LGBTQ ESTATE PLANNING AND ADMINSTRATION: WINDSOR, OBERGEFELL, PAVAN, V.L. V E.L AND MORE

Paula A. Kohut

Anne Randall

Kohut, Adams & Randall, P.A.

513 Market Street

Wilmington, NC 28401

(910) 815-4066

pkohut@kohut.pro

LGBTQ ESTATE PLANNING AND ADMINSTRATION IN 2018: APPLYING OBERGEFELL IN NORTH CAROLINA DURING THE TRUMP ADMINISTRATION

LGBTQ ESTATE PLANNING AND ADMINSTRATION IN 2018: APPLYING OBERGEFELL IN NORTH CAROLINA DURING THE TRUMP ADMINISTRATION

Paula A. Kohut

I. MARITAL AND LGBTQ EQUALITY.

A. Marriage and Family Equality. On June 26, 2015, the United States Supreme Court established marriage equality as a constitutional right in all states. *Obergefell v. Hodges*, 576 U.S. 644, 135 S. Ct. 2584 (2015). The *Obergefell* decision was announced two years to the date of the Court's June 26, 2013 decision in *Windsor v. United States* holding Section 3 of the Defense of Marriage Act (DOMA) unconstitutional and establishing marriage equality for all federal purposes. *Windsor v. United States*, 570 U.S. 744, 133 S. Ct. 2675 (2013). In *Obergefell*, the Supreme Court struck down state bans against same-sex marriage under the Due Process Clause and Equal Protection Clause of the Fourteenth Amendment of the United States Constitution. *Id.* at 675, 135 S. Ct. at 2604. Justice Kennedy, writing for the majority, held that states may not ban same-sex marriages, nor may states refuse to recognize same-sex marriages celebrated in other states. *Id*. at 675-76, 135 S. Ct. at 2605.

On March 7, 2016, the United States Supreme Court unanimously reversed the Alabama Supreme Court holding that Alabama could not disregard or refuse to enforce a non-biological mother's second parent adoption decree issued by a Georgia family court, thereby affirming the non-biological mother's parental relationship under the Full Faith and Credit Clause. *V.L. v. E.L.*, 577 U.S. 404, 136 S. Ct. 1017 (2016). As discussed below in greater detail, this decision makes clear why it is so important for every non-biological parent to secure an adoption decree (or parentage order), as opposed to relying upon co-parenting agreements, the rebuttable presumption arising from a birth certificate, and the statutory protections of voluntary affidavit of parentage (VAPs).

On June 26, 2017, the fourth anniversary of *Windsor*, the United States Supreme Court again weighed in on the rights of LGBTQ parents and reversed the Arkansas Supreme Court holding that Arkansas' Department of Health could not refuse to list a non-biological mother's name on birth certificates of a married lesbian couple. The Court found that allowing non-biological parents (men) in opposite sex marriages to be listed as a parent on birth certificates but denying the same rights to non-biological parents (women) in same-sex marriages violated the non-biological mother's constitutional right to marriage. *Pavan v. Smith*, 137 S. Ct. 2075, 192 L. Ed. 2d 636 (2017). The Court specifically noted that "[*Obergefell*'s commitment was] to provide same-sex couples 'the constellation of benefits that the States have linked to marriage." *Id*. at 2078, 192 L. Ed. 2d at 639, *quoting*, *Obergefell v. Hodges*, 576 U.S. 644, 646 135 S. Ct. 2584, 2590 (2015).

Although the Supreme Court's decisions upholding marriage equality in *Windsor*, *Obergefell*, *V.L. v. E.L.*, and *Pavan* have extended significant rights to married LGBTQ people, both the history of discrimination against LGBTQ people, and the alternative legal structures used by LGBTQ couples and their families to achieve estate planning and family law goals prior to *Windsor* and *Obergefell* present issues in estate planning and estate administration unique to LGBTQ clients. Despite *Windsor*, *Obergefell, V.L. v. E.L.*, and *Pavan* establishing marriage equality, legal

challenges seeking to curtail legal equality for LGBTQ people and their families continue, particularly since 2017. *See infra* Section VIII, Challenges to LGBTQ Equality.

In the last decade, the trend in the federal court decisions was advancing the rights of LGBTQ equality while the Trump administration and conservative state legislatures sought to limit the rights of LGBTQ people and their families. Yet, Justice Thomas's concurrence in *Dobbs v. Jackson Women's Health Organization*, 142 S. Ct. 2228 (2022) indicated he would reconsider the Court's decision upholding LGBTQ equality. Post *Dobbs*, state constitutional rights will be important. However, the process of appointment of state courts lend to even less certainty. *See Planned Parenthood S. Atl. v. State*, 2023 S.C. Lexis 3 (2023) (holding the Fetal Heartbeat and Protection from Abortion Act, S.C. Code §44-41-680 unconstitutional under South Carolina's constitutional right to privacy; the South Carolina Governor signed a revised version of the Fetal Heartbeat and Protection from Abortion Act on May 25, 2023 which was stayed on May 26, 2023 pending review by the South Carolina Supreme Court, the composition of which had changed since its January, 3, 2023 decision in *Planned Parenthood S Atl. v. State*).

Finally, the enactment of the Respect for Marriage Act provides significant assurances of marriage equality, but like its predecessor, the Defense of Marriage Act, it can be repealed and does not carry the weight of a constitutional right which a legislature may not take away. Finally, the Respect for Marriage Act does not prevent prior unconstitutional state bans from taking effect if Ogerbefell is reversed in the future.

B. Understanding LGBTQ Marital Status. The existence and length of a marriage are critical in determining a client's legal rights and obligations regarding income and transfer taxes, community property rights, equitable distribution, spousal support, social security benefits, the rights of a surviving spouse, and other rights and benefits. The marital status of LGBTQ people is often integral to trust and estate planning and administrations (e.g., defining and identifying spouses and the marital status of beneficiaries). As discussed below, retroactive application of *Obergefell* provides trust and estate counsel with both opportunities and challenges in determining whether LGBTQ clients and beneficiaries are married.

It is essential to discuss and review all prior legal relationships, including without limitation, civil unions, domestic partnerships, and pre-*Obergefell* marriage ceremonies. LGBTQ clients and their families may be unaware of the legal effect of prior marriages, civil unions, or domestic partnerships, especially concerning prior relationships that can, without proper termination, prevent them from marrying in the future. For example, without properly terminating a prior marriage, the validity of a subsequent marriage could be challenged as bigamous. Prior legal techniques used to protect their partners, family or relationships (e.g., adult adoptions) can also prove to be barriers to committed couples desiring to marry.

Most importantly, marital status of LGBTQ couples has rapidly changed from limited state recognition without federal recognition (pre-*Windsor*) to limited state recognition with federal recognition (post-*Windsor*), and, finally, nationwide federal and state recognition (post-*Obergefell*). Likewise, the analysis for determining marital status has evolved from determining if there was state recognition alone, federal and state recognition, and, finally, national recognition. For example, the Social Security Administration (SSA) no longer uses the date upon which either

state law or a federal court established marital equality prior to *Obergefell* in determining marital status. Instead, the 2017 updates to the Program Operations Manual System (POMS) sets forth a clear and concise rule: "*We will recognize a valid same-sex marriage as of the date of the marriage, including during periods when the number holder's (NH's) state of domicile did not recognize same-sex marriages*." GN 00210.002, *Determining Marital Status (Marriages and Non-Marital Legal Relationships) for Title II and Medicare Benefits*. https://secure.ssa.gov/poms.nsf/lnx/0200210002. (italics added).

C. Retrospective or Prospective Application. As a general rule, Supreme Court decisions are applied retrospectively:

> "When this Court applies a rule of federal law to the parties before it, that rule is the controlling interpretation of federal law and must be given full retroactive effect in all cases still open on direct review and as to all events, regardless of whether such events predate or postdate our announcement of the rule. . ."

Harper v. Va. Dep't of Taxation, 509 U.S. 86, 97 (1993).

See also, Lee-Ford Tritt, *Moving Forward By Looking Back: The Retroactive Application of Obergefell*, 2016 WIS. L. REV. 873, 891 (2016).

1. Recognition of Same-Sex Marriages Retroactively. Both federal and state courts have begun applying *Obergefell* retroactively, but the cases are fact specific and there is at least one unfavorable decision. The Superior Court of Pennsylvania held that two gay men who had exchanged vows and rings in Pennsylvania in 1996 and held themselves out as married from that date forward had established a common law marriage under Pennsylvania law before January 1, 2005 (when common law marriages were no longer recognized in Pennsylvania). *In re Estate of Carter*, 159 A.3d 970 (Pa. Super. Ct. 2017). In *Hard v. AG*, the United States Court of Appeals for the Eleventh Circuit upheld the trial court's recognition of a 2011 Massachusetts same-sex marriage of the decedent and his surviving spouse in connection with a wrongful death settlement. 648 F. Appx. 853 (11th Cir. 2016). Similarly, in *Dousset v. Florida Atlantic University*, the Florida Court of Appeals for the Fourth District reversed the Resident Appeals of Florida Atlantic University holding the University could not deny the appellant request for classification as a resident based on his legal marriage to his same-sex spouse. 184 So. 3d 1133 (Fla. Dist. Ct. App. Sept. 16, 2015).

However, in *Ferry v. De'Longhi Am, Inc.*, the court held that the survivor of a house fire did not have standing to bring a wrongful death action as a surviving spouse of putative spouse despite the fact that the couple was previously "married in a religious ceremony performed by a religious leader pursuant to the principles of [their] beliefs…at the Frist Unitarian Church of San Francisco." 2017 U.S. Dist. LEXIS 131766, 2017 WL 3535058 (N.D. Ca. 2017). This decision is truly heartbreaking but illustrates the importance of confirming marital status in connection with estate planning for all same-sex couples. Note: This author believes the personal injury firm representing the plaintiff did not associate counsel well versed in LGBTQ rights and equality. The area of LGBTQ rights is best handled by seasoned advocates and assistant from advocacy groups.

Courts have generally declined to apply *Obergefell* to nonmarital relationships, usually in cases where the same-sex couple had entered into a domestic partnerships or civil union instead of a legally recognized marital relationship. *In re Estate of Leyton*, the decedent's relatives sought to have the will declared revoked as to the decedent's former domestic partner arguing that a commitment ceremony in New York in 2002 when same-sex marriage did not exist should be treated as a marriage and their separation in 2010 as a divorce revoking the will as to the former domestic partner. 135 A.D. 3d 418 (N.Y. App. Div. 2016). The court refused to apply *Obergefell* retroactively as doing so would be inconsistent with the couple's understanding that the domestic partnership was not a legal marriage and that their informal separation had no analogous "dissolution ceremony." *Id. See also, In re Villaverde,* 540 B.R. 431 (Bankr. C.D. Cal. 2015) (denying a joint bankruptcy petition from a couple in a civil union); *Celec v. Edinboro University*, 132 F. Supp. 3d 651 (W.D. Pa. 2015) (denying an unmarried same-sex partner life insurance benefits).

Prior to *Obergefell*, at least one state recognized a nonmarital relationship in the context of a wrongful death action. Without recognizing marital status of a lesbian couple, the Connecticut Supreme Court held that the surviving domestic partner had standing to pursue a wrongful death claim upon a showing that the couple "would have been married or in a civil union when the underlying tort occurred if they had not been barred from doing so under the laws of this state" and remanded the case to the trial court for further proceedings on her loss of consortium claims. *Mueller v. Tepler*, 95 A.3d 1011, 1014 (2014).

Practice Note: The discussions herein do not mean that "marriage ceremonies" or common law marriages pre-*Obergefell* should be relied upon if both spouses are able to confirm their marital status by formally remarrying in compliance with the laws of the state or country where the marriage occurs. **If there is any question regarding the validity of a client's marriage (including the failure to formally dissolve a prior marriage or non-marital legal relationship), the client should be advised to formally dissolve all prior relationships and remarry (obtaining a marriage certificate).** The couple can confirm the length of the marriage in a post-nuptial agreement and the remarriage will assure that the couple will not incur unnecessary legal expense in the future. **Maintaining a copy of a couple's marriage certificate in the clients' file will prove helpful if the validity of the clients' marital relationship is questioned.**

2. Retroactive Application of Supreme Court Decisions in the Trust and Estate Context. The Supreme Court has applied its decisions retroactively in the context of estate administrations and inheritance rights. In *Trimble v. Gordon*, the Supreme Court held that state statutes which excluded children born out of wedlock as heirs of a biological father were unconstitutional. 430 U.S. 762 (1977). Nine years later, in *Reed v. Campbell*, the Supreme Court applied *Trimble* retroactively, even though the child's father died before the Court's decision in *Trimble*. 476 U.S. 852 (1986). In *Campbell*, the plaintiff's biological, yet unmarried father had passed away four months before the *Trimble* decision and Texas probate law at the time of her father's death prohibited plaintiff from inheriting from her father due to her status as an illegitimate child. *Id.* at 853–54. The plaintiff claimed she was entitled to receive under her father's estate because the Court had found statutes like the Texas statute unconstitutional. The Court ruled in favor of the plaintiff and noted:

> The interest, protected by the Fourteenth Amendment, in avoiding unjustified discrimination against children born out of wedlock, requires that the appellant's claim to a share of her father's estate be protected by the full applicability of *Trimble*. There is no justification for the State's rejection of the claim. At the time appellant filed her claim, *Trimble* had been decided and her father's estate remained open. Neither the date of her father's death nor the date of the appellant's claim was filed should have prevented the applicability of *Trimble*. Those dates, either separately or in combination, had no impact on the State's interest in orderly administration of the estate.

Id. at 854. *See also,* Lee-Ford Tritt, *Moving Forward By Looking Back: The Retroactive Application of Obergefell*, 2016 WIS. L. REV. 873, 907–09 (2016).

However, the analysis is often fact specific and whether a probate estate has been closed or never opened may limit the ability to apply a Supreme Court's decision retroactively. *Turner v. Perry County Coal Corp.* is a case in point. In *Turner*, the Kentucky Supreme Court declined to apply *Trimble* where there was no probate proceeding. 242 S.W.3d 658 (Ky. Ct. App. Apr. 6, 2007), *rev. denied*, 2008 Ky. LEXIS 439 (Ky., Feb 13, 2008), *cert. denied*, 555 U.S. 818 (2008). The plaintiff's parents never married and she was the only living child of her father at the time of his death in 1962. In 1967, the decedent's second cousins recorded an affidavit of descent identifying themselves as the sole intestate heirs to the decedent's real property. In 2004, several undivided interests in the property were purchased by Perry County Coal Corp. which filed a partition action and named the plaintiff as a defendant. The defendant field an answer claiming to be the sole heir and owner of the property pursuant to *Trimble*. The court held that *Trimble* did not apply retroactively to the facts since, unlike *Reed*, there was no open probate estate. *Id. But see, Combs v. Mullins*, 2009 Ky. App LEXIS 176, 2009 WL 2971636 (Ky. Ct. App 2009) (Vanmeter, J., dissenting) ("*Turner* recited the 'magic words' concerning …finality, but 'ignored the method by which real estate passes to heirs'…and [should have allowed] the plaintiff to prove her paternity by clear and convincing evidence. An heir's ability to establish a claim to real estate, after it passes by intestate succession, exists regardless of whether any administration of the decedent's estate occurs following death."), *rev. denied,* 2010 Ky. LEXIS 446 (Ky. Aug. 18, 2010).

Since the length of marriage may be determinative of spousal benefits and rights (social security, elective share rights, equitable distribution rights, etc.), applying *Obergefell* retroactively can have a significant impact upon a client's rights and obligations arising out of a marriage. In connection with probate proceedings, there may be a distinction between closed estates and those in which the probate proceeding is still pending.

II. FEDERAL RECOGNITION OF MARRIAGES AND LEGAL NON-MARITAL RELATIONSHIPS.

A. Federal Tax Recognition of Same-Sex Marriages. With respect to federal taxes, the principles announced in Internal Revenue Service (IRS) Revenue Ruling 2013-17, as supplemented by Notice 2013-61 and amplified by Notice 2014-1, apply; all married taxpayers must file either jointly or married filing separately for tax years beginning 2013. Rev. Rul. 2013-17, 2013-2 C.B. 201. A taxpayer or employer may claim a refund for taxes improperly paid due to non-recognition of a marriage prior to *Windsor* within the applicable statute of limitation – the later of three years from the due date for filing the return or two years after payment of the tax.
On September 2, 2016, the Department of the Treasury and the IRS issued a final regulation defining terms relating to marital status for federal tax purposes in light of *Obergefell*. T.D. 9785, 2016-2 C.B. 361.

§ 301.7701-18. **Definitions; spouse, husband and wife, husband, wife, marriage.**

(a) *In general*. For federal tax purposes, the terms *spouse*, *husband*, and *wife* mean an individual lawfully married to another individual. The term *husband and wife* means two individuals lawfully married to each other.

(b) *Persons who are lawfully married for federal tax purposes*- (1) *In general*. Except as provided in paragraph (b) (2) of this section regarding marriages entered into under the laws of a foreign jurisdiction, a marriage of two individuals is recognized for federal tax purposes if the marriage is recognized by the state, possession, or territory of the United States in which the marriage is entered into, regardless of domicile.

(2) *Foreign marriages*. Two individuals who enter into a relationship denominated as marriage under the laws of a foreign jurisdiction are recognized as married for federal tax purposes if the relationship would be recognized as marriage under the laws of at least one state, possession, or territory of the United States, regardless of domicile.

(c) *Persons who are not lawfully married for federal tax purposes.* The terms *spouse*, *husband*, and *wife* do not include individuals who have entered into a registered domestic partnership, civil union, or other similar formal relationship not denominated as a marriage under the law of the state, possession, or territory of the United States where such relationship was entered into, regardless of domicile. The term *husband and wife* does not include couples who have entered into such a formal relationship, and the term *marriage* does not include such formal relationships.

The Treasury and IRS explained that civil unions, registered domestic partnerships, or similar relationships that are not recognized by a state as a marriage will not be treated as a marriage for

federal tax purposes, noting that imposing marital status for federal tax purposes "could undermine taxpayer expectations regarding the federal tax consequences of these relationships." T.D. 9785, 2016-2 C.B. 361, 2016 IRB LEXIS 640, at *37.

B. Notice Regarding Use of Estate and Gift Tax Exemption - I.R.S Notice 2017-15. Before the decision in *Windsor*, a same-sex individual who made transfers to a same-sex partner was not entitled to a marital tax deduction related to the transfer. "Those taxpayers were required to use their applicable exclusion amount under § 2505 or § 2010 (c) to defray any gift or estate tax imposed on the transfer or were required to pay gift or estate taxes, to the extent the taxpayer's exclusion previously had been exhausted." I.R.S Notice 2017-15, 2017-6 I.R.B. 783 (Jan. 17, 2017). In response to the decision in *Windsor* and the final regulations amending § 301.7701-18, the IRS issued Notice 2017-15 permitting taxpayers "to establish that transfer's qualification for the marital deduction and to recover the applicable exclusion amount previously applied on a return by reason of such a transfer, even if the limitations period applicable to that return for the assessment of tax or for claiming a credit or refund of tax under §§ 6501 or 6511, respectively, has expired" and reclaim any applicable generation-skipping transfer (GST) exemption. The filed return must include a statement on the top of the first page: "FILED PURSUANT TO NOTICE 2017-15."

C. Revenue Procedure – Late Portability Claims- Rev. Proc. 2017-34 and 2022-32. The IRS has "simplified the methods" for a surviving spouse to make a portability election to claim a deceased spouse's unused exclusion amount (DSUE amount). Rev. Proc. 2017-34, 2017-26 I.R.B. 1282 (June 9, 2017). Rev. Proc 2017-34 provided that a 706 must be filed by the second anniversary of the deceased's date of death. Rev. Proc 2022-32 increased the time to the fifth anniversary. Prior to Rev. Proc. 2017-34, if a timely election to claim portability on a Form 706 was not made, the personal representative would have to obtain "9100 relief" to claim portability. In a reaction to number of such requests, the IRS announced Revenue Procedure 2017-34 on June 9, 2017. "Accordingly, this revenue procedure provides a simplified method to obtain an extension of time to elect portability that is available to the estates of decedents having no filing requirement under § 6018(a) for a period the last day of which is…the second anniversary of the decedent's date of death."

D. U.S. Department of Labor. On September 18, 2013, the Department of Labor announced in Technical Release 2013-04 that the definitions of "spouse" and "marriage" under ERISA and regulations thereunder "will be read to refer to individuals who are lawfully married to one another under any state law, including individuals married to a person of the same-sex who were legally married in a state that recognizes such marriages, but who are domiciled in a state that does not recognize such marriages." https://www.dol.gov/agencies/ebsa/employers-and-advisers/guidance/technical-releases/13-04

In July 2015, the Department of Labor updated its Fact Sheet #28F providing that qualification for leave under the Family and Medical Leave Act in the case of a spouse will be determined based upon the validity of the marriage in the state of celebration.
http://www.dol.gov/whd/regs/compliance/whdfs28f.html

Final rule - https://www.dol.gov/whd/fmla/spouse/index.htm 29 CFR 825.102 29 CFR 122(b)

E. Office of Personnel Management. Shortly after *Windsor*, the United States Office of Personnel Management extended employee benefits to legally married same-sex spouses of Federal employees and annuitants, *regardless of the employee's or annuitant's state of residency.* Benefits Administration Letter Number 13-203, July 17, 2013. http://www.opm.gov/retirement-services/publications-forms/benefits-administration-letters/2013/13-203.pdf. In 2013, it was clear that Federal employees and retirees living in non-recognition states who had been legally married in another state were entitled to benefits. Although a special enrollment period ended on August 26, 2103, some benefits were available through the late elections during the six-month period ending December 26, 2013.

F. SOCIAL SECURITY, SUPPLEMENTAL SECURITY INCOME (SSI), AND MEDICARE.

1. Social Security. On February 5, 2016, the SSA began publishing its updated POMS regarding Same-Sex Marriage Claims:

GN 00210.001 Introduction to Same-Sex Marriage Claims. https://secure.ssa.gov/poms.nsf/lnx/0200210001. The 2016 POMS generally directed marital status to be recognized as of the date of the marriage, but also directed that in determining the validity of a marriage to verify the status of the law in the state of the marriage celebration. Beginning in March 2017, the POMS has been again updated.

The 2017 updates set forth a clear and concise rule: "We will recognize a valid same-sex marriage as of the date of the marriage, including during periods when the number holder's (NH's) state of domicile did not recognize same-sex marriages." **GN 00210.002, *Determining Marital Status (Marriages and Non-Marital Legal Relationships) for Title II and Medicare Benefits*.** https://secure.ssa.gov/poms.nsf/lnx/0200210002.

Like the preceding discussion regarding retroactive application of *Obergefell*, there is no longer a need to examine prior state law same-sex marriage bans – the only determinative factor is whether the marriage is valid.

PR 05820.000 State Recognition of Foreign Same Sex Marriages. On March 21, 2018, PR 05820.000 was released, listing precedential regional counsel's opinions (PRs) addressing the recognition of same-sex marriages celebrated in foreign countries pre-*Obergefell*. These opinions generally found valid marriages even in formally non-recognition states.

PR-05820.342 Validity of Same Sex Marriage (Spain). This precedential regional counsel's opinion was released in February 2018 allowing the recognition of a 2008 marriage celebrated in Spain. https://secure.ssa.gov/apps10/poms.nsf/lnx/1505820342

While a detailed discussion of social security benefits is beyond the scope of this article, the new POMS sets forth the following guidelines:

- **GN 00210.002, *Determining Marital Status (Marriages and Non-Marital Legal Relationships) for Title II and Medicare Benefits*.** "[The Social Security Administration] will recognize a valid same-sex marriage as of the date of the marriage, including during periods when the number holder's (NH's) state of domicile did not recognize same-sex marriages." https://secure.ssa.gov/poms.nsf/lnx/0200210002.

- **GN 00210.004 *Same-Sex Relationships - Non-Marital Legal Relationships*.** In addition to marriage recognition, the Social Security Act recognizes non-marital legal relationships if the NMLR was valid in the state where it was entered into and if the laws of the state of the decedent's domicile would allow the claimant to inherit a spouse's share of the decedent's personal property if the decedent had died intestate. This POMS sets forth a table of state laws on civil unions, domestic partnerships, designated beneficiary statutes and reciprocal beneficiary statutes. https://secure.ssa.gov/poms.nsf/lnx/0200210004. Like other spousal rights under state law, the length of a non-martial legal relationship is often determinative of eligibility for benefits.

- **PR-05830.070 Same-Sex Marriage-Like Relationship in British Columbia, Canada.** This precedential regional counsel's opinion provided recognition to a British Columbia non-martial relationship based upon British Columbia's recognition of inheritance rights of "a person who has lived and cohabitated with another person in a marriage-like relationship, for a period of at least two years immediately before the person's death."

- **GN 00210.005 *Processing Cases Involving Same-Sex Marriages and Non-Marital Legal Relationships that were Previously on Hold.*** Effective October 5, 2017, the Social Security Administration issued a directive to process cases previously on hold. Except for the instructions in GN 00210.000, such claims are to be processed in the same manner for same-sex couples and opposite-sex couples. https://secure.ssa.gov/poms.nsf/lnx/0200210005.

For example, to collect survivorship benefits, the marriage must have been at least nine months in duration (with a few exceptions, including an accidental death or death in the line of duty while serving in the military). **RS 00207.001 Widow(er)'s Benefits Definitions and Requirements.** https://secure.ssa.gov/apps10/poms.nsf/lnx/0300207001

Similarly, to collect spousal retirement and disability benefits, the marriage must have been at least twelve (12) months in duration, or, in the case of a divorced spouse, the marriage must have lasted for ten (10) years or more before a divorce was granted.

RS 00202.001.B Spouse.
https://secure.ssa.gov/apps10/poms.nsf/lnx%20/0300202001

RS 00202.005 Divorced Spouse. https://secure.ssa.gov/apps10/poms.nsf/lnx/0300202005

- **GN 00210.003 Dates States and U.S. Territories Permitted Same-Sex Marriages.** Sets forth a chart of the dates upon which same-sex marriages were recognized in various states and US territories. https://secure.ssa.gov/apps10/poms.nsf/lnx/0200210003

Many practitioners advised their clients to file an appeal of any adverse ruling after the *Windsor* decision on June 26, 2013, and the SSA was holding most appeals pending clarification of the law. The new 2017 POMS GN 00210.002A.2 provides that a new claim under "current procedures." The POMS directs that a prior determination or decision may be reopened, thereby removing procedural bars. https://secure.ssa.gov/poms.nsf/lnx/0200210002

2. Transgender and Intersex Individuals. POMS GN 00305.005.B.5&6, Determining Martial Status. Sections B.5 and B.6 of this POMS direct the interviewer to ask a claimant who in the interview process is identified as transgender or intersex "Did you enter a same-sex or an opposite sex marriage?" and to accept the claimant's answer. The claim is then processed as either a same-sex relationship (GN 00210.000) or opposite sex relationship (GN 00305.000). https://secure.ssa.gov/apps10/poms.nsf/lnx/ 0200305005.

3. Supplemental Security Income (SSI). On July 15, 2017, the SSA announced the following rules for recognition of same-sex marriages for SSI purposes (GN 00210 TN 33):

- **POMS GN 00210.800 Supplemental Security Income (SSI) Same-Sex Marriages, Same-Sex Couples, and SSI Deeming from a Same-Sex Ineligible Spouse, the Social Security Administration. "**We recognize marriages between individuals of the same-sex for SSI purposes in all states. We recognize marriages between individuals of the same sex for SSI purposes in all states. We recognize a valid same-sex marriage as of the date of the marriage, including dates before the June 26, 2015 *Obergefell* decision.

When selecting the month to apply a finding of a same-sex marriage for SSI deeming purposes, or to apply the SSI eligible couple's payment rate and resource limit to a member of a same-sex couple, do **not** consider:

- the date of the *Windsor* Supreme Court decision, June 26, 2013;
- the date of the *Obergefell* Supreme Court decision, June 26, 2015; or
- the date that the laws of the state where the couple make or made their permanent home first recognized same-sex marriages performed in that state or in any other jurisdiction.

To determine marital status, refer to SI 00501.150 Determining Whether a Marital Relationship Exists and SI 00501.152 Determining Whether Two Individuals Are Holding Themselves Out as a Married Couple.

GN 00210.800 Supplemental Security Income (SSI) Same-Sex Marriages and Same-Sex Couple. https://secure.ssa.gov/apps10/poms.nsf/lnx/0200210800.

For marriages and relationships established in foreign jurisdictions, also refer to GN 00210.006 Same-Sex Marriages and Non-Marital Legal Relationships Established in Foreign Jurisdictions."

Practice Note: Given the gender-neutral recognition of marital status under *Obergefell* and the new POMS, the marriages of same-sex couples will be recognized for purposes of SSI eligibility.

4. POMS SI 00501.152 Determining Whether Two Individuals Are Holding Themselves Out as a Married Couple (Revised effective 7/13/17). It is important to note that for purposes of SSI, if a couple live in the same household and hold themselves out as married, the couple may be considered married for purposes of deeming each other's assets and income in determining either person's qualification for SSI.

Practice Note: Many LGBT couples who resided in formerly "non-recognition" states and were informed their pre-*Obergefell* marriages did not "count" for purposes of determining eligibility for SSI and Medicaid (that is, the income and assets of both individuals) must now consider the effects of their relationship in the same manner as opposite sex couples. Unmarried couples often have rental agreements, separate bank accounts, and do not hold themselves out as married to avoid the deeming of each other's assets and income.

5. SSI Overpayment Waivers Presumed Through March 16, 2018 If Due to Deeming Following Same-Sex Marriage Recognition. As revised on June 8, 2016, **POMS EM-16013 REV**, provides that all SSI Post-Eligibility actions (SSI PE actions) for same-sex couples, including SSI PE action that would result in overpayment of benefits, are to be processed. However, instead of requiring an affirmative request for waiver of overpayments, a waiver will be presumed if the overpayment is due to recognition of a same-sex marriage. This revised Emergency Message applies to SSI PE actions beginning March 15, 2016 through March 15, 2018. **POMS EM-16013**. **NOTE: March 15, 2018, was the last day for this type of presumed waiver.**

6. Child's Benefit Based on Stepchild Relationship. POMS GN 00210.505 sets out the instructions for determining a stepchild's entitlement to benefits based on the NH's same-sex marriage or non-marital legal relationship ("NMLR") with the child's parent or adoptive parent. Factors for determining entitlement to child's benefits that depend on the parent's same-sex relationship include the relationship between the child and the parent or adoptive parent; the relationship between the NH and the child's parent or adoptive parent; the duration of the stepchild relationship; and the dependency requirement for the child (that the stepchild is receiving one-half support from the NH). https://secure.ssa.gov/poms.nsf/lnx/0200210505. Determining eligibility for benefits based on a NMLR requires the SSA to first determine whether they will recognize the same-sex NMLR pursuant to **POMS GN 00210.004**, *see supra* Section II.F.1. As discussed above, this in turn requires SSA to determine both that the NMLR was valid in the state where it was entered into and that, applying the laws of the state of the NH's domicile, either the NMLR qualifies as a marital relationship or the claimant would be entitled to inherit a spouse's share of the NH's personal property should the NH have died without leaving a will. Of course, this

procedure only applies if the NH is neither the biological parent nor an adoptive parent of the child. Where the NH is the biological or adoptive parent of the child seeking benefits, the child benefits can be awarded on that NH's record.

Practice Note: An adoption decree is the gold standard for a non-biological parent, regardless of marital status. If no adoption decree is in place, the child's application will be reviewed by the local and regional offices determine: (1) validity of the NMLR; (2) stepparent status recognition; (3) duration of marriage/qualified-NMLR; and (4) dependency of child on the stepparent. To help establish dependency, non-biological stepparents can claim the IRS dependency deduction if the couple doesn't file a joint federal return.

III. STATE MARITAL AND NON-MARITAL RELATIONSHIPS AND SPOUSAL RIGHTS.

A. Non-Marital Legal Relationships: Civil Unions, Domestic Partnerships, and Designated Beneficiaries. Though not recognized as marriage under the Internal Revenue Code or the state income tax codes, some states and the Social Security Administration recognize various non-marital legal relationships. Civil unions and domestic partnerships create property rights, inheritance rights and other rights between the parties which are statutory and specific to each state's statute. Similarly, some states have reciprocal beneficiary statutes by which two adults may make themselves reciprocal beneficiaries of each other's estate in lieu of intestate succession or designated beneficiary statutes pursuant to which designated beneficiaries can be named in lieu of intestate heirs. The Social Security Act provides benefits to someone in a non-marital legal relationship if the worker's domicile ("number holder's" or "NH's" domicile in Social Security jargon) would allow a claimant to inherit a spouse's share of the number holder's personal property should the number holder die intestate. **POMS RS 00202.001 Spouse** https://secure.ssa.gov/apps10/poms.nsf/lnx/0300202001

1. Overviews of Relationship Recognition. The following links provide overviews of legal non-marital relationship:

> ***Marriage, Domestic Partnerships, and Civil Unions: An overview of relationship recognition for same-sex couples Within the United States:***
> http://www.nclrights.org/legal-help-resources/resource/marriage-domestic-partnerships-and-civil-unions-an-overview-of-relationship-recognition-for-same-sex-couples-within-the-united-states/ (hereinafter "NCLR, *Marriage, Domestic Partnerships and Civil Unions*")
>
> **POMS GN 00210.006 Same-Sex Marriages and Non-Marital Legal Relationships Established in Foreign Jurisdictions:** https://secure.ssa.gov/poms.nsf/lnx/0200210006

2. Statutory Conversions of Civil Unions and Domestic Partnerships. Some states which enacted marriage equality by statute after the enactment of civil unions or

domestic partnerships provide for (a) automatic conversion of civil unions and domestic partnerships to marriage (Connecticut, Delaware, New Hampshire and Washington) or (b) conversion of a domestic partnership upon marriage (District of Columbia, Illinois, Rhode Island and Vermont). See, NCLR, *Marriage, Domestic Partnerships and Civil Unions, supra*. There was not an automatic conversion to marriage for persons over 62 years of age in the State of Washington.

B. Recognition of Same-Sex Marriages Retroactively. Retroactive application of *Obergefell* can provide relief to spouses in same sex marriages who, but for unconstitutional same-sex marriage bans, would be married. As discussed in the preceding Sections I.C.1 and 2, (retroactive application of *Obergefell*) and the following Section III. E. (common law marriage), application of *Obergefell* retroactively by the courts is fact-specific.

Practice Reminder: The discussions herein do not mean that "marriage ceremonies" or common law marriages pre-*Obergefell* should be relied upon if both spouses are able to confirm their marital status by formally marrying in compliance with the laws of the state or country where the marriage occurs. **If there is any question regarding the validity of a client's marriage (including the failure to formally dissolve a prior marriage or non-marital legal relationship), the client should be advised to formally dissolve all prior relationships and remarry (obtaining a marriage certificate).** The couple can confirm the length of the marriage in a post-nuptial agreement and the remarriage will assure that the couple will not incur unnecessary legal expense in the future. **Additionally, maintaining a copy of a couple's marriage certificate in the clients' file will prove helpful if the validity of the clients' marital relationship is questioned.**

C. Transgender Spouses. Prior to *Obergefell*, there was some uncertainty regarding whether a marriage with a transgender person could be challenged as an invalid same-sex marriage. In New Jersey and Minnesota, the courts recognized the post-transition gender of transgender spouses and denied challenges to the validity of such marriages as same-sex marriages. R*adtke v. Misc. Drivers & Helpers Union*, 867 F. Supp. 2d 1023 (D. Minn. 2012) (holding employee benefit plan could not deny spousal coverage to transgender spouse); *M.T. v. J.T.*, 140 N.J. Super. 77 (App. Div. 1976) (affirming the trial court's award of spousal support to transgender spouse). In contrast, Kansas and Texas refused to recognize the post-transition gender of transgender spouses. *In re Estate of Gardiner*, 273 Kan. 191 (2002) (transgender spouse denied intestate share of the decedent's estate); *Littleton v. Prange*, 9 S.W.3d 223 (Tex. App. 1999), *cert. denied*, 531 U.S. 872 (2000) (transgender spouse denied standing to pursue wrongful death claim); *but see*, *In re Estate of Araguz*, 443 S.W. 3d 233, 245 (Tex. App. 2014 (noting that Littlejohn was legislatively overruled in 2009 by Tex. Fam. Code §2.005(a),(b)(8)). *Obergefell*, in holding that there is a constitutional right to marry without regard to gender, has eliminated this prior uncertainty. It is important to note that a gender transition by a spouse after marriage has never affected the validity of the marriage.

D. Does the Lack of Marriage License Invalidate a Marriage? In North Carolina, the lack of a marriage license does not invalidate an otherwise valid marriage. *In re Estate of Peacock*, Richard and Bernadine Peacock first married in 1993. 788 S.E.2d 191 (N.C. Ct. App. 2016), rev. denied, 793 S.E.2d 227 (2016). They divorced in 2007 and reconciled in 2012 and lived together. On December 12, 2013, Richard and Bernadine Peacock were remarried by their

minister at the hospital without a marriage license during Richard Peacock's last illness. Richard Peacock died intestate the next day on December 13, 2013. Richard and Bernadine had three children by their marriage (one of whom predeceased Richard). Richard Peacock also had two children by a prior marriage, who contested the validity of the 2013 marriage and Bernadine's rights as a surviving spouse. The New Hanover County Assistant Clerk of Superior Court entered an order determining that the marriage was invalid for lack of a marriage certificate which order was affirmed by the Superior Court on appeal. The Court of Appeals reversed the Superior Court's order and remanded the matter for entry of an order holding the marriage to be valid and Bernadine to be the lawful spouse of the decedent. Combining a retroactive application of *Obergefell* with the decision in the *Estate of Peacock*, celebrations conducted in North Carolina pre-*Obergefell* for same-sex couples by proper authorities could be valid marriages despite the lack of a North Carolina marriage certificate in connection with either the termination of the relationship or the death of a "spouse."

E. Common Law Marriage. Common law marriage is recognized in Colorado, Iowa, Kansas, Montana, New Hampshire, Texas and Utah. Additionally, common law marriage was previously recognized in Florida (not after 1/1/68), Georgia (not after 1/1/97), Indiana (not after 1/1/58), Ohio (not on or after 10/10/91), Pennsylvania (not after 1/1/05), and South Carolina (not after 7-24-19). Nat'l Conference of State Legislatures, *Common Law Marriage by State,* http://www.ncsl.org/research/human-services/common-law-marriage.aspx. *See also, GN 00305.075 State Laws on Validity of Common-Law (Non-Ceremonial) Marriages* https://secure.ssa.gov/apps10/poms.nsf/lnx/0200305075

Courts have applied *Obergefell* in the context of common law marriages. *In re Underwood*, No. 2014-E0681-29, 2015 WL 5052382 (Pa. C.P. Orphans' Ct. July 29, 2015) (finding the decedent was in a common law marriage with her same-sex spouse for purposes of a spousal beneficiary payment and survivor benefits for disability payments where the couple had had a religious ceremony celebrating their marriage and named each other as beneficiaries in their wills). *In re Estate of Stella Marie Powell*, No. C-1-PB-14-1695 (Travis Cty. Prob. Ct. No. 1 Nov. 6, 2014) (The decedent's siblings argued that the surviving same-sex partner could not be a common law spouse of the decedent due to Texas' bans against same-sex marriage. After *Obergefell* was decided, the parties submitted a settlement agreement to the probate court for approval.) *See also, Memorandum dated April 15, 2016 from The Honorable Barry C. Dozor,* Court of Common Pleas, Delaware County, Pennsylvania (set forth in Appendix at I-9); Lee-Ford Tritt, *Moving Forward By Looking Back: The Retroactive Application of Obergefell,,* 2016 Wis. L. Rev. 936-939.

Ranolls v. Dewling is a case in point from Texas. 223 F. Supp. 3d 613 (E.D. Tex. 2016). Shirley Ranolls instituted a wrongful death action against the driver of a tractor tanker/trailer in connection with death of her daughter, April Ranolls, on March 9, 2015 (the date of death being three months prior to the *Obergefell* decision). After the lawsuit was filed, Rhonda Hogan intervened in the lawsuit maintaining that April Ranolls was Rhonda's common law spouse (April and Rhonda had been living together for approximately eighteen (18) years but had separated almost a year before April's death). The court held that *Obergefell* applied retroactively, denied the defendant's motion for summary judgment, and remanded the case to the trial court since there were "genuine issues of material fact regarding whether Rhonda and April were common law spouses." *Id*. at 625.

F. Annulment or Divorce. Before *Obergefell*, many same-sex couples who were legally married in a state which recognized same-sex marriage could not get divorced in non-recognition states like North Carolina. In at least one other former "non-recognition state," the Wyoming Supreme Court found divorce did not violate Wyoming's same-sex marriage ban. *Christiansen v. Christiansen*, 253 P.3d 153 (Wyo. 2011). Given the inability to divorce, many same-sex couples simply separated and took no action to dissolve the marriage, believing the same to be without legal effect. Though some marriage recognition jurisdictions allowed non-resident same-sex couples to obtain divorces if their state of domicile would not grant a divorce prior to *Obergefell*, many couples did not understand the legal implications of not securing a divorce decree, or such couples were simply unable or unwilling to incur the legal expense to divorce formally. Some obtained annulments.

Based upon nationwide recognition of all same-sex marriages post-*Obergefell*, many couples, though separated for long periods of time, are still legally married. Any person previously married ***must*** be divorced before they marry another person. Similarly, couples who entered into civil unions in states that have automatically converted those unions into marriages must divorce if they wish to remarry or prevent the spouse from claiming elective share and spousal support rights in the other spouse's estate. Some clients may have entered into more than one marriage or non-marital legal relationship believing them not to be recognized. In such cases, all prior relationships and the termination of such relationships need to be confirmed.

G. Termination of Adult Adoptions. Adult adoptions have long been used by same-sex couples to obtain legal rights that they were deprived or excluded from by virtue of their sexual orientation. Adult adoptions were an option for gay and lesbian couples but may now be a barrier to marriage. For such "adopted" couples, an order annulling or vacating the prior order of adoption is required as a condition precedent to marrying. While many judges are granting these petitions, some requests have been denied due to the finality of adoption decrees (which in most cases is an essential principle of law). *See, e.g.*, Chris Potter, *Adoption Gave Gay Couple Legal Stature; Now It Disallows Them Marriage*, PITTSBURGH POST-GAZETTE (Oct. 9, 2015), http://www.post-gazette.com/local/north/2015/10/09/Fox-Chapel-gay-couple-had-to-legalize-their-status-through-adoption-now-it-keeps-them-from-getting-married/stories/201510110112. Roland Bosee, Jr. and Nino Espoosito, the couple in the Pittsburgh Post-Gazette Article did prevail on appeal from the Allegheny County Orphan's Court's denial of their petition to annul or revoke the adult adoption of Roland by Nino. *In re Adoption of R.A.B.*, 153 A.3d. 332 (2016) (The Superior Court held that the denial of the unopposed petition to annul or revoke the adoption in order to marry was contrary to the fundamental right of same sex couples to marry. The court noted other jurisdictions which have granted similar relief.). S*ee also,* Elon Green, *The Lost History of Gay Adult Adoption*, N.Y. TIMES MAGAZINE (Oct. 19, 2015), https://www.nytimes.com/2015/10/19/magazine/the-lost-history-of-gay-adult-adoption.html.

IV. FAMILY LAW FOR LGBTQ CLIENTS.

A. Prenuptial and Postnuptial Agreements. Similar to elective share rights, the marital estate for purposes of equitable distribution depends upon the length of the marriage. In contested cases, the length of a marriage may depend upon prior marriage celebrations or civil

unions or domestic partnerships which were celebrated pre-*Obergefell*. Couples who have only recently married, but have been in a long-term relationship, may want to define both property rights and support obligations in prenuptial and postnuptial agreements. Such agreements can preemptively address issues such as distribution of assets and support based upon the parties' expectations given the length of the relationship regardless of the length of legal recognition, thereby minimizing the risk of litigation.

B. Birth Certificates and a Rebuttal Presumption of Parenthood. In North Carolina, when a child is born to a legally married couple, that child is considered to be the child of the married parties. The North Carolina statute providing this presumption of parentage based on marriage is gender specific referring to "mother" and "father." N.C. Gen. Stat. § 130A-101. In 2017, North Carolina amended the statute governing rules for construction of statutes making the terms and phrases "husband," "wife, "man and wife," and similar terms apply to any two individuals who are lawfully married to each other regardless of gender. N.C. Gen. Stat. § 12-3(16). Despite prior litigation and uncertainty in some states whether the lack of gender-neutral language in state statutes would be applied to same-sex parents, the Supreme Court's decision in *Pavan* makes this right clear. *See supra* Section I.A. There are special considerations in cases of surrogacy which are beyond the scope of this manuscript.

It cannot be over-emphasized that the presumption that is created by a parent being recognized on a birth certificate is nothing more than that – a rebuttable presumption. N.C.G. S. § 8-50.1 provides that in any proceeding in any court in which the question of parentage arises, regardless of any presumption, the court shall order that the parent in question and the child submit to a blood test to establish parentage. Including both same-sex parents on a birth certificate of a child born during the marriage often creates a false sense of security, despite the risk that the non-biological parent's relationship could be challenged in future litigation. In other states where same-sex couples have attempted to rely on the presumption of parenthood, the courts have consistently held that birth certificates only confer a rebuttable presumption, not legal parenthood. *E.g.*, *Barse v. Pasternak*, 2015 Conn. Super. LEXIS 142*, 2015 WL 600973, at*14-15 (Jan. 16, 2015), *aff'd on reh'g*, 2015 Conn Super. LEXIS 1705* (Jun. 29, 2015) (holding a birth certificate is only prima facie evidence of parentage). While non-biological parent "prevailed," the parties incurred substantial legal fees which an adoption order would have avoided). For this reason, same-sex couples are strongly encouraged to use stepparent or second parent adoptions to establish a parental relationship between the child and both the biological and non-biological parent.

The Arizona Supreme Court recognized a nonbiological mother as a parent in *McLaughlin v. Jones*, 2017 Ariz. LEXIS 263, at *16 (Ariz. Sept. 19, 2017), but there is no question that the mother would have opted for a step-parent adoption had she realized the time and expense it would take to secure her parental rights in litigation.

Practice Note: All non-biological parents should establish a formal relationship with their children by obtaining an adoption decree. Neither a birth certificate nor a co-parenting agreement provides sufficient protection for the parents and the child.

C. Stepparent Adoptions. Stepparent adoption statutes allow the spouse of a legal or genetic parent to adopt the child of their spouse in certain circumstances. *E.g.*, N.C. Gen. Stat. §

48-4-101. To qualify for a stepparent adoption in North Carolina: (i) the petitioner must be legally married to the child's biological parent for at least six (6) months immediately preceding the filing of the petition, (ii) the parental spouse must have legal custody of the child, (iii) the other parent must consent to the adoption, unless their rights have been terminated or another exception applies, and (iv) the home the parents share must have been the residence of the child for six (6) months prior to the petition.

Adoption decrees are court orders that all states are required to recognize under the Full Faith and Credit Clause of the United States Constitution. On March 7, 2016, the United States Supreme Court unanimously held that under the Full Faith and Credit Clause, the Alabama Supreme Court could not disregard and refuse to enforce a Georgia adoption decree which appeared on its face to be issued by a court of competent jurisdiction thereby restoring the non-biological parent's relationship. *V.L. v. E.L.*, 577 U.S. 404, 136 S. Ct. 1017 (2016). This decision makes clear why it is so important to secure an adoption decree, as opposed to relying upon a rebuttable presumption arising from a birth certificate.

D. Voluntary Affidavits of Parentage (VAPs). Currently, California, Colorado, Connecticut, Maryland, Nevada, New York, Maine, Rhode Island, Washington, and Vermont allow parents to acknowledge they are the parent by affidavit. The goal of VAPs is to allow a simple process to acknowledge parentage. However, unlike an adoption decree which requires all states to recognize its validity under the Full Faith and Credit Clause (see, V.L. v. E.L., *supari*, I A.), VAPs do not provide such constitutional protection of a non-biological parent's rights. The client will ultimately make the decision on how much protection they want to be assured of in the event of a separation or divorce from the other parent.

E. Co-parenting Agreements. Like the rebuttable presumption of a birth certificate, co-parenting agreements, while in some cases less expensive than the adoption process, also fail to adequately protect parental rights of a non-biological or non-adoptive parent. Though the existence of a co-parenting agreement is a strong factor in establishing that a biological or adoptive parent has given up his or her constitutional right to exclusively raise a child, such agreements do not in themselves guarantee that a court will uphold visitation rights of the "co-parent," or award child support and future litigation is always a risk. Unlike a decree of adoption, a co-parenting agreement will only give the non-biological "parent" visitation rights (not full custody rights) and such agreements do not give the biological parent the right to pursue child support if the couple separates. Such agreement also does little to prevent future litigation expense. *See Davis v. Swan*, 206 N.C. App. 521 (2010), *rev. denied* 365 N.C. 76 (2011) (although visitation rights of the Plaintiff were upheld on appeal, the Plaintiff was required to litigate for such rights).

Practice Note: All non-biological parents should establish a formal relationship with their children by obtaining an adoption decree. Birth certificates, VAPs and co-parenting agreements do not provide a parent with rights under the Full Faith and Credit Clause.

F. Unmarried Parents and Second Parent Adoptions. Historically, when unmarried same-sex couples had a child together, a common means to establish legal parentage for the non-biological parent was through "second parent" adoption. A second parent adoption allows an unmarried co-parent to adopt a child without terminating or affecting the legal

relationship of the child and the existing biological or other legal parent. While similar to stepparent adoptions, second parent adoptions do not require the co-parent to be married to the legal parent. However, in some jurisdictions, including North Carolina, second parent adoptions are not available. *Boseman v. Jarrell*, 704 S.E.2d 494 (N.C. 2010) (holding that the law governing adoptions in North Carolina is wholly statutory and, therefore, courts lack subject matter jurisdiction to issue second parent adoptions and such judgments are void *ab initio*). Second parent adoptions remain available to unmarried same-sex couples in other jurisdictions (residency requirements vary by state). If parents are not married, the adopting parent may be entitled to a tax credit for the adoption expenses incurred (in 2023 the tax credit is $15,950, which is phased out for taxpayers with MAGI exceeding $239,230 and completely phased out at $279,230. I.R.C. §23; Rev. Proc. 2022-38).

G. Elective Share Rights. Since North Carolina's elective share rights are based upon the length of the marriage ranging from fifteen percent (15%) to fifty percent (50%) of Total Net Assets for marriages of less than five (5) years to more than fifteen (15) years, it is important to determine whether a marriage was celebrated in another state (or a civil union or domestic partnership previously entered into was automatically converted to marriage) in assessing a surviving spouse's elective share rights. N.C. Gen. Stat. § 30-3.1.

H. Spousal Consents. Depending upon state law, spousal consent is often required relating to the following:

a. **Real Estate Transfers**. In absence of a premarital agreement, spousal consent is often required to release all marital rights in such property. Revocable trusts may not avoid the need for a spouse to join in the conveyance.

b. **Qualified Retirement Benefits.** Spouse is beneficiary in absence of written waiver (waiver must be made after marriage even if in premarital agreement).

c. **IRAs.** North Carolina does not require consent, but other states, including community property states, do require consent. Some IRA custodians require spousal consent regardless of domicile of account owner.

d. **Group Life Insurance.** Spouse is not beneficiary by operation of law and consent not required.

I. Tenants by the Entireties. Effective January 1, 1983, N.C. Gen. Stat. § 39-13.6 expressly changed the common law incidents of tenancy by the entireties to provide for equal rights of both the husband and wife to the control, use, possession, rent, income and profit of such real property. However, N.C. Gen. Stat. § 39-13.6 refers to "husband and wife," not married persons or spouses. Effective July 12, 2017, North Carolina added subsections (16) and (17) to N.|C. Gen. Stat §12-3 (the rules of construction of statutes) which provide:

> N.C. Gen. Stat §12.-3(16) - The words "husband and wife," "man and wife," woman and husband," "husband or wife," "wife or husband," "man or wife,"

"woman or husband," or other terms suggesting two individuals who are then lawfully married to each other shall be construed to include any two individuals who are then lawfully married to each other.

N.C. Gen. Stat §12.-3(16) - The words "widow" and "widower" mean the surviving spouse of a deceased individual.

The above amendments to the rule of statutory construction are welcome as *Obergefell* expressly stated that it is unconstitutional for states to deny "the benefits of marriage" based upon the sex of the spouses. *Obergefell*, 135 S. Ct. 2584. While some of the real estate bar expressed concerns prior to July 12, 2017, these amendments make clear there is no basis for a court to use antiquated language in the statute to deny same-sex married couples the benefits of tenancy by the entireties with respect to any real estate they acquire during the marriage or other statutory rights for that matter.

Prior to *Obergefell*, deeds to same-sex married couples as tenants by the entireties often included a savings clause (stating that if the tenancy by the entireties was not recognized it would be a joint tenancy with right of survivorship). Some practitioners have cautioned that such savings clauses could be used to argue for disregarding the creditor protections and are unnecessary post-*Obergefell.* In North Carolina, in absence of a creditor issue, the North Carolina real estate bar recommends transferring the property first as joint tenants with rights of survivorship and then to tenants by the entireties to assure that if the second deed were invalidated the tenancy would be by survivorship.

Practice Note: Confirm title on deeds for same-sex couples. Be sure to provide counsel regarding whether it is desirable and appropriate to retitle property, keeping in mind that joint title may not be desirable or appropriate (e.g., changing the character of separate property brought into a marriage or inherited during a marriage).

V. ADOPTIONS FOR LGBTQ FAMILIES.

State law on adoptions varies by state. The following summary of North Carolina law is intended to provide an overview of typical terminology and procedure. A state law survey is beyond the scope of this manuscript.

A. Adoptions in North Carolina. North Carolina adoption statutes are gender neutral and differentiate between married versus unmarried couples, not opposite sex or same-sex couples. Married couples must adopt jointly unless a waiver for cause is granted by the Court, regardless of the gender of the individuals. An unmarried couple may not adopt jointly, regardless of the gender of the individuals or sexual orientation.

B. Types of Adoptions. In North Carolina, there are 3 ways by which an adoption may take place:

1. Direct Placement Adoption. This type of adoption contemplates substitution of families where biological parents sever their rights in favor of adoptive parents. Most often this is a situation where birth parents chose who will adopt their child without the involvement of public or government agencies.

2. Agency Placement Adoptions. Public or government adoption agencies acquire legal and physical custody of a minor and adoption occurs by means of relinquishment or termination of parental rights. Most often, this is a situation where a child has become a ward of the state due to abuse, neglect or abandonment by the birth parents.

3. Stepparent Adoption. The spouse of a legal or genetic parent may adopt a child if statutory requirements of N.C. Gen. Stat. § 48-2-310 and §§ 48-4-101-103 are met.

4. Second Parent Adoptions. A second parent adoption allows an unmarried co-parent to adopt a child without terminating or affecting the legal relationship of the child and the existing biological or legal parent. While similar to stepparent adoptions, second parent adoptions do not require the co-parent to be married to the legal parent. However, in some jurisdictions, including North Carolina, second parent adoptions are not available. *Boseman v. Jarrell*, 704 S.E.2d 494 (2010) (holding that the law governing adoptions in North Carolina is wholly statutory and, therefore, courts lack subject matter jurisdiction to issue second parent adoptions and such judgments are void *ab initio*). In those states that allow second parent adoptions, the residency requirements vary.

Practice Note: An adoption tax credit is available to an unmarried adoptive parent in a second parent adoption. The tax credit is nonrefundable but may be carried forward for up to five (5) years. In 2023, the tax credit is $15,950 which is phased out for taxpayers with MAGI exceeding $239,230 and completely phased out at $279,230. I.R.C. §23; Rev. Proc. 2022-38.

C. Adult Adoptions. An "Adult" is defined as an individual who is 18 years of age, or if under the age 18, is either married or has been emancipated under applicable State law.

VI. TRANSGENDER CLIENTS

A. Name and Gender Change. N.C. Gen. Stat. §101-2 provides that an individual may obtain change for good cause. Changing one's gender on a birth certificate is a matter of the laws of the state which issued the birth certificate. Under N.C. Gen. Stat. §130A-118, "a notarized statement form the physician who performed sex reassignment surgery or form a physician who has examined the individual and can certify that the person has undergone sex reassignment surgery" is required to change the gender marker on a birth certificate. N.C. Gen. Stat. §130A-118(b)(4), (e). However, after the Secretary of the North Carolina Department of Health and Human Services was sued for violating the Equal Protection Clause and Due Process Clause of the Fourteenth Amendment to the U.S. Constitution, the parties entered into a consent judgment which requires the North Carolina Vital Statistics Program to process requests to correct the sex on a registrant's birth certificate if the registrant's assigned sex at birth differs from the registrant's gender identity. *Campos v. Kinsley*, Case 1:21-cv-0080-LCB-JEP (M.D.N.C. June 22, 2022). Registrant must submit an application along with supporting documentary evidence of the

registrant's sex to be reflected on registrant's birth certificate which may include any of the following (i) a valid North Carolina Driver's License or valid State ID card issued by the North Carolina Division of Motor Vehicles which reflects the person's sex, (ii) a valid United States passport that reflects the person's sex, or (iii) a certification signed by a physician, psychiatrist, physician's assistant, licensed therapist, counselor, psychologist, case worker, or social worker stating, based on their professional opinion, the gender identity of the registrant. *Id*. at 5.

Other state law varies on the requirements for name and gender changes. Some states only require evidence that a person is undergoing a gender change, other states require proof of "gender reassignment surgery," and a few states prohibit a person from changing the gender on their birth certificate. The requirements for each state can be found at: http://www.lambdalegal.org/know-your-rights/article/trans-changing-birth-certificate-sex-designations

The Department of State currently allows transgender individuals to change the gender marker on their passport upon a physician's certification that such person is undergoing a transition. https://travel.state.gov/content/travel/en/passports/apply-renew-passport/change-of-sex-marker.html. Since this is an agency rule which could be revised or repealed, transgender clients who have transitioned or are contemplating a transition should consider obtaining or amending passports to reflect their gender identity. *See Name and Gender Changes After the 2016 Election,* http://www.nclrights.org/wp-content/uploads/2016/11/FAQ-Name-and-Gender-Change-post-election.pdf.

B. Medicare and Transgender Health Care. On May 31, 2014, the Department of Health and Human Services (HHS) Departmental Appeals Board ruled that the National Coverage Determination (NCD) requiring denial of all claims for gender reassignment surgery under Medicare was no longer valid under the Board's reasonableness standard. Transgender persons with Medicare coverage may now obtain coverage for gender reassignment surgery. While the NCD may not be used to summarily deny coverage, Medicare coverage of gender reassignment may be denied for "other reasons permitted by law." NCD 140.3, Transsexual Surgery, No. A-13-87, Decision No. 2576 (May 30, 2014), https://www.hhs.gov/sites/default/files/static/dab/decisions/board-decisions/2014/dab2576.pdf.

C. Health Care Powers of Attorney and Advanced Directives. Transgender clients should be advised to provide advanced directives in their health care power of attorney and other end of life documents which will assure that their gender identity is respected by health care providers if they are incapacitated and after their death. http://www.LGBTQagingcenter.org/resources/pdfs/End-of-Life%20PlanningArticle.pdf.

D. Challenges to Transgender Equality. As discussed in Section VIII, Challenges to LGBTQ Equality *infra*, some of those opposed to LGBTQ equality have focused on transgender rights and are using arguments that the biological differences between transgender and cisgender people[1]warrant differing treatment under the law, particularly as it relates to bathrooms, locker

[1] "Transgender" is an adjective (not a noun or verb) and "an umbrella term for people whose gender identity and/or gender expression differs from what is typically associated with the sex they were assigned at birth. People under the transgender umbrella may describe themselves using one or more of a wide variety of terms - including transgender. … Use the descriptive term preferred by the person. Many transgender people are prescribed hormones by their

rooms and other facilities segregated by sex. One commentator has noted the similarity of such arguments – biological differences between men and women – to justify limiting the rights of gays and lesbians. Shannon Price Minter, "*Déjà Vu All Over Again": The Recourse to Biology By Opponents of Transgender Equality*, 95 N.C.L. REV. 1161 (2017).

VII. STATUTORY SURROGATES, REGULATORY CHANGES, HEALTH CARE POWERS OF ATTORNEY AND RELATED CONSIDERATIONS.

The following is a revised copy of an excerpt from a 2012 article published in the *Will and the Way* on April 2012. Kohut, *Estate Planning for Gay, Lesbian, Bisexual and Transgender (LGBTQ) Clients: Statutory Surrogates, Regulatory Changes, Health Care Powers of Attorney and Related Considerations*, THE WILL AND THE WAY (April 2012) (Estate Planning and Fiduciary Law Section, North Carolina Bar Association). Despite marriage equality, this discussion is still relevant to LGBTQ clients, especially in the case of LGBTQ clients whose family members are unaccepting or hostile.

The following is a post (January 2012) on a listserv for lawyers representing the LGBTQ (lesbian, gay, bisexual and transgender) clients:

Subject: Time-sensitive re death of same-sex partner

Does anyone have knowledge or experience about the best way to seek enforcement of provision in will giving same-sex partner the power to make funeral arrangements? This is in Florida but would appreciate hearing from anyone who has dealt with this situation. The parents kept partner from visiting in hospice facility. We just found out the ill partner passed away. We do not know the location of the body.

A later post explained that the partner was the designated health care surrogate, but the patient's family had made false allegations to the police and hospice facility regarding the surrogate which resulted in his exclusion. In North Carolina, the 2007 amendments to the informed consent statute (N.C. Gen. Stat. § 90-21.13) and the adoption of a Patient Bills of Rights provide for greater certainty of a person's right to self-determination and visitation rights of non-family members. The 2011 changes in the federal regulations applicable to health care facilities accepting Medicare and Medicaid also help in similar circumstances. Finally, Chapter 130A of the North Carolina General Statutes provide some clarity on burial rights and authority to dispose of one's remains. Assuming the same facts as the post but in North Carolina, the decedent's funeral arrangements

---

doctors to bring their bodies into alignment with their gender identity. Some undergo surgery as well. But not all transgender people can or will take those steps, and a transgender identity is not dependent upon physical appearance or medical procedures."

"Cisgender" is a term used by some to describe people who are not transgender. "Cis-" is a Latin prefix meaning "on the same side as," and is therefore an antonym of "trans-." A more widely understood way to describe people who are not transgender is simply to say non-transgender people." *GLAAD Media Reference Guide – Transgender*, https://www.glaad.org/reference/transgender.

could have been set forth in a pre-need funeral contract (or authorization for cremation), a health care power of attorney, direction in a will or a written, attested statement, witnessed by two adults. N.C. Gen. Stat. § 130A-420(a). *See* Michael F. Anderson, *Dust to Dust*, THE WILL AND THE WAY (April 2012) (Estate Planning and Fiduciary Law Section, NCBA).

While the focus of this manuscript is estate planning and family issues unique to LGBTQ clients, many single individuals, as well as unmarried opposite-sex couples, face similar issues especially in the case of health care decisions, recognition of health care surrogates, visitation rights, funeral arrangements, cremation, and disposition of one's remains. For example, suppose in the above post the lawyer was writing about a client who had been the caregiver for her neighbor of 20 years or a client who is the unmarried opposite-sex partner of 10 years. Had the adult children of the patient been called so they could visit with their mother during her last illness, the facility may have similarly excluded the support person or companion from visitation and the support person may not have been included or informed about the funeral arrangements. Both LGBTQ and unmarried clients need to appoint statutory agents if they want to ensure that the support persons of their choice, if other than their immediate family as defined by statute, are involved in health care decisions and have visitation rights. Although the North Carolina statutory default rules in absence of a statutory agent give family members priority, N.C. Gen. Stat. § 130A-420, there are recent federal regulations (and some North Carolina regulations) which in most cases should prevent immediate family members from excluding support persons and unmarried companions from visitation rights and consultation regarding health care decisions during a period of incapacity.

A. State and Federal Law Regarding Health Care Agents, Surrogates, Support Persons and Legal Representatives. Since the advantages of having an attorney-in-fact and health care agent are best understood by what happens in absence of such an appointment, a review of state and federal law precedes the discussion of the appointment of statutory agents.

1. North Carolina Statutory Provisions Regarding Health Care Decisions.

a. Consent to Medical Treatment When Patient Incapacitated. In absence of a valid Health Care Power of Attorney, the hierarchy of persons who are given authority to make health care decisions "on behalf of a patient who is comatose or otherwise lacks capacity to make or communicate health care decisions" is set forth in N.C. Gen. Stat. § 90-21.13(c):

i. Guardian of the person or general guardian, but health care power takes precedence unless clerk suspends the health care agent's authority.

ii. Health care agent.

iii. An attorney in fact to the extent authority is so granted, subject to the authority of a health are agent appointed under chapter 32A. N.C. Gen. Stat. § 32A-2. [Note: N.C. Gen. Stat. §32A-2(9) does give such authority if a statutory short form power of attorney is so initialed.]

iv. The patient's spouse.

v. A majority of available parents and adult children.

vi. A majority of adult siblings.

vii. An individual who has an established relationship with the patient, who is acting in good faith on behalf of the patient and who can reliably convey the patient's wishes.

viii. The attending physician, with confirmation by a second physician.

Based upon the statutory defaults under N.C. Gen. Stat. § 90-21.13(c), in absence of a guardian or duly authorized health care agent or attorney in fact, the health care provider is to exhaust the listed categories of family members before looking to a non-family member, even if the latter has in fact the closest relationship with the patient. Note that this holds true for all unmarried couples (gay and straight), as well as other unmarried persons in supportive relationships (for example, two adults who have no familial or personal relationship other than support of one another).

The 2007 amendments to N.C.G.S § 90-21.13, while an improvement, still leave unmarried partners (gay and straight), as well as individuals who have no relationship with their next of kin but strong relationship with a "family member of choice" subject to health care decisions being made by next of kin in absence of a guardianship or, preferably, a health care power of attorney. Fortunately, accreditation standards, licensure regulations and conditions for participation in Medicare and Medicaid to a great extent recognize a patient's right to self-determination and the medical benefits of assuring the support persons and companions of all patients are afforded access to the patient even in absence of a statutory agent. *See* State Operational Manual, Appendix A, Medicare Conditions of Participation § 482.2.13 (hyperlink provided below); *infra* Section VII.A.4, JCAHO Accreditation Standards.

b. North Carolina Patient Bill of Rights. North Carolina has adopted a Patient Bill of Rights in connection with the licensure of many healthcare institutions and home health agencies which, among other things, allows a patient to designate visitors without regard to familial relationship. These provisions can provide help where the applicable federal regulations on conditions of Medicare and Medicaid reimbursement do not apply. An exhaustive study of all types of health care providers is beyond the scope of this article, but a summary and non-exclusive list of provisions in the North Carolina General Statutes and Administrative Code regulating health care providers is set forth below:

Hospitals: Hospitals must honor a patient's right to designate visitors who shall have the same visitation privileges as the patient's immediate family members, regardless of whether the visitors are legally related to the patient. 10A N.C.A.C. 13B.3302 (2012).

Nursing Homes: Nursing homes must allow patients to associate and communicate privately and without restriction with persons and groups of the patient's choice. N.C. Gen. Stat. § 131E-117(8).

Hospice Facilities and Home Healthcare Agencies: The patient's right to designate non-family members other than by health care power of attorney or power of attorney is less clear. *See* 10 N.C.A.C 13k.O604 (2012) (hospice) and 10 N.C.A.C. 13J.1007 (2012) (home health care agencies).

2. Section 1557 - The Non-Discrimination Provisions of the Affordable Care Act. Section 1557 of the Patient Protection and Affordable Care Act is the nondiscrimination provision of the Affordable Care Act (ACA) codified at 42 U.S.C. § 18116 (2012) and reads:

> § 18116. Nondiscrimination
>
> **(a) In general.** Except as otherwise provided for in this title (or an amendment made by this title), an individual shall not, on the ground prohibited under title VI of the Civil Rights Act of 1964 (42 U.S.C. 2000d et seq.), title IX of the Education Amendments of 1972 (20 U.S.C. 1681 et seq.), the Age Discrimination Act of 1975 (42 U.S.C. 6101 et seq.), or section 504 of the Rehabilitation Act of 1973 (29 U.S.C. 794), be excluded from participation in, be denied the benefits of, or be subjected to discrimination under, any health program or activity, any part of which is receiving federal financial assistance, including credits, subsidies, or contracts of insurance, or under any program or activity that is administered by an Executive Agency or any entity established under this title (or amendments). The enforcement mechanisms provided for and available under such Title VI, Title IX, section 504, or such Age Discrimination Act shall apply for purposes of violations of this subsection.
>
> **(b) Continued application of laws.** Nothing in this title (or an amendment made by this title) shall be construed to invalidate or limit the rights, remedies, procedures, or legal standards available to individuals aggrieved under title VI of the Civil Rights Act of 1964 (42 U.S.C. 2000d et seq.), title VII of the Civil Rights Act of 1964 (42 U.S.C. 2000e et seq.), title IX of the Education Amendments of 1972 (20 U.S.C. 1681 et seq.), section 504 of the Rehabilitation Act of 1973 (29 U.S.C. 794), or the Age Discrimination Act of 1975 (42 U.S.C. 611 et seq.), or to supersede State laws that provide additional protections against discrimination on any basis described in subsection (a).
>
> **(c) Regulations**. The Secretary [of Health and Human Services] may promulgate regulations to implement this section.
>
> 42 U.S.C. § 18116 (2012).

Section 1557 has been in effect since its enactment in 2010 and the HHS Office for Civil Rights has been enforcing the provision since it was enacted. On May 13, 2016, the HHS Office for Civil Rights issued the final rule implementing of Section 1557 ("2016 Final Rule") to be effective on July 18, 2016. Read the full text version published in the Federal Register. The 2016 Rule provided protection against discrimination based upon gender identity and sexual

orientation: Section 92.206 (non-discrimination protections of transgender people based upon their gender identity), Section 92.207 (non-discrimination protections prohibiting exclusions in healthcare policies for transgender care) and Section 92.209 (non-discrimination protections prohibiting discrimination based upon association, including sexual orientation). The 2016 Final Rule was challenged and, on December 31, 2016, the United States District Court for the Northern District of Texas has issued a nationwide preliminary injunction against the enforcement of the Final Rule's prohibitions against discrimination by health care providers towards transgender people and health insurance policy coverage requirements for transgender individuals based upon their gender identity. *Franciscan Alliance, Inc. v. Burwell*, 227 F. Supp. 3d 660 (N.D. Tex. 2016). On July 10, 2017, the district court entered a stay of the case pending a review of the Final Rule by the Department of Health and Human Services (by that time under the Trump Administration) but retained jurisdiction over the case and clarified that the December 31, 2016 preliminary injunction remained in full force and effect. 2017 U.S. Dist. LEXIS 145416 (N.D. Tex, July 10, 2017).

On June 19, 2020, The Department of Health and Huaman Service under the Trump Administration, issued a new Final Rule (2020 Final Rule) to be effective August 18, 2020. The 2020 Final Rule eliminated the protections for transgender people and against discrimination based upon sexual orientation. However, before the 2020 Final Rule become effective, the Supreme Court issued its decision on *Bostock v. Clayton County* on June 15, 2022, holding discrimination based upon sexual orientation or gender identity are unlawful discrimination based upon "sex." 140 S. Ct. 1731, 207 L. Ed. 2d 218 (2020). Based upon the Supreme Court's decision in *Bostock*, two federal courts enjoined the 2020 Final Rule. *Walker and Gentili v. Azar*, Case 1:20-cv-02834-FB-SMG (E.D.N.Y.) (injunction entered 8-17-20) and *Whitman-Walker Clinic, Inc, V. U.S Department of Health and Human Services, et al*, Case 1:20-cv-01630-JEB (District of Columbia) (injunction entered 9-2-20).

On July 25, 2022, Health and Human Services issued a Notice of Proposed Rulemaking to revise its 1557 regulations. The proposed rule protects against discrimination on the basis of sex including sexual orientation and gender identity consistent with the Supreme Court's decision in *Bostock*. *See* https://www.hhs.gov/civil-rights/for-individuals/section-1557/index.html

3. Federal and Regulatory Requirements of Health Care Institutions Regarding Support Persons and Personal Representatives. Hospitals and critical access hospitals which accept Medicare or Medicaid funds cannot exclude a support person (even in absence of a statutory health care agent) from visitation. These regulatory changes benefit and protect all persons in supportive relationships outside the context of opposite-sex marriages and are based upon best medical practices which recognize that valuable patient information may be missed and communication with the patient may be enhanced. *See* State Operational Manual, Appendix A, Interpretive Guidelines, § 482.13(h) at: https://www.cms.gov/Regulations-and-Guidance/Guidance/Manuals/downloads/som107ap_a_hospitals.pdf.

These regulations expressly state that the healthcare institution should accept the representations of the support person whether oral or written in absence of two or more persons claiming to have such authority (in which case the hospital must have policies for conflict resolution).

a. Hospitals – Conditions of Medicare Participation. Effective January 18, 2011, the conditions for participation in Medicare with respect to hospitals were revised to: (a) provide patients with the right to designate surrogates for health care decisions and in the event of incapacity recognize support persons as a patient's representative, 42 C.F.R. § 482.13(b)(3),(4); and (b) provide patients with the right to control who has visitation rights and, in the event of incapacity, the health care institution must allow visitation rights to support persons regardless of the lack of a health care power of attorney or other formal documentation. These new regulations were in response to a hospital's refusal to permit a patient's lesbian partner of 18 years, Janice Langbehn, and their minor children from visiting with the patient for over eight hours after a hospital admission for a brain aneurism. By the time the partner and children were able to see the patient, she was unconscious and died the next morning. Tara Parker-Poe, *Kept from a Dying Partner's Bedside*, N.Y. TIMES (May 18, 2009), http://www.nytimes.com/2009/05/19/health/19well.html. In that case, it was the health care providers and not next of kin that prevented the patient's family from being with her during her last hours of life.

Most notably, the new rules:

• Require that when a patient is competent to choose a surrogate decision-maker, hospitals must honor that request, even if the person had previously designated someone else.

• Unless prohibited by applicable state law[2], require that when a patient is incapacitated, hospitals must recognize the patient's self-identified family members, regardless of whether they are related by blood or legally recognized. The rules specifically include same-sex partners and de facto parent-child relationships.

• Prohibit a hospital from requiring proof of a relationship in order to respect that relationship.

• Require that when a patient is incapacitated, and more than one person claims to be the patient's representative, hospitals must resolve the dispute by considering who the patient would be most likely to choose. The hospital must consider factors including the existence of a marriage, domestic partnership, or civil union, a shared household, or any special factors that show that a person has a special familiarity with the patient and the patient's wishes.

See Frequently Asked Questions Regarding New Federal Hospital Visitation Rules on Who Can Make Medical Decisions for You, National Center for Lesbian Rights, NAT'L CTR. FOR LESBIAN RTS. (Sept. 9, 2011), http://www.nclrights.org/wp-content/uploads/2014/01/FAQ-New-Fed-Hospital-Visitation-Rules.pdf

[2] Note: In North Carolina, N.C.G.S. §90-23(c)(7) provides that an individual who has an established relationship with the patient, who is acting in good faith on behalf of the patient and who can reliably convey the patient's wishes, may consent to medical treatment if the patient is unable to and all other statutory surrogates (healthcare agents, guardian, spouse, parents, adult children and adult siblings) are not available.

The Interpretive Guidelines amplify and explain the regulations. The Interpretive Guidelines can be found at:
http://www.cms.gov/Regulations-and-Guidance/Guidance/Manuals/downloads/som107ap_a_hospitals.pdf

On June 16, 2016, the Centers for Medicare & Medicaid Services (CMS), proposed a non-discrimination rule, including sexual orientation and gender identity under Section 1557 of the ACA entitled *Hospital and Critical Access Hospital (CHA) Changes to Promote Innovation, Flexibility, and Improvement in Patient Care*, 81 Fed. Reg. 39448 (June 16, 2016). The Proposed Rule would add the following sections to the Conditions of Participation:

42 C.F.R. §482.13(g)(4)(i) Standard: Non-discrimination. A hospital must meet the following requirements:

(1) Not discriminate on the basis of race, color, religion, national origin, sex (including gender identity), sexual orientation, age, or disability.

(2) Establish and implement a written policy prohibiting discrimination on the basis of race, color, religion, national origin, sex (including gender identity), sexual orientation, age, or disability.

(3) Inform each patient (and/or support person, where appropriate), in a language he or she can understand, of his or her right to be free from discrimination against them and how to file a complaint if they encounter discrimination when he or she is informed of his or her other rights under this section [Patient's Right – §483.13].

42 C.F.R. §485.635(g) Standard: Non-discrimination. A CAH [critical access hospital] must meet the following requirements:

(1) Not discriminate on the basis of race, color, religion, national origin, sex (including gender identity), sexual orientation, age, or disability.

(2) Establish and implement a written policy prohibiting discrimination on the basis of race, color, religion, national origin, sex (including gender identity), sexual orientation, age, or disability.

(3) Inform each patient (and/or support person, where appropriate), in a language he or she can understand, of his or her right to be free from discrimination against them and how to file a complaint if they encounter discrimination.

The comment period closed on August 15, 2016, but no final rule was issued.

While the forgoing regulations only apply to hospitals, there are similar regulations for other health care facilities and providers which receive Medicare and Medicaid funding.

b. Skilled Nursing Facilities – Conditions of Participation. Nursing facilities receiving Medicare or Medicaid must provide residents with the right of self-determination, the right to immediate access to the resident's immediate family members and others as designated by the resident (and subject to the resident's right to withdraw consent). 42 C.R.F. § 483.10(j). Additionally, the facility must honor the resident's appointment of a surrogate and to the extent permitted by state law and to the maximum extent practicable the facility must respect this request. Interpretive Guidelines § 483(a)(3) and (4).

c. Advanced Directives as a Condition of Participation. Hospitals, critical hospitals, skilled nursing facilities, nursing facilities, home health agencies, providers of home health care (and for Medicare purposes of providers of personal care), hospices, and religious nonmedical health care institutions must all follow a patient or client's advanced directives (which is defined to include health care powers of attorney). 42 C.F.R. §§ 489.100 - 489.102.

4. JCAHO Accreditation Standards. The Joint Commission on Accreditation of Healthcare Organizations (JCAHO) has established criteria which require the hospital to allow for the presence of a support individual of the patient's choice. RI.01.01.01. *See* http://www.jointcommission.org. (Note: This link is to the webpage where the Joint Commission Standards can be purchased.) On November 8, 2011, JCAHO released a field guide, *Advancing Effective Communication, Cultural Competence and Patient-and Family-Centered Care for the Lesbian, Gay, Bisexual and Transgender (LGBTQ) Community: A Field Guide* (2011) which can be downloaded at: **https://www.lgbtagingcenter.org/resources/resource.cfm?r=420** Appendix C of the Field Guide has a summary of federal laws available in a health care setting to protect the rights of LGBTQ clients.

B. Alternative Provisions for Health Care Powers of Attorney, Powers of Attorney, and Related Advanced Directives. As noted above, health care powers of attorney are the most effective means of insuring the ability of a non-family member to make health care decisions in the event of the principal's incapacity. Even a short form power of attorney can be effective in appointing a non-family member as one's health care agent with priority over other family members. The priority given health care agents under N.C. Gen. Stat. § 90-21.13 (which by definition applies to a broad array of health care providers as defined in N.C. Gen. Stat. § 90-21.11), coupled with the federal regulations on advanced directives at health care institutions receiving Medicare and Medicaid funds, make health care powers of attorney an essential for LGBTQ clients, as well as unmarried clients, who desire to appoint a person other than the statutory defaults.

In that regard, an estate planning attorney may wish to consider the following when drafting:

1. Health Care Powers of Attorney. As noted in the Listserv post above, LGBTQ clients may have family members who would be antagonistic towards a client's partner or wish to impose unacceptable personal or health care decisions in the event of incapacity. Similarly, family members of transgender clients may refuse to accept the client's new gender or continue to refer to them in the birth gender. In such cases, the client may need assistance in protecting against families using the client's incapacity to assert their own beliefs and desires. If such conflicts are known, it may be prudent to specifically exclude any such individual in the

health care power of attorney itself, including the provisions nominating the health care agent as guardian of the person. A sample provision is set forth in Appendix I-1.

As experienced by Janice Langbehn in 2009, it was her health care providers, not her partner's family, who excluded her from visitation rights and thus became the impetus of the new Medicare and Medicaid conditions of participation. An estate planner may want to consider adding an affirmative statement in a health care power of attorney that all entities subject to 42 C.F.R. § 489.102 follow its mandate and comply with the patient's advance directives (which is defined to include powers of attorney). While limited to health care providers receiving Medicare or Medicaid funds, the scope of providers subject to 42 C.F.R. § 489.102 is very broad. A sample provision is set forth in Appendix I-1.

2. Powers of Attorney. Powers of attorney are often drafted with gifting powers and powers to use assets to support the principal's spouse, issue and dependents. These provisions need to be revised to address the specific facts of each case. For example, unmarried couples may want their attorney-in-fact to have the ability to use the principal's assets (including the principal residence without payment of rent) to support their partner in the event the principal is incapacitated. Like the health care power of attorney, if there are provisions nominating the attorney-in-fact as a guardian of the estate, in appropriate cases it may be helpful to specifically exclude family members from the nomination providing a clear guide to the principal's intent in any contested proceeding. Again, as noted above, any such provision should be thoughtfully drafted. Of course, transfer tax issues need to be considered as well. A sample provision is set forth in Appendix I-6.

3. HIPAA Authorization Forms. Given the potential for family members interfering with the desires of unmarried clients and LGBTQ clients in particular, HIPAA authorization forms will assist in documenting the client's desires in addition to assuring access to necessary health care information.

4. Directions and Authority Regarding Disposition of Remains. The client's direction and designation of authority to dispose of the client's remains should be clearly addressed, especially if there is the potential for conflict between the client's next of kin and spouse, partner or family of choice. A sample provision is set forth in Appendix I-2.

C. Health Care Authorizations for Minors and Nominations of Guardians. Healthcare authorizations, as provided in Article 4 of Chapter 32A of the North Carolina General Statutes, permit a parent of a minor child to delegate decisions regarding the parent's minor children to another adult when the parent is unavailable. An authorization is not affected by the subsequent incapacity or mental incompetence of the custodial parent making the authorization. N.C. Gen. Stat. § 32A-32(d). In absence of a stepparent or second parent adoption, such authorizations are an essential document for LGBTQ couples (both married and unmarried) with children. The authorization terminates upon the earlier of a specified date, revocation by the custodial parent, termination of such custodial parent's custody rights, or upon the minor attaining eighteen years of age. N.C. Gen. Stat. § 32A-32(a). If the authorization of the agent terminates, the provisions of Article 1 of Chapter 90 and applicable common law apply as if no authorization

had been signed. N.C. Gen. Stat. § 32A-32(c). The statutory form is set forth at N.C. Gen. Stat. § 32A-34 and in Appendix I-4.

VIII. CHALLENGES TO LGBTQ EQUALITY.

Title VII, Title IX, and the Affordable Care Act's Final Rule on Nondiscrimination. Despite the Supreme Court's pronouncements on the constitutional rights to marry and family equality regardless of sexual orientation in *Windsor*, *Obergefell*, *V.L. v. E.L.*, and *Pavan*, LGBTQ people are still subject to discrimination with respect to employment, education, housing and public accommodations, except in jurisdictions with favorable case law, statutes, or ordinances. This section will discuss (A) Title IX and attacks on transgender youth; (B) the Supreme Court's recent decisions in *Masterpiece Cakeshop v. Colorado Civil Rights Division* and *303 Creative LLC v. Elenis* on the conflict between state public accommodation laws prohibiting discrimination against LGBTQ people and the constitutional freedoms of religion and free speech; and (C) states, such as North Carolina, passing anti-LGBTQ legislation at a record pace.

A. Transgender Discrimination Under Title IX of the Education Amendment. We have seen a rapid increase in the attacks on transgender children by state legislatures and local school systems. In *Whitaker v. Kenosha Unified School District*, 858 F.3d 1034 (7th Cir. 2017), a transgender high school student in the Kenosha Unified School District filed suit in 2016 against the school district alleging that the treatment he received at his high school after he started his female-to-male transition violated Title IX and the Equal Protection Clause when the school refused to allow the plaintiff to use the boys' restroom. *Whitaker v. Kenosha Unified School District*, 2016 U.S. Dist. LEXIS 129678, 2016 WL 5239829 (E.D. Wisc. Sept. 22, 2016). The United States District Court of the Eastern District of Wisconsin enjoined the school district from "(1) denying [plaintiff's] access to the boys' restroom (2) enforcing any [such] policy…(3) discipling the plaintiff for using the boys' bathroom…[and] (4) monitoring or surveilling in any way [plaintiff's] bathroom use." *Id.*, 2017 U.S. Dist. LEXIS 129678, at *22. The school district appealed to the United States Court of Appeals for the Seventh Circuit to stay the injunction. The district court denied the defendants' motion to stay the preliminary injunction while the appeal was pending in the Seventh Circuit. *Whitaker*, No. 16-cv-943-pp, 2016 U.S. Dist. LEXIS 136940, at *7 (W.D. Wisc. Oct. 2, 2016). The Seventh Circuit upheld the preliminary injunction, finding:

> A transgender student's presence in the restroom provides no more of a risk to other students' privacy than the presence of an overly curious student of the same biological sex…Or, for that matter, any other student who uses the bathroom at the same time. Common sense tells us that the communal restroom is a place where individuals act in a discreet manner to protect their privacy, and those who truly have privacy concerns are able to utilize a stall. Nothing in the record suggests that the bathroom [at the high school was] particularly susceptible to an intrusion upon an individual's privacy. Further, if the School District's concern is that a child will be in the bathroom with another child who does not look anatomically the same, then it would seem that separate bathrooms also would be appropriate for pre-pubescent and post-pubescent children who do not look alike anatomically. The School District has not drawn this line. Therefore, the court agrees with the district

court that the School District's privacy arguments are insufficient to establish an exceedingly persuasive justification for the classification.

Whitaker, 858 F.3d at 1052-53. A petition for certiorari was filed on August 25, 2017 but it was dismissed.

B. Do Non-Discrimination Laws Infringe Upon the Freedom of Religion or Freedom of Speech?

1. Freedom of Religion. In *Mullins v. Masterpiece Cakeshop, Inc.*, the Colorado Court of Appeals affirmed the Colorado Civil Rights Commission's order finding that a baker's refusal to bake a cake for a gay married couple's wedding celebration violated Colorado's public accommodation law which bans discrimination based upon sexual orientation and gender identity, despite the baker's allegations that his cakes were a form of art and that he would displease God by creating cakes for same-sex couples. 370 P.3d 272 (Colo. App. 2015), *cert. denied, Masterpiece Cakeshop, Inc. v. Colo. Civil Rights Commission*, 2016 Colo. LEXIS 429 (Colo. 2016), *cert. granted, Masterpiece Cakeshop, Inc. v. Colo. Civil Rights Commission*, 137 S. Ct. 2290 (June 26, 2017). On June 26, 2017 (the same day of June as the *Windsor, Obergefell*, and *Pavan* decisions), the Supreme Court granted certiorari.

Jack Phillips, the baker, asserted that he was not discriminating against the petitioners because of their sexual orientation as prohibited by Colorado's public accommodation law. Instead, Phillips argued that he had offered to bake any other bakery product other than a wedding cake, and his decision not bake a wedding cake was solely because of the petitioners' intended conduct – entering into a same-sex marriage and "the celebratory message that baking a wedding cake would convey." *Masterpiece*, 370 P.3d at 280. The court rejected this argument, citing both a New Mexico case involving a wedding photographer, *Elane Photography, LLC v. Willock*, 309 P. 3d 53, 60-64 (N. M. 2013), *cert. denied*, 134 S. Ct. 1787 (2014), and an Oregon decision involving a bakery's refusal to bake a wedding cake, *In the Matter of Klein*, Nos. 44-14 & 45-15, 2015 WL 4503460, at *52 (Or. Comm'r of Labor & Indus. July 2, 2015). The baker in *Klein* also contended that "wedding cakes inherently communicate a celebratory message about marriage and that, by forcing the bakery to make cakes for same-sex wedding, the Commission was unconstitutionally compelling it to express a celebratory message about same-sex marriage that it [did] not support." *Klein*, 2015 WL 4503460, at *52. On December 28, 2017, the Oregon Court of Appeals upheld an award of $135,000 in damages to the plaintiffs, rejecting the baker's free speech arguments under the First Amendment. 2899 Or. App. 507, 2017 WL 6613356, 2017 Or. App. LEXIS 1598 (Or. App. Dec. 28, 2017).

In *Masterpiece*, the Colorado Court of Appeals was unpersuaded by Phillips' argument, and found that the Commission's Order only required the bakery not to discriminate against customers based upon their sexual orientation, and that the Order did not require the bakery to convey any particular message and "[r]easonable observers are unlikely to interpret [the bakery's cakes] as an endorsement of [the same-sex wedding]". *Masterpiece*, 370 P.3d at 281, *quoting, Elane Photography*, 309 P. 3d at 69.

On June 4, 2018, Justice Kennedy wrote and delivered the opinion of the Court. The Court reversed the Colorado Court of Appeals holding that the Colorado Civil Rights Commission's proceedings evidenced "hostility …inconsistent with the First Amendment's guarantee that our laws be applied in a manner that is neutral toward religion." *Masterpiece Cakeshop, Ltd. v. Colo. Civil Rights Comm'n*, 138 S.Ct. 1719, 201 L.Ed. 2d 35 (2018). The Court recognized that its decision was limited and that:

> The outcome of cases like this in other circumstances must await further elaboration in the courts, all in the context of recognizing that these disputes must be resolved with tolerance, without undue disrespect to sincere religious beliefs, and without subjecting gay persons to indignities when they seek goods and services in an open market.

Id. at 1732. More importantly, the Court recognized that the civil rights of gay persons and gay couples must be protected:

> Our society has come to the recognition that gay persons and gay couples cannot be treated as social outcasts or as inferior in dignity and worth. For that reason the laws and the Constitution can, and in some instances must, protect them in the exercise of their civil rights. The exercise of their freedom on terms equal to others must be given great weight and respect by the courts

Id. at 1727. Similarly, the Court noted that while the First Amendment also protects religious organizations and persons, those rights have limits, noting:

> At the same time, the religious and philosophical objections to gay marriage are protected views and in some instances protected forms of expression. As this Court observed in *Obergefell v. Hodges*, 576 U. S. 644, 135 S. Ct. 2584, 192 L. Ed. 2d 609 (2015), '[t]he First Amendment ensures that religious organizations and persons are given proper protection as they seek to teach the principles that are so fulfilling and so central to their lives and faiths.' Nevertheless, while those religious and philosophical objections are protected, it is a general rule that such objections do not allow business owners and other actors in the economy and in society to deny protected persons equal access to goods and services under a neutral and generally applicable public accommodations law.

Id. at 1727.

Justice Ginsburg, with whom Justice Sotomayor joined in dissent, noted agreement with the Court's recognition that "[g]ay persons may be spared from 'indignities' when they seek goods and services in an open market," but disagreed that the facts supported the theory that the Civil

Rights Commission was hostile towards Mr. Phillips' religious beliefs and the Court's conclusion that Craig and Mullens should have lost their case. *Id.* at *1748-49 (Ginsburg, J., dissenting).

2. Freedom of Speech. Colorado's public accommodation law was before the Supreme Court again in *303 Creative LLC v Elenis*, ___ U.S. ____, 143 S. Ct. 2298, 216 L. Ed. 2d 1131 (2023). Lorie Smith, owner of a graphic design business in Colorado, filed a lawsuit in federal district court in Colorado seeking an injunction to prevent the state from forcing her to create websites celebrating marriages that defy her belief that marriage should be reserved to unions between one man and one woman. *303 Creative LLC*, 143 S. Ct. at 2308, 216 L. Ed. 2d at 1139-40. When Ms. Smith filed her lawsuit, she was not offering graphic design services for wedding websites, but if she offered those services in the future, she wanted to refuse to provide those services for LGBTQ weddings and wanted to put a statement to that effect on her business website. *Id*.

The district court ruled that Ms. Smith was not entitled to an injunction and the Tenth Circuit affirmed. 143 S. Ct. at 2310, 216 L. Ed 2d at 1141. The Tenth Circuit found that Plaintiff's website qualifies as "pure speech" protected by the First Amendment so Colorado had to satisfy strict scrutiny and show that compelling speech from Ms. Smith serves a compelling government interest and there is no less restrictive alternative to secure that interest. *Id.* The majority held that Colorado has a compelling interest in ensuring "equal access to publicly available goods and services" and no option short of requiring speech from Ms. Smith can satisfy that interest because she plans to offer "unique services" that are, "by definition, unavailable elsewhere." 143 S. Ct. at 2310, 216 L. Ed 2d at 1142.

In a 6-3 decision, the Supreme Court reversed the decision of the Tenth Circuit and held that the First Amendment prohibits Colorado from compelling such speech from Plaintiff. *303 Designs LLC*, 143 S. Ct. at 2313, 216 L. Ed. 2d at 1145. In the opinion for the Court, Justice Gorsuch discussed previous First Amendment precedents, including *Hurley v. Irish-American Gay Lesbian and Bisexual Group of Boston, Inc.*, 515 U.S. 557, 115 S. Ct. 2338, 132 L. Ed. 2d 487 (1995), where the Court held that the St. Patrick's Day parade was legally allowed to ban the defendants from a parade despite the public accommodation law in Massachusetts because the parade was constitutionally protected speech and requiring the plaintiffs to include voices they wished to exclude would "impermissibly require them to 'alter the expressive content of their parade.'" *303 Designs LLC*, 143 S. Ct. at 2311, 216 L. Ed. 2d at 1143 (internal citation omitted). The majority also relied on *West Virginia Bd. Of Ed. v. Barnette*, 319 U.S. 624, 63 S. Ct. 1178, 87 L. Ed 1628 (1943), which held the state could not require a student to say the Pledge of Allegiance, and *Boy Scouts of America v. Dale*, 530 U.S. 640, 120 S. Ct. 2446, 147 L. Ed. 2d 554 (2000), allowing the Boy Scouts to exclude the defendant, who was gay, from membership despite New Jersey's public accommodation law because the Boy Scouts "is an expressive association entitled to First Amendment protection." *303 Designs LLC*, 143 S. Ct. at 2311, 26 L. Ed. 2d at 1142-43 (internal citations and quotations omitted).

In the dissent, Justice Sotomayor, joined by Justices Kagan and Brown Jackson, harkened back to the Tenth Circuit's strict scrutiny analysis and other Supreme Court decisions which found that "[p]reventing the 'unique evils' caused by 'acts of invidious discrimination in the distribution of publicly available goods, services, and other advantages' is a compelling state interest 'of the

highest order.'" *303 Designs, LLC*., 143 S. Ct. at 2325, 216 L. Ed. 2d. at 1158 (quoting *Roberts v. U.S.*, 468 U.S. 609, 104 S. Ct. 3244, 82 L. Ed. 2d 462, holding that requiring the Jaycees to admit women did not violate the First and Fourteenth Amendments) (Sotomayor, J., dissenting). Additionally, laws that prohibits only acts by businesses open to the public are "narrowly tailored to achieve that compelling interest" because "the law responds precisely to the substantive problem which legitimately concerns the State: the harm from status-based discrimination in the public marketplace." *Id.*

The majority argued that Ms. Smith did not discriminate against LGBTQ customers because she was willing to design other websites for LGBTQ customers, just not wedding websites, but the dissent compares this rational to the owner of Olie's Barbeque who said he did not refuse to transact with Black customers because while he was unwilling to offer table service to Black customers, he was willing to offer take-out service at a separate counter. 143 S. Ct. at 2331, 216 L. Ed 2d at 1164 (citing *Katzenbach v. McClung*, 379 U.S. 294, 85 S. Ct. 377, 13 L. Ed. 2d 290 (1964)). In *Katzenbach*, the Supreme Court rejected owner's argument that he had a constitutional right to offer Black people a limited menu of his services. *303 Designs LLC,* 143 S. Ct. at 2331, 216 L. Ed 2d at 1164

The dissent argues that the majority "reaches the wrong answer because it asks the wrong questions." *303 Designs LLC,* 143 S. Ct. at 2338, 216 L. Ed. 2d at 1172. "The question is not whether the company's products include 'elements of speech.' The question is not even whether [Colorado's anti-discrimination statute] would require the company to create and sell speech, notwithstanding the owner's sincere objection to doing so, if the company chooses to offer 'such speech' to the public." *Id.* (internal citations omitted). Instead the focus should have been on "the character of state action and its relationship to expression." *Id*. Because Colorado seeks to apply its law "only to the refusal to provide same-sex couples the full and equal enjoyment of the company's publicly available services, so that the company's speech is only compelled if, and to the extent, the company chooses to offer such speech to the public, any burden on speech is plainly incidental to a content neutral regulation of conduct." *Id*. (internal quotations omitted).

C. Pro- and Anti-LGBTQ Legislation and Current Law. Following the Supreme Court's pronouncement in *Obergefell* that the right to marry cannot constitutionally be denied to same-sex couples, the stances of state legislatures are mixed.

Some states have advanced the rights of LGBTQ people through enacting protections against (i) anti-LGBTQ discrimination in employment and housing (Utah), (ii) bullying for youth in schools (Nevada), (iii) outlawing "conversion therapy" for youth (Illinois and Oregon), (iv) simplified processes for changing gender markers on identity documents (Hawaii, Maryland and Nevada), and (v) the repeal of bans on adoptions by gay and lesbian couples (Florida). HUMAN RIGHTS CAMPAIGN, PREVIEW 2016 PRO-EQUALITY AND ANTI-LGBT STATE AND LOCAL LEGISLATION (2016), http://hrc-assets.s3-website-us-east-1.amazonaws.com//files/assets/resources/2016_Legislative-Doc.pdf.

Unfortunately, 2022 was a record-breaking year for anti-LBGTQ legislation in state legislatures, and the trend has continued in 2023, from banning drag performances to targeting care for transgender youth. *See* HUMAN RIGHTS CAMPAIGN, OUTLOOK FOR 2023, https://reports.hrc.org/2022-state-equality-index?_ga=2.24995258.1864367112.1694183706-1440856992.1694183706#outlook-2023.

For an overview of state laws, see HRC 2022 State Equality Index.https://reports.hrc.org/2022-state-equality-index?_ga=2.212214292.1864367112.1694183706-1440856992.1694183706

Recent legislation in North Carolina exemplifies the trend of socially conservative state legislatures which have pursued legislation limiting the rights of LGBTQ persons.

4868-5547-4552, v. 4