legal relationship to [me][the person of reference], provided in all cases [I][the person of reference] openly and notoriously treated such child as a child of [mine][theirs], and as to terms such as "issue" and "descendants", all descendants of any such persons (applying similar principles).

In either the familial or property disposition context, there are certain actions families can take to shore up the rights of any non-genetic or non-birth parent in the offspring and children of the LGBT family, and thus in the rights of any children of such persons. Certain states allow the name of each parent to be inserted into the birth certificate after birth; other states provide a pre-birth procedure to establish parental rights in which both parents names appear on the birth certificate from the outset. In states where such options are not possible, consideration can be given to second parent adoption, or other techniques. Clients should be directed to consult family counsel in their respective state or jurisdiction for possible options to explore and implement.

E. *Full Parentage Rights.* Also beyond the scope of this outline, but essential for LGBT couples planning to have children, is the establishment of full parental rights. While such rights extend far beyond the area of estate planning, they serve

mandatory inheritance of a portion of the real property of decedent parent domiciled at death in Puerto Rico – and even in the case of decedents parents not domiciled at death in Puerto Rico with respect to Puerto Rico real property.

as a buttress toward inheritance rights (which ideally should not be based in complete reliance on the language contained in a Will) and are necessary for rights to property via intestacy. Accordingly, LGBT couples who have children are strongly advised to retain legal counsel to help analyze the relevant law in their state and other potential jurisdictions and to assess what actions (such as pre-birth parentage orders, second parent adoption, parenting agreements, etc.) are deemed helpful to have for both parents to be considered to have full parentage rights in the children of the couple.

F. *Health and Employment-Related Benefits.* While the IRS has issued comprehensive regulations indicating that for purposes of the tax code, provisions extending benefits to spouses or to "husband" and "wife" apply with equal force to spouses of same-sex couples (and currently there is talk of introduction in the near future of a tax bill that will seek to amend the law to make it gender neutral in this areas), and while the effect of *Windsor* and *Obergefell* and other decisions has resulted in a broad extension of benefits to same sex married couples, it is not still not the case that married couples of the same sex are on complete parity with married couples of opposite sex in all areas. Of far greater importance to current LGBT planning, for those same sex couples in an (often long-standing) committed relationship whose circumstances indicate they will remain in the relationship but will choose not to get married, any protections afforded in the recent court decisions and various issued regulations will be of no benefit. Again, in such cases, it is essential to take proactive planning measures and to speak to competent counsel in the area to understand what rights will arise upon certain events, and what actions, if any, can be taken to address them.

G. *Long-Term Care, and Disability Insurance.* There are several issues that face your clients of more advanced years, and these issues of course will face all clients eventually and advance planning in these areas can help them as well. Benefits of disability or long-term care insurance are the same for same sex as for opposite sex couples, but may be more important for unmarried LGBT couples not enjoying other potential monetary benefits or the greater support of a wide family network that may be more readily afforded to the surviving spouse of married couples.

H. *Nursing Home and Retirement Communities*. Planning for retirement and medical care toward the end of life is an important consideration for all couples, but for elderly LGBT couples it is more so, as not all nursing homes and retirement communities are LGBT-friendly and, under the laws of many states, LGBT individuals do not benefit from blanket non-discrimination protection. Here, the solution is to counsel clients to act in the same manner as in the other planning areas noted herein: to be proactive in planning and structuring living arrangements and pre-approved default planning options, so that when eventually one or both of the couple are unable to care for themselves, suitable and appropriate options are available and pre-cleared. There are certain LGBT organizations, like SAGE ("Services and Advocacy for Gay Elders") that can be an excellent resource in this area.

VII. *Advanced Estate Planning Issues*

A. *Multi-jurisdictional Clients.* None of the benefits of *Windsor* or *Obergefell* necessarily apply to couples who span non-U.S. jurisdictions. While a number of countries in the world led the U.S. in recognition of the rights of same sex couples, including the right to marry and the right to inherit, a greater number of jurisdictions do not treat same sex partners on a par with opposite sex partners, prohibit marriage, and provide little or no legal protection to same sex couples, including rights relevant to estate planning such as the right to a marital share of the estate, rights of intestate distribution (an automatic share passing to a surviving spouse on death with no Will in place), survivorship retirement benefit rights, etc. In certain more conservative jurisdictions, all same-sex rights are expressly denied. Accordingly it is imperative for same sex couples whose footprint is multi-national to consult competent and specialized counsel in each jurisdiction in which they have a connection.

B. *Business Interests - Succession and Tax Issues*

1. *Succession Issues*. Shared business interests always present a challenge to family members at death, especially when not all business entity members share a close personal relationship. This is one area of planning not unique to the LGBT client. For example, while children of a matriarch or patriarch are very likely to get along (at least while their parent is alive!), as the family footprint spreads, family relations in connection with a family business tend to be more strained, either as between the family members in the business and those not in the business, or among direct family members and their respective spouses, or as the family consanguinity increases (e.g., always harder for grandchildren or cousins to get along than siblings).

For the reasons set forth elsewhere, the same issues present to the LGBT client, coupled with the added layers of potential conflict with a family of origin not fully accepting of the same sex relationship (even if such lack of acceptance was "under check" during the life of the matriarch or patriarch).

As with other planning areas, the best way to deal with such situation is for the client, to the extent possible, to be proactive in putting in place a succession plan -- if not for the business, then at least his or her surviving partner -- during life. Anticipating potential tension, the advisor can help the client to implement a plan while the client is alive that pre-establishes a succession plan (with or without the surviving spouse/partner) and, more importantly, with the appropriate economic arrangements for the surviving spouse/partner in place. Such arrangements typically include one or more components of a buy-out arrangement including:

(a) Buy-Sell Agreement

(b) Cross-Purchase Agreement

2. *Tax Issues.* In either of the situations above, it is often the case that for businesses with any value, the client's equity interest may be sufficient to attract wealth transfer tax exposure but which leaves the client with virtually no funds with which to pay such tax. Just as common, functioning businesses rarely have sufficient liquidity (or access to liquidity, such as lines of credit) to meet such obligations (or to meet them in a manner that would be fair and equitable to all equity stakeholders in the business). In such situations, life insurance, whether used in connection with a buy-sell or cross-purchase agreement, and whether taken out by the individual equity stakeholder or the company itself, can provide a very effective solution to address this concern.

EXHIBIT A – STATE DEATH TAXES – 2021

State Type of Tax	Current Law	2021 State Death Tax Threshold
Alabama None	Tax is tied to federal state death tax credit. AL ST § 40-15-2.	
Alaska None	Tax is tied to federal state death tax credit. AK ST § 43.31.011.	
Arizona None	Tax was tied to federal state death tax credit. AZ ST §§ 42-4051; 42-4001(2), (12). On May 8, 2006, Governor Napolitano signed SB 1170 which permanently repealed Arizona's state estate tax.	-
Arkansas None	Tax is tied to federal state death tax credit. AR ST § 26-59-103; 26-59-106; 26-59-109, as amended March, 2003.	
California None	Tax is tied to federal state death tax credit. CA REV & TAX §§ 13302; 13411.	
Colorado None	Tax is tied to federal state death tax credit. CO ST §§ 39-23.5-103; 39-23.5-102.	
Connecticut Separate Estate Tax	On October 31, 2017, the Connecticut Governor signed the 2018-2019 budget which increased the exemption for the Connecticut state estate and gift tax to $2,600,000 in	$7,100,000

	2018, to $3,600,000 in 2019, and to the federal estate and gift tax exemption in 2020. On May 31, 2018, Connecticut changed its estate tax law to extend the phase-in of the exemption to 2023 to reflect the increase in the federal exemption to $10 million indexed for inflation in the 2017 Tax Act. The exemption will be phased in as follows: 2019: $3.6 million 2020: $5.1 million 2021: $7.1 million 2022: $9.1 million 2023: federal exemption for deaths on or after January 1, 2023. Beginning in 2019, the cap on the Connecticut state estate and gift tax is reduced from $20 million to $15 million (which represents the tax due on a Connecticut estate of approximately $129 million).	
Delaware None	On July 2, 2017, the Governor signed HB 16 which sunsets the Delaware Estate Tax on December 31, 2017.	
District of Columbia Pick-up Only	DC Bill B22-0685 was introduced in the DC City Council on February 8, 2018. This proposal cut the DC threshold to $5.6 million adjusted for inflation retroactive to January 1, 2018. This change was enacted by the DC City Council on September 5, 2018 as part of the Budget Support Act. In August 2020, the DC City Council enacted the "Estate Tax Adjustment Amendment Act of 2020, which reduces	$4,000,000

	the DC threshold to $4 million in 2021 and which will be adjusted for inflation beginning in 2022. No separate QTIP election.	
Florida None	Tax is tied to federal state death tax credit. FL ST § 198.02; FL CONST. Art. VII, Sec. 5.	
Georgia None	Effective July 1, 2014, the Georgia estate tax was repealed. See § 48-12-1.	
Hawaii Modified Pick-up Tax	On May 2, 2012, the Hawaii legislature passed HB 2328 which conforms the Hawaii estate tax exemption to the federal estate tax exemption for decedents dying after January 25, 2012. On June 7, 2018, the governor signed SB 2821, which amended HI ST § 236E-6 to reduce the Hawaiian exemption, effective January 1, 2018, to $5,000,000 indexed for inflation. The Hawaii Department of Taxation released Announcement 2018-13 on September 4, 2018 in which it announced that the exemption will remain at the amount available to decedents dying during 2017. In response to calls from practitioners, the Hawaii Department of Taxation indicated that was not going to adjust the exemption for inflation in 2019. Effective January 1, 2020, Hawaii increased the rate of its state estate tax on estates valued at over $10,000,000 to 20 percent. See Act No. 3 (April 4, 2019).	$5,490,000

Idaho None	Tax is tied to federal state death tax credit. ID ST §§ 14-403; 14-402; 63-3004 (as amended Mar. 2002).	
Illinois Modified Pick-up Only	On January 13, 2011, Governor Quinn signed Public Act 096-1496 which increased Illinois' individual and corporate income tax rates. Included in the Act was the reinstatement of Illinois' estate tax as of January 1, 2011 with a $2 million exemption. Senate Bill 397 passed both the Illinois House and Senate as part of the tax package for Sears and CME on December 13, 2011. It increased the exemption to $3.5 million for 2012 and $4 million for 2013 and beyond. Governor Quinn signed the legislation on December 16, 2011. Illinois permits a separate state QTIP election, effective September 8, 2009. 35 ILCS 405/2(b-1).	$4,000,000
Indiana None	Pick-up tax is tied to federal state death tax credit. IN ST §§ 6-4.1-11-2; 6-4.1-1-4. On May 11, 2013, Governor Pence signed HB 1001 which repealed Indiana's inheritance tax retroactively to January 1, 2013. This replaced Indiana's prior law enacted in 2012 which phased out Indiana's inheritance tax over nine years beginning in 2013 and ending on December 31, 2021 and increased the inheritance tax exemption amounts retroactive to January 1, 2012.	.
Iowa Inheritance Tax	Pick-up tax is tied to federal state death tax credit. IA ST § 451.2; 451.13. Effective July 1, 2010, Iowa specifically reenacted its pick-up estate tax for decedents dying after December	

	31, 2010. Iowa Senate File 2380, reenacting IA ST § 451.2. Iowa has a separate inheritance tax on transfers to others than lineal ascendants and descendants.	
Kansas None	For decedents dying on or after January 1, 2007 and through December 31, 2009, Kansas had enacted a separate stand alone estate tax. KS ST § 79-15, 203.	
Kentucky Inheritance Tax	Pick-up tax is tied to federal state death tax credit. KY ST § 140.130. Kentucky has not decoupled but has a separate inheritance tax and recognizes by administrative pronouncement a separate state QTIP election.	
Louisiana None	Pick-up tax is tied to federal state death tax credit. LA R.S. §§ 47:2431; 47:2432; 47:2434.	
Maine Pick-up Only	For decedents dying after December 31, 2002, pick-up tax was frozen at pre-EGTRRA federal state death tax credit, and imposed on estates exceeding applicable exclusion amount in effect on December 31, 2000 (including scheduled increases under pre-EGTRRA law) (L.D. 1319; March 27, 2003). On June 20, 2011, Maine's governor signed Public Law Chapter 380 into law, which increased the Maine estate tax exemption to $2 million in 2013 and beyond. The rates were also changed, effective January 1, 2013, to 0% for Maine estates up to $2 million, 8% for Maine estates between $2 million and $5 million, 10 % between $ 5 million and $8 million and 12% for the excess over $8 million.	$5,870,000

	On June 30, 2015, the Maine legislature overrode the Governor's veto of LD 1019, the budget bill for fiscal years 2016 and 2017. As part of the law, the Maine Exemption was tagged to the federal exemption for decedents dying on or after January 1, 2016. The tax rates are: 8% on the first $3 million above the Maine Exemption; 10% on the next $3 million above the Maine Exemption; and 12% on all amounts above $6 million above the Maine Exemption. The new legislation did not include portability as part of the Maine Estate Tax. On September 12, 2018, LP1655 became law without the Governor's signature. The new law amends M.R.S. Title 36, Section 4102 and Section 4119 to make the Maine exemption $5,600,000 adjusted for inflation for decedents dying on and after January 1, 2018. For estates of decedents dying after December 31, 2002, Sec. 2058 deduction is ignored in computing Maine tax and a separate state QTIP election is permitted. M.R.S. Title 36, Sec. 4062. Maine also subjects real or tangible property located in Maine that is transferred to a trust, limited liability company or other pass-through entity to tax in a non-resident's estate. M.R.S. Title 36, Sec. 4064.	

Maryland Pick-up Tax Inheritance Tax	On May 15, 2014, Governor O'Malley signed HB 739 which repealed and reenacted MD TAX GENERAL §§ 7-305, 7-309(a), and 7-309(b) to do the following: Increased the threshold for the Maryland estate tax to $1.5 million in 2015, $2 million in 2016, $3 million in 2017, and $4 million in 2018. For 2019 and beyond, the Maryland threshold will equal the federal applicable exclusion amount. Continued to limit the amount of the federal credit used to calculate the Maryland estate tax to 16% of the amount by which the decedent's taxable estate exceeds the Maryland threshold unless the Section 2011 federal state death tax credit is then in effect. Continued to ignore the federal deduction for state death taxes under Sec. 2058 in computing Maryland estate tax, thus eliminating a circular computation. Permitted a state QTIP election. On April 5, 2018, HB 0308 became law. The new law provides that for 2019 and thereafter, the Maryland threshold will be capped at the fixed amount of $5 million rather than being equal to the inflation-adjusted federal exemption as provided under prior law. The new law also provides for the portability of the unused predeceased spouse's Maryland exemption amount to the surviving spouse beginning in 2019.	$5,000,000
Massachusetts Pick-up Only	For decedents dying in 2002, pick-up tax is tied to federal state death tax credit. MA ST 65C §§ 2A. For decedents dying on or after January 1, 2003, pick-up tax is frozen at federal state death tax credit in effect on December 31, 2000. MA ST 65C §§ 2A(a), as amended July 2002. Tax imposed on estates exceeding applicable exclusion amount in effect on December 31, 2000 (including scheduled increases under pre-EGTRRA law), even if	$1,000,000

	that amount is below EGTRRA applicable exclusion amount. See, Taxpayer Advisory Bulletin (Dec. 2002), DOR Directive 03-02, Mass. Guide to Estate Taxes (2003) and TIR 02-18 published by Mass. Dept. of Rev. Massachusetts Department of Revenue has issued directive, pursuant to which separate Massachusetts QTIP election can be made when applying state's new estate tax based upon pre-EGTRRA federal state death tax credit.	
Michigan None	Tax is tied to federal state death tax credit. MI ST §§ 205.232; 205.256.	
Minnesota Pick-up Only	Tax frozen at federal state death tax credit in effect on December 31, 2000, clarifying statute passed May 2002. Tax imposed on estates exceeding federal applicable exclusion amount in effect on December 31, 2000 (including scheduled increases under pre-EGTRRA law), even if that amount is below EGTRRA applicable exclusion amount. MN ST §§ 291.005; 291.03; instructions for MN Estate Tax Return; MN Revenue Notice 02-16. Separate state QTIP election permitted. On May 30, 2017, the governor signed the budget bill, H.F. No. 1 which increased the Minnesota estate tax exemption for 2017 from $1,800,000 to $2,100,000 retroactively, and increases the exemption to $2,400,000 in 2018, $2,700,000 in 2019, and $3,000,000 for 2020 and thereafter.	$3,000,000

	A provision enacted in 2013 to impose an estate tax on non-residents who own an interest in a pass-through entity which in turn owned real or personal property in Minnesota was amended in 2014 to exclude certain publicly traded entities. It still applies to entities taxed as partnerships or S Corporations that own closely held businesses, farms, and cabins.	
Mississippi None	Tax is tied to federal state death tax credit. MS ST § 27-9-5.	
Missouri None	Tax is tied to federal state death tax credit. MO ST §§ 145.011; 145.091.	
Montana None	Tax is tied to federal state death tax credit. MT ST § 72-16-904; 72-16-905.	
Nebraska County Inheritance Tax	Nebraska through 2006 imposed a pick-up tax at the state level. Counties impose and collect a separate inheritance tax. NEB REV ST § 77-2101.01(1).	
Nevada None	Tax is tied to federal state death tax credit. NV ST Title 32 §§ 375A.025; 375A.100.	
New Hampshire None	Tax is tied to federal state death tax credit. NH ST §§ 87:1; 87:7.	
New Jersey Inheritance Tax	On October 14, Governor Christie signed Assembly Bill A-12 which was the tax bill accompanying Assembly Bill A-10 which revised the funding for the state's	.

	Transportation Fund. Under this law, the Pick-Up Tax had a $2 million exemption in 2017 and was eliminated as of January 1, 2018. The new law also eliminated the tax on New Jersey real and tangible property of a non-resident decedent. The repeal of the pick-up tax did not apply to the separate New Jersey inheritance tax.	
New Mexico None	Tax is tied to federal state death tax credit. NM ST §§ 7-7-2; 7-7-3.	
New York Pick-up Only	The Executive Budget of 2014-2015 which was signed by Governor Cuomo on March 31, 2014 made substantial changes to New York's estate tax. The New York estate tax exemption which was $1,000,000 through March 31, 2014 was increased as follows: April 1, 2014 to March 31, 2015 -- $2,062,500 April 1, 2015 to March 31, 2016 -- $3,125,000 April 1, 2016 to March 31, 2017 -- $4,187,500 April 1, 2017 to December 31, 2018 -- $5,250,000 As of January 1, 2019, the New York estate tax exemption amount will be the same as the federal estate tax applicable exclusion amount **prior** to the 2017 Tax Act which is $5,000,000 adjusted for inflation. The maximum rate of tax will continue to be 16%. Taxable gifts within three years of death between April 1, 2014 and December 31, 2018 will be added back to a	$5,930,000

	decedent's estate for purposes of calculating the New York tax. The New York estate tax is a cliff tax. If the value of the estate is more than 105% of the then current exemption, the exemption will not be available. On April 1, 2015, as part of 2015-2016 Executive Budget, New York enacted changes to the New York Estate Tax. New York first clarified that the new rate schedule enacted in 2014 applies to all decedents dying after April 1, 2014. Previously, the rate schedule only applied through March 31, 2015. New York then modified the three year gift add-back provision to make it clear that the gift add-back does not apply to any individuals dying on or after January 1, 2019. Previously, the gift add-back provision did not apply to gifts made on or after January 1, 2019. New York continues not to permit portability for New York estates and no separate state QTIP election is allowed when portability is elected on a federal return.	
North Carolina None	On July 23, 2013, the Governor signed HB 998 which repealed the North Carolina estate tax retroactively to January 1, 2013.	
North Dakota None	Tax is tied to federal state death tax credit. ND ST § 57-37.1-04	
Ohio None	Governor Taft signed the budget bill, 2005 HB 66, repealing the Ohio estate (sponge) tax prospectively and granting credit for it retroactively. This was effective June 30, 2005 and killed the sponge tax.	

	On June 30, 2011, Governor Kasich signed HB 153, the biannual budget bill, which contained a repeal of the Ohio state estate tax effective January 1, 2013.	
Oklahoma None	Tax is tied to federal state death tax credit. OK ST Title 68 § 804. The separate estate tax was phased out as of January 1, 2010.	
Oregon Separate Estate Tax	On June 28, 2011, Oregon's governor signed HB 2541 which replaced Oregon's pick-up tax with a stand-alone estate tax effective January 1, 2012. The new tax has a $1 million threshold with rates increasing from ten percent to sixteen percent between $1 million and $9.5 million. Determination of the estate for Oregon estate tax purposes is based upon the federal taxable estate with adjustments.	$1,000,000
Pennsylvania Inheritance Tax	Tax is tied to the federal state death tax credit to the extent that the available federal state death tax credit exceeds the state inheritance tax. PA ST T. 72 P.S. § 9117 amended December 23, 2003. Pennsylvania had decoupled its pick-up tax in 2002, but has now recoupled retroactively. The recoupling does not affect the Pennsylvania inheritance tax which is independent of the federal state death tax credit. Pennsylvania recognizes a state QTIP election.	

Rhode Island Pick-up Only	Tax frozen at federal state death tax credit in effect on January 1, 2001, with certain adjustments (see below). RI ST § 44-22-1.1. Rhode Island recognized a separate state QTIP election in the State's Tax Division Ruling Request No. 2003-03. Rhode Island's Governor signed into law HB 5983 on June 30, 2009, effective for deaths occurring on or after January 1, 2010, an increase in the amount exempt from Rhode Island estate tax from $675,000, to $850,000, with annual adjustments beginning for deaths occurring on or after January 1, 2011 based on "the percentage of increase in the Consumer Price Index for all Urban Consumers (CPI-U). . . rounded up to the nearest five dollar ($5.00) increment." RI ST § 44-22-1.1. On June 19, 2014, the Rhode Island Governor approved changes to the Rhode Island Estate Tax by increasing the exemption to $1,500,000 indexed for inflation in 2015 and eliminating the cliff tax.	$1,595,156
South Carolina None	Tax was permanently repealed in 2014 with repeal of all of SDCL § 10-40A, effective July 1, 2014.	
South Dakota None	Tax was permanently repealed in 2014 with repeal of all of SDCL § 10-40A, effective July 1, 2014.	
Tennessee None	Pick-up tax is tied to federal state death tax credit. TN ST §§ 67-8-202; 67-8-203. Tennessee had a separate inheritance tax which was phased out as of January 1, 2016.	

Texas None	Tax was permanently repealed effective as of September 15, 2015 when Chapter 211 of the Texas Tax Code was repealed. Prior to September 15, 2015, the tax was tied to the federal state death tax credit.	
Utah None	Tax is tied to federal state death tax credit. UT ST § 59-11-102; 59-11-103.	
Vermont Modified Pick-up	In 2010, Vermont increased the estate tax exemption threshold from $2,000,000 to $2,750,000 for decedents dying on or after January 1, 2011. As of January 1, 2012, the exclusion equaled the federal estate tax applicable exclusion amount, so long as the FET exclusion was not less than $2,000,000 and not more than $3,500,000. VT ST T. 32 § 7442a. On June 18, 2019, Vermont enacted H. 541 which increased the Vermont estate tax exemption to $4,250,000 in 2020 and $5,000,000 in 2021 and thereafter. No separate state QTIP election permitted. Vermont does not permit portability of its estate tax exemption.	$5,000,000
Virginia None	Tax is tied to federal state death tax credit. VA ST §§ 58.1-901; 58.1-902. The Virginia tax was repealed effective July 1, 2007. Previously, the tax was frozen at federal state death tax credit in effect on January 1, 1978. Tax was imposed only on estates exceeding EGTRRA federal applicable exclusion amount. VA ST §§ 58.1-901; 58.1-902.	

Washington Separate Estate Tax	LEGISLATIVE FRAMEWORK. On February 3, 2005, the Washington State Supreme Court unanimously held that Washington's state death tax was unconstitutional. The tax was tied to the current federal state death tax credit, thus reducing the tax for the years 2002 - 2004 and eliminating it for the years 2005 - 2010. Hemphill v. State Department of Revenue 2005 WL 240940 (Wash. 2005). In response to Hemphill, the Washington State Senate on April 19 and the Washington House on April 22, 2005, by narrow majorities, passed a stand-alone state estate tax with rates ranging from 10% to 19%, a $1.5 million exemption in 2005 and $2 million thereafter, and a deduction for farms for which a Sec. 2032A election could have been taken (regardless of whether the election is made). The Governor signed the legislation. WA ST §§ 83.100.040; 83.100.020. Washington voters defeated a referendum to repeal the Washington estate tax in the November 2006 elections. On June 14, 2013, Governor Inslee signed HB 2075 which closed an exemption for marital trusts retroactively immediately prior to when the Department of Revenue was about to start issuing refund checks, created a deduction for up to $2.5 million for certain family owned businesses and indexes the $2 million Washington state death tax threshold for inflation. SEPARATE QTIP ELECTION. Washington permits a separate state QTIP election. WA ST §83.100.047. NO INDEXING FOR INFLATION IN 2019. Washington State was supposed to index the	$2,193,000

	exemption annually for inflation. However, this was not done for 2019. On December 18, 2018, the Department of Revenue sent an email stating that pursuant to Revised Code of Washington (RCW) 83.100, the Department must adjust the Washington applicable estate tax exclusion amount annually using the Seattle-Tacoma-Bremerton metropolitan area October consumer price index (Seattle CPI). As of January 1, 2018, the US Bureau of Labor and Statistics (USBLS) no longer calculates the consumer price index for the Seattle-Tacoma-Bremerton metropolitan area. Instead, the USBLS will calculate the consumer price index for the Seattle-Tacoma-Bellevue Core Based Statistical Area for the Puget Sound region. As a result of these changes, the definition of "consumer price index" in RCW 83.100.020(1)(b) does not match with the current CPI measure calculated by the USBLS. The Department is using the last CPI figure for the Seattle CPI. This resulted in no increase in the applicable exclusion amount for 2019 and 2020.	
West Virginia None	Tax is tied to federal state death tax credit. WV § 11-11-3.	
Wisconsin None	Tax is tied to federal state death tax credit. WI ST § 72.01(11m). For deaths occurring after September 30, 2002, and before January 1, 2008, tax was frozen at federal state death tax credit in effect on December 31, 2000 and was imposed on estates exceeding federal applicable exclusion amount in effect on December 31, 2000 ($675,000), not including scheduled increases under pre-EGTRRA law, even though that amount is below the	

	lowest EGTRRA applicable exclusion amount. Thereafter, tax imposed only on estates exceeding EGTRRA federal applicable exclusion amount. WI ST §§ 72.01; 72.02, amended in 2001; WI Dept. of Revenue website. On April 15, 2004, the Wisconsin governor signed 2003 Wis. Act 258, which provided that Wisconsin will not impose an estate tax with respect to the intangible personal property of a non-resident decedent that has a taxable situs in Wisconsin even if the non-resident's state of domicile does not impose a death tax. Previously, Wisconsin would impose an estate tax with respect to the intangible personal property of a non-resident decedent that had a taxable situs in Wisconsin if the state of domicile of the non-resident had no state death tax.	
Wyoming None	Tax is tied to federal state death tax credit. WY ST §§ 39-19-103; 39-19-104.	

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