

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

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Paula A. Kohut¹

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. ___, 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. ___, 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 ___, 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 ___, 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. ___, 136 S. Ct. 1017 (2016). As discussed below in greater detail, this decision makes clear why it is so important for every non-biological LGBTQ² parent to secure an adoption decree, as opposed to relying upon a rebuttable presumption arising from a birth certificate. *Infra* Part VI, Subpart H.

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. ___, 135 S. Ct. 2584, 2590 (2015).

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² LGBTQ is an acronym for Lesbian, Gay, Bisexual, Transgender and Queer.

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. More importantly, while *Windsor*, *Obergefell, V.L. v. E.L.*, and *Pavan* have established marriage equality, legal challenges seeking to curtail legal equality for LGBTQ people and their families continue, particularly since 2017. *See infra* Section VII, Challenges to LGBTQ Equality.

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 could, 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.

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 ability to apply *Obergefell* retroactively, while helpful in many cases, is not certain as the *Ferry* decision demonstrates. 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. **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.**

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 filed 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 – Portability June 2017 - Rev. Proc. 2017-34. 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). 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.” <http://www.dol.gov/ebsa/newsroom/tr13-04.html>.

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-marital 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-marital 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/lrx/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.**

<https://secure.ssa.gov/apps10/reference.nsf/links/06082016012740PM>

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 is delayed while 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*.

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 following in Sections I.C.1 and 2, (retroactive application of *Obergefell*), III.D (pre-*Obergefell* marriage ceremonies), and III.E.(common law marriage), application of *Obergefell* retroactively by the courts is fact-specific and at least one court has refused to recognize a couples' effort to marry in the early 1990s. See, *Ferry v. De'Longhi Am, Inc.*, page 3.

Practice Reminder: The ability to apply *Obergefell* retroactively, while helpful in many cases, is not certain as the *Ferry* decision demonstrates. 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. **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. *Radtke 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’s 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) which references “a court order relating to ... a sex change” but in the context of a marriage license). *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.

Despite the lack of any bar to marriage, it is recommended that a transgender person who has transitioned disclose his or her transgender status to a prospective spouse and that the intended spouses sign a memorandum of understanding acknowledging the spouse is transgender. Nat’l Ctr. For Lesbian Rts, *Transgender Family Law In The U.S.: A Fact Sheet For Transgender Spouses, Partners, Parents, And Youth* (2015).

<http://www.nclrights.org/wp-content/uploads/2014/01/Transgender-Family-Law-National.pdf>

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, South Carolina, 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), and Pennsylvania (not after 1/1/05). 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>; *see also* Elon Green, *The Lost History of Gay Adult Adoption*, N.Y. TIMES MAGAZINE (Oct. 19, 2015), <http://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. Like 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.G.S. § 130A-101. Despite prior litigation and uncertainty in some states such as North Carolina 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. However, there are special considerations in cases of surrogacy which are beyond the scope of this manuscript and, *most importantly, a birth certificate in cases where both parents are not the biological parent does nothing more than establish a rebuttable presumption of parentage for the non-biological parent.*

It is very important to emphasize 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.

Although the Arizona Supreme Court recently recognized a nonbiological mother as a parent in *McLaughlin v. Jones*, 2017 Ariz. LEXIS 263, at *16 (Ariz. Sept. 19, 2017), 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. The *McLaughlin v. Jones* decision is discussed *infra* Section VIII.F.1.

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.G.S. § 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. ____, 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. 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. While 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. Neither a birth certificate nor a co-parenting agreement provides sufficient protection for the parents and the child.

E. 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 2017 up to \$13,570 subject to phase out if MAGI exceeds \$203,540; complete phase out at \$243,540). I.R.C. §23.

F. Spousal Rights. Although a North Carolina court did not recognize equality until October 14, 2014, *Obergefell* found all state marriage bans unconstitutional. Therefore, marriages which were celebrated outside of North Carolina will be relevant in establishing spousal rights under both federal and North Carolina law. Assuming retroactive application of *Obergefell*, all current and prior relationships will need to be considering in determining the rights of spouses.

1. 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.G.S. § 30-3.1.

2. 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.

3. Tenants by the Entireties. Effective January 1, 1983, N.C.G.S. § 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.G.S. § 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 entirety often included a savings clause (stating that if the tenancy by the entirety 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 entirety to assure that if the second deed were invalidated the tenancy would be by survivorship.

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.G.S. § 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 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 2017, the tax credit for 2017 is \$13,570 which is phased out for taxpayers with MAGI exceeding \$203,540 and completely phased out at \$243,540. I.R.C. §23; Rev. Proc. 2016-55, 2016-45 I.R.B. 707.

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.G.S. §101-2 provides that an individual may obtain change for good cause. However, changing one’s gender on a birth certificate is a matter of the laws of the state which issued the birth certificate. State law varies on the requirements for the same. 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. 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 VII, 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 people³ warrant differing treatment under the law, particularly as it relates to bathrooms, locker rooms and other facilities segregated by sex. At least one commentator has noted a 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.

³ “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. Some of those terms are defined below. Use the descriptive term preferred by the person. Many transgender people are prescribed hormones by their 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>.

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.G.S. § 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 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.G.S. § 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.G.S. § 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.G.S. § 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 care agent appointed under chapter 32A. N.C.G.S. § 32A-2. [Note: N.C.G.S. §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.G.S. § 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 some 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.G.S. § 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 of the Affordable Care Act. Section 1557 of the Affordable Care Act prohibits discrimination against individuals on the basis of race, color, national origin, sex, age, and disability. Patient Protection and Affordable Care Act § 1557, codified at 42 U.S.C. § 18116 (2012). The Final Rule provides that: “*On the basis of sex* includes, but is not limited to, discrimination on the basis of pregnancy, false pregnancy, termination of pregnancy, or recovery therefrom, childbirth or related medical conditions, sex stereotyping, and gender identity....[and] *Sex stereotypes* means stereotypical notions of masculinity or femininity, including expectations of how individuals represent or communicate their gender to others, such as behavior, clothing, hairstyles, activities, voice, mannerisms, or body characteristics. These stereotypes can include the expectation that individuals will consistently identify with only one gender and that they will act in conformity with the gender-related expressions stereotypically associated with that gender. Sex stereotypes also include gendered expectations related to the appropriate roles of a certain sex.” 45 C.F.R. §92.4.

See also, 81 FR 31465, May 18, 2016 and Letter from Leon Rodriguez, Dir. of Office for Civil Rights, Dep’t. of Health & Human Servs. to Maya Rupert, Fed. Pol’y Dir., Nat’l Ctr. for Lesbian Rights (Jul. 12, 2012) (OCR Transaction No. 12-000800).

There was a nationwide preliminary injunction issued by the United States District Court for the Northern District of Texas as it relates to discrimination based upon gender identity and termination of pregnancy. Under the current administration, the Department of Health and Human Services has placed the following statement regarding discrimination under Section 1557 on its website:

On December 31, 2016, the U.S. District Court for the Northern District of Texas issued an opinion in *Franciscan Alliance, Inc. et al v. Burwell*, enjoining the Section 1557 regulation’s prohibitions against discrimination on the basis of gender identity and termination of pregnancy on a nationwide basis. Accordingly, HHS’ Office for Civil Rights (HHS OCR) may not enforce these two provisions of the regulation implementing these same provisions, while the injunction remains in place. Consistent with the court’s order, HHS OCR will continue to enforce important protections against discrimination on the basis of race, color, national origin, age, or disability, as well as other sex discrimination provisions that are not impacted by

the court's order. **[Note: The statement on the website, contrary to the Final Rule, does not include a statement regarding protections for discrimination on the basis of gender identity and sexual stereotyping.]**

On January 18, 2018, the Department of Health and Human Services announced the formation of the Conscience and Religious Freedom Division within the Office for Civil Rights of the Department of Health and Human Services. While the website indicates a focus on “protecting individuals and organizations from being compelled to participate in procedures such as abortion, sterilization, and assisted suicide when it would violate their religious beliefs or moral convictions,” it is uncertain whether the argument that religious freedom should allow individuals to discriminate against LGBTQ people will be used by the Conscience and Religious Freedom Division within the Office for Civil Rights in interpreting discrimination under Section 1557. *See infra* Section VIII.D., discussing *Mullins v. Masterpiece Cakeshop*.

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 law⁴, 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>

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.

⁴ 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.

(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.

It is important to note that hospital policies may not restrict, limit, or otherwise deny visitation privileges on the basis of race, color, national origin, religion, sex, gender identity, sexual orientation, or disability.

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.F.R. § 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: <http://www.jointcommission.org/LGBTQ/>. 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.G.S. § 90-21.13 (which by definition applies to a broad array of health care providers as defined in N.C.G.S. § 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.

5. Appointment of Support Person and Legal Representative. Based upon the accreditation standards and conditions of participation in Medicare and Medicaid discussed above, at least one author has suggested that a client execute a Designation of Agent for Health Care Visitation, Receipt of Personal Property, and Disposition of Remains and Making Funeral Arrangements. JOAN BURDA, *ESTATE PLANNING FOR SAME-SEX COUPLES* (ABA Third Ed. 2015). In light of the provisions of Chapter 130A of the North Carolina General Statutes noted above, such a form, if used in North Carolina, should be attested by two witnesses. 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.G.S. § 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.G.S. § 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.G.S. § 32A-32(c). The statutory form is set forth at N.C.G.S. § 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) the federal court decisions addressing whether discrimination based upon sexual orientation and gender identity is “sex discrimination” under Title VII of the Civil Rights Act (prohibits employers from discriminating against employees on the basis of sex, race, color, national origin, and religion) and Title IX of the Education Amendment of 1972 (protects people from discrimination based on sex in education programs or activities that receive federal financial assistance); (B) the non-discrimination provisions of Section 1557 of the Affordable Care Act; (C) President Trump’s reversal of the Open Service Directive, which would have allowed transgender servicemembers to serve openly in the military effective July 1, 2017 and allowed the provision of transgender healthcare; (D) *Masterpiece Cakeshop v. Colorado Civil Rights Division*, et al, which was heard by the Supreme Court on December 5, 2017 and which the Court will issue its ruling this year on the conflict between state public accommodation laws prohibiting discrimination against LGBTQ people and the constitutional freedoms of religion and free speech; (E) states, such as North Carolina, that have enacted statutes which prohibit municipalities and local governments from enacting local ordinances to protect LGBTQ people from discrimination in employment, education and public accommodations; and (F) those courts which have found *Obergefell* and *Pavan* to mean that all the benefits of marriage are protected and at least one court that has questioned whether those decisions mean something less.

A. Transgender Discrimination Under Title VII of the Civil Rights Act and Title IX of the Education Amendment.

1. Does Discrimination Against Individuals Based Upon Sexual Orientation or Gender Identity Constitute Sex Discrimination Under Title VII of the Civil Rights Act? Until recently, the federal courts have ruled that discrimination based upon sexual orientation or gender identity is not sex discrimination under Title VI of the Civil Rights Act. More recent decisions have determined that such discrimination is actionable. A brief overview of a few recent decisions follows:

a. *Hively v. Ivy Tech Community College of Indiana*, 853 F.3d 339 (7th Cir. 2017). On April 4, 2017, the Seventh Circuit Court of Appeals, sitting *en banc*, held that discrimination based upon sexual orientation is unlawful sex discrimination under Title VII. *See* Amanda Ciccattelli, *What the Hively Decision Means for Employers & LGBT Community*, INSIDE COUNSEL (July 26, 2017), <http://www.insidecounsel.com/2017/07/26/what-the-hively-decision-means-for-employers-lgbt>. In *Hively*, the court found Ivy Tech Community College’s rejection of an adjunct professor’s five prior applications for full time professorship was actionable sex discrimination under Title VII if it was found to be based on the plaintiff’s sexual orientation. *Hively v. Ivy Tech Community College of Indiana*, 853 F.3d 339 (7th Cir. 2017). The court acknowledged that “almost all of [its] sister circuits” had held the discrimination based upon sexual orientation was not actionable under Title VII.⁵ However, despite its own prior

⁵ *See, e.g.*, *Kalich v. AT&T Mobility, LLC*, 679 F.3d 464, 471 (6th Cir. 2012); *Prowel v. Wise Bus. Forms, Inc.*, 579 F.3d 285, 290 (3d Cir. 2009); *Dawson v. Bumble & Bumble*, 398 F.3d 211, 217 (2d Cir. 2005); *Medina v. Income Support Div.*, 413 F.3d 1131, 1135 (10th Cir. 2005); *Higgins v. New Balance Athletic Shoe, Inc.*, 194 F.3d 252, 259 (1st Cir. 1999); *Fredette v. BVP Mgmt. Assocs.*, 112 F.3d 1503, 1510 (11th Cir. 1997); *Wrightson v. Pizza Hut of Am., Inc.*, 99 F.3d 138, 143 (4th Cir. 1996); *Williamson v. A.G. Edwards & Sons, Inc.*, 876 F.2d 69, 70 (8th Cir.

precedent and that in other circuits, the court recognized “the paradoxical legal landscape [such a position creates] in which a person can be married on Saturday and then fired on Monday for just that act.” *Id.* at 342. The court discussed the consistency of its decision with the Supreme Court’s decision in *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989) in which the Court found “the practice of sexual stereotyping to fall with Title VII’s prohibition against sex discrimination,”⁶ and *Oncale v. Sundowner Offshore Services, Inc.*, 523 U.S. 75 (1998), in which the Court found “that it makes no difference if the sex of the harasser is (or is not) the same sex of the victim.”⁷ *Hively*, 853 F.3d at 342 (quoting *Price Waterhouse*, 490 U.S. at 235).

In addition to the “bizarre result” that someone could be fired for exercising their constitutional right to marry a same-sex spouse if discrimination based upon sexual orientation is not sex discrimination, the court noted that failing to recognize such as unlawful discrimination would run contrary to the precedent set in *Loving v. Virginia*, 388 U.S. 1 (1967) when the Court held that Virginia’s statutory bar against interracial marriage was unconstitutional. *Hively*, 853 F.3d at 342.

The court decided the time had come to overrule the court’s prior decisions that had held that employer discrimination based on sexual orientation was outside the scope of discrimination prohibited by Title VII. *Id.* at 350–51. The court found it to be “common-sense reality that it is actually impossible to discriminate on the basis of sexual orientation without discriminating on the basis of sex....” *Hively*, at 351.

b. *Zarda v. Altitude Express*, 855 F. 3d 76 (2d Cir. 2018). On February 26, 2018, the Second Circuit Court of Appeals joined the Seventh Circuit Court of Appeals and held that discrimination based upon sexual orientation is discrimination based upon sex and actionable under Title VII, overruling prior precedent to the contrary.

c. *U.S. EEOC v. Scott Medical Health Center*, 217 F. Supp. 834 (W.D. Pa. 2016). In *U.S. EEOC v. Scott Medical Health Center*, the district court distinguished an earlier circuit decision, *Bibby v. Phila. Coca Cola Bottling Co.*, 260 F.3d 257 (2002) (holding harassment in the workplace of a gay man based upon his sexual orientation was not sexual harassment prohibited by Title VII) noting:

[T]here have been significant intervening legal developments that call into question how the Court evaluated Title VII in *Bibby*. First, the principles of statutory interpretation relied on by the Court of Appeals in *Bibby* have since been revisited

1989); *Blum v. Gulf Oil Corp.*, 597 F.2d 936, 938 (5th Cir. 1979). In *Evans v. Georgia Regional Hospital*, a panel of the Eleventh Circuit, recognizing that it was bound by the Fifth Circuit’s precedent in *Blum*, 597 F.2d 936, recently reaffirmed (by a 2-1 vote) that it could not recognize sexual orientation discrimination claims under Title VII. 850 F.3d 1248, 2017 U.S. App. LEXIS 4301, 2017 WL 943925, at *5-6 (11th Cir. Mar. 10, 2017). The Eleventh Circuit Court of Appeals was established on October 1, 1981.

⁶ In *Price Waterhouse*, the plaintiff was “advised her that her chances [to become a partner] could be improved the next time around if she would, among other gender-based suggestions, ‘walk more femininely, talk more femininely, dress more femininely, wear make-up, have her hair styled, and wear jewelry.’” *Price Waterhouse V. Hopkins*, 490 U.S. 235 (1989).

⁷ In *Oncale*, the male plaintiff was sexually harassed by his male co-workers on an oil platform and the Court held that “male-on-male sexual harassment in the workplace was assuredly not the principal evil Congress was concerned with when it enacted Title VII. But statutory prohibitions often go beyond the principal evil to cover reasonably comparable evils, and it is ultimately the provisions of our laws rather than the principal concerns of our legislators by which we are governed.” *Oncale v. Sundowner Offshore Servs., Inc.*, 523 U.S. 75, 79 (1998).

and revised, rendering suspect *Bibby's* statutory analysis. *Bibby* relied heavily on Congressional inaction on the Employment Non-Discrimination Act, which would have explicitly covered sexual orientation discrimination, as a means of justifying its ultimate conclusion that Title VII does not cover sexual orientation discrimination. However, subsequent Third Circuit decisions have questioned the value of reliance on Congressional inaction. *See In re Visteon Corp.*, 612 F.3d 210, 230 (3d Cir. 2010) ("Evidence of congressional inaction is generally entitled to minimal weight in the interpretive process.") But, perhaps more importantly, much of the Title VII precedent relied on by the Court of Appeals in *Bibby* either predated *Price Waterhouse* or contained little to no analysis, merely accepting as a given that Title VII did not cover sexual orientation discrimination.

U.S. EEOC v. Scott Medical Health Center, 217 F. Supp.3d at 842 (citing *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989)).

d. *Baldwin v. Foxx*, EEOC Appeal No. 0120133080, 2015 EEOPUB LEXIS 1905 (July 16, 2015). In 2015, the EEOC reversed a Federal Aviation Administration ruling which had dismissed the complainant's claim that he was not selected for a managerial position due to his sexual orientation and that such an act constituted sex discrimination under Title VII of the Civil Rights Act of 1964. The EEOC noted that the federal courts have begun recognizing that "sexual orientation discrimination and harassment 'are often, if not always, motivated by a desire to enforce heterosexually defined gender norms [and thereby constitute unlawful sex discrimination under Title VII].'" *Baldwin*, 2015 EEOPUB LEXIS 1905, at *22 (quoting *Centola v. Potter*, 183 F. Supp. 2d 403, 410 (D. Mass. 2002)). *See also*, *Terveer v. Billington*, 34 F. Supp. 3d 100, 116 (D.D.C. 2014) (finding plaintiff's complaint sufficiently stated a claim for sex and religious discrimination under Title VII based upon allegations that his supervisor created a hostile work environment and took adverse action against Plaintiff after learning that Plaintiff was gay).

e. Is Discrimination Against Transgender Persons Sex Discrimination Under Title VII? The federal courts have increasingly found that discriminating based upon a person being transgender is actionable sex discrimination under Title VII. *Chavez v. Credit Nation Auto Sales, LLC*, 641 F. App'x 883 (11th Cir. 2016) (holding sex discrimination includes discrimination against a transgender person based on gender nonconformity); *Glenn v. Brumby*, 663 F.3d 1312 (11th Cir. 2011) (Title VII and transgender status); *Smith v. City of Salem*, 378 F.3d 566 (6th Cir. 2004) (Title VII and gender nonconformity); *Roberts v. Clark County School District*, 215 F. Supp. 3d 1001 (D. Nev. Oct. 4, 2016), (Title VII use of "sex" encompasses protections for discrimination based upon gender identity) *recons. denied*, 2016 U.S. Dist. LEXIS 163800 (D. Nev., Nov. 28, 2016); *Fabian v. Hospital of Central Connecticut*, 172 F. Supp. 3d 509 (D. Conn. 2016) (same); *Finkle v. Howard County*, 12 F. Supp. 3d 780 (D. Md. 2014) (Title VII and transgender status); *Lopez v. River Oaks Imaging & Diagnostic Grp., Inc.*, 542 F. Supp. 2d 653 (S.D. Tex. 2008) (Title VII applies to sex stereotyping claim of transgender plaintiff); *Schroer v. Billington*, 577 F. Supp. 2d 293 (D.D.C. 2008) (Title VII and failure to conform to sex stereotype); *Mitchell v. Axcan Scandipharm*, No. 05-243, 2006 U.S. Dist. LEXIS 6521, 2006 WL 456173 (W.D. Pa. Feb. 17, 2006) (Title VII and failure to conform to gender stereotype by a transgender person).

Yet, some federal courts have been resistant to extend Title VII protections to transgender victims of workplace discrimination based upon their transgender status. *Etsitty v. Utah Transit Authority*, 502 F.3d 1215 (10th Cir. 2007) (Title VII does not address transgender discrimination per se); *Johnston v. University of Pittsburgh*, 97 F. Supp. 3d 657 (W.D. Pa. Mar. 31, 2015) (same and collecting prior contrary authority); *Eure v. Sage Corp.*, 61 F. Supp. 3d 651 (W.D. Tex. 2014) (holding neither Supreme court nor Fifth Circuit caselaw has held discrimination based on transgender status per se unlawful under Title VII).

2. Does Discrimination Based Upon Gender Identity Constitute Unlawful Discrimination Under Title IX of Education Amendment of 1972 or Due Process Under the Equal Protection Clause? As exemplified by North Carolina’s infamous House Bill 2, the right of transgender people and students to use public restrooms and locker rooms that correspond to their gender identity, as opposed to their “biological sex” as documented on their birth certificate, is being challenged in the courts, legislatures, and executive branches of federal and state government.

a. *G.G. v Gloucester County School Board*, 822 F.3d 709 (4th Cir. 2016), *stay granted sub nom. Gloucester County School Board v. G.G.*, 136 S. Ct. 2442 (2016), *cert. granted*, 137 S. Ct. 369 (2016), *judgment vacated and remanded*, 137 S. Ct. 1239. On April 19, 2016, the Fourth Circuit Court of Appeals reversed and remanded the United States District Court for the Eastern District of Virginia’s dismissal of a transgender student’s claims for sex discrimination under Title IX of the United States Code arising from the School Board’s policy limiting access to bathrooms based upon “biological sex,” as well as the district court’s denial of a preliminary injunction. *G.G. v Gloucester County School Board*, 822 F.3d 709 (4th Cir. Apr. 19, 2016). The Fourth Circuit did not reach the plaintiff’s claim that the school board’s action violated his rights under the Equal Protection Clause of the Constitution, but instead relied upon district court’s failure to follow existing guidance set forth in the May 13, 2016 Joint Statements of Policy and Guidance issued by the Department of Justice, Civil Rights Division and Department of Education, Office for Civil Rights opining that discrimination against transgender students constituted “sex discrimination” under Title IX. Catherine E. Lhamon & Vanita Gupta, *Office Of Civil Rights, Dep’t Of Education, Dear Colleague Letter On Transgender Students* (May 13, 2016).

<https://www2.ed.gov/about/offices/list/ocr/letters/colleague-201605-title-ix-transgender.pdf>.

On August 3, 2016, the United States Supreme Court granted a stay and, on October 28, 2016, the appellant’s petition for certiorari was granted. *Id.*, *stay granted sub nom.*, *Gloucester County School Board v. G.G.*, 136 S. Ct. 2442 (2016), *cert. granted*, 137 S. Ct. 369 (2016). On February 22, 2017, prior to the Court hearing the appeal, the Department of Justice, Civil Rights Division and Department of Education, Office for Civil Rights withdrew the May 13, 2016 Joint Statements of Policy and Guidance regarding enforcement of Title IX as it related to transgender students. <https://www2.ed.gov/about/offices/list/ocr/letters/colleague-201702-title-ix.pdf>.⁸

⁸ The February 22, 2017 Dear Colleague Letter read:

Dear Colleague:

The purpose of this guidance is to inform you that the Department of Justice and the Department of Education are withdrawing the statements of policy and guidance reflected in:

- Letter to Emily Prince from James A. Ferg-Cadima, Acting Deputy Assistant Secretary for Policy, Office for Civil Rights at the Department of Education dated January 7, 2015; and
- Dear Colleague Letter on Transgender Students jointly issued by the Civil Rights Division of the Department of Justice and the Department of Education dated May 13, 2016.

These guidance documents take the position that the prohibitions on discrimination “on the basis of sex” in Title IX of the Education Amendments of 1972 (Title IX), 20 U.S.C. § 1681 et seq., and its implementing regulations, *see, e.g.*, 34 C.F.R. § 106.33, require access to sex-segregated facilities based on gender identity. These guidance documents do not, however, contain extensive legal analysis or explain how the position is consistent with the express language of Title IX, nor did they undergo any formal public process.

This interpretation has given rise to significant litigation regarding school restrooms and locker rooms. The U.S. Court of Appeals for the Fourth Circuit concluded that the term “sex” in the regulations is ambiguous and deferred to what the court characterized as the “novel” interpretation advanced in the guidance. By contrast, a federal district court in Texas held that the term “sex” unambiguously refers to biological sex and that, in any event, the guidance was “legislative and substantive” and thus formal rulemaking should have occurred prior to the adoption of any such policy. In August of 2016, the Texas court preliminarily enjoined enforcement of the interpretation, and that nationwide injunction has not been overturned.

In addition, the Departments believe that, in this context, there must be due regard for the primary role of the States and local school districts in establishing educational policy.

In these circumstances, the Department of Education and the Department of Justice have decided to withdraw and rescind the above-referenced guidance documents in order to further and more completely consider the legal issues involved. The Departments thus will not rely on the views expressed within them.

Please note that this withdrawal of these guidance documents does not leave students without protections from discrimination, bullying, or harassment. All schools must ensure that all students, including LGBT students, are able to learn and thrive in a safe environment. The Department of Education Office for Civil Rights will continue its duty under law to hear all claims of discrimination and will explore every appropriate opportunity to protect all students and to encourage civility in our classrooms. The Department of Education and the Department of Justice are committed to the application of Title IX and other federal laws to ensure such protection.

This guidance does not add requirements to applicable law. If you have questions or are interested in commenting on this letter, please contact the Department of Education at ocr@ed.gov or 800-421-3481 (TDD: 800-877-8339); or the Department of Justice at education@usdoj.gov or 877-292-3804 (TTY: 800-514-0383).

Sincerely,

/s/
Sandra Battle
Acting Assistant Secretary for Civil Rights
U.S. Department of Education

/s/
T.E. Wheeler, II
Acting Assistant Attorney General for Civil Rights
U.S. Department of Justice

Given the withdraw of the guidance in the May 13, 2016 Dear Colleague letter upon which the Fourth Circuit’s decision was based, the Supreme Court vacated the Fourth Circuit’s judgment and remanded the case “in light of the guidance document issued by the Department of Education and Department of Justice on February 22, 2017.” *Gloucester County School Board v. G.G.*, 137 S. Ct. 1239, 1239 (2017). In his concurrence with the uncontested vacation of the preliminary injunction following the Supreme Court’s March, 2017 decision, Justice Davis took note of the leadership of plaintiff, Galvin Grimm: “G.G. takes his place among other modern-day human rights leaders who strive to ensure that, one day, equality will prevail, and that the core dignity of every one of our brothers and sisters is respected by lawmakers and others who wield power over their lives.” *G.G. v. Gloucester County Sch. Bd.*, 853 F.3d 729, 729 (4th Cir. 2017). Gavin Grimm voluntarily dismissed his appeal since it was based upon the preliminary injunction. On August 30, 2107, the case was remanded to the district court to determine whether the court has jurisdiction due to mootness since Galvin graduated from high school in 2017. *Grimm v. Gloucester County School Board*, 869 F.3d 286, 290 (4th Cir. 2017).

b. *Texas v. United States*, 201 F. Supp. 3d 810 (N.D. Tex. 2016). This action was filed by the States of Texas, Alabama, Wisconsin, West Virginia, Tennessee, Maine, Oklahoma, Louisiana, Utah, Georgia, Mississippi, and the Commonwealth of Kentucky and a Texas and Arizona School District seeking a preliminary injunction against the Departments of Education,, Justice, Labor, Equal Employment Opportunity Commission from interpreting and enforcing Title VII of the Civil Rights Act and Title IX of the Education Amendments of 1972 in a manner requiring that all persons must be afforded the opportunity to have access to restrooms, locker rooms, showers, and other intimate facilities which match their gender identity rather than their biological sex as set forth in various Department and Agency guidance letters and memos, including the May 13, 2016 Joint Statements of Policy and Guidance issued by the Department of Justice, Civil Rights Division and Department of Education, Office for Civil Rights at issue in the *G.G. v. Gloucester County School Board*, the Department of Education’s Bullying Memo, OHSA Best Practices Guide, Holder 2014 Memo EEOC Fact Sheet (collectively the Guidelines). On August 21, 2016, the court issued a nationwide preliminary injunction enjoining the Defendants from “initiating, continuing, or concluding any investigation based on Defendants' interpretation that the definition of sex includes gender identity in Title IX's prohibition against discrimination on the basis of sex.... [and] from using the Guidelines or asserting the Guidelines carry weight in any litigation initiated following the date of this Order. *Texas v. United States*, 201 F. Supp. 3d 810, 836 (N.D. Tex. 2016). The United States appealed the injunction, but the appeal was withdrawn. On March 31, 2017, the Plaintiffs voluntarily dismissed the action, without prejudice, and in the dismissal referenced the Dear Colleague letter dated February 22, 2017.

There is considerable debate over the United States district courts authority to issue nationwide injunctions. *See also*, Andrew Kent, *Nationwide Injunctions and the Lower Federal Courts*, LAWFARE (Feb. 3, 2017), <https://www.lawfareblog.com/nationwide-injunctions-and-lower-federal-courts>.

c. *Dodds v. United States Department of Education*, 845 F.3d 217 (6th Cir. 2016). On December 15, 2016, the Sixth Circuit Court of Appeals declined to stay the

injunction issued by the United States District for Southern Ohio against the Board of Education, Highland Local School District, enjoining the school district from refusing to recognize an eleven-year-old transgender girl as a female and permitting her to use the girl's restroom. In finding the school board had not met its burden of showing a likelihood of success on appeal (to continue to enforce a policy which prohibited the student from using the girl's restroom), the court noted that:

[u]nder the law in this Circuit, gender non-conformity .. is an individual's fail[ure] to act and/or identify with his or her gender....Sex stereotyping based on a person's gender non-conforming behavior is impermissible discrimination....[T]he weight of authority establishes that discrimination based on transgender status is already prohibited by the language of the federal civil rights statutes as interpreted by the Supreme Court.

Id. at 220 (quoting *G.G. v Gloucester County*, 822 F.3d 729, 729 (4th Cir. 2016); *Smith v. City of Salem*, 378 F.3d 566, 575 (6th Cir. 2004)). Following the issuance of the February 22, 2017 Dear Colleague Letter from the Department of Education (DOE) and Department of Justice (DOJ), both the DOE and DOJ were dismissed from the case which is still pending against the Highland School District. *Doe v. Board of Education*, 2017 U.S. Dist. LEXIS 133199, at *5 (S.D. Ohio, Aug. 21, 2017).

d. *Evancho v. Pine Richland School District*, 237 F. Supp. 3d 267 (W.D. Penn. 2017). *Evancho v. Pine Richland School District* was filed by three (3) transgender high school students during their senior year in response to "Resolution 2" of the school board which provided that: "All students will have the choice of using either the facilities that correspond to their biological sex or unisex facilities." *Id.* at 270-272. The three plaintiffs had attended school in the gender consistent with their gender identity without incident until a student's parent made inquiry with the School district's superintendent which culminated in public debate and discussion at school board meetings and ultimately the passage of Resolution 2. *Evancho* was decided five days after the release of the February 22, 2017 Guidance withdrawing the 2016 Guidance at issue in *G.G. v. Gloucester County School Board*. The court noted that it had reviewed the new Guidance prior to rendering its opinion. The court found that a heightened or intermediate standard of review should be used in analyzing the transgender student's claims and the classification enacted by Resolution 2:

The record before the Court reflects that transgender people as a class have historically been subject to discrimination or differentiation; that they have a defining characteristic that frequently bears no relation to an ability to perform or contribute to society; that as a class they exhibit immutable or distinguishing characteristics that define them as a discrete group; and that as a class, they are a minority with relatively little political power.

Id. at 288.

Although the court granted the plaintiffs' motion for a preliminary injunction against Resolution 2 on the plaintiffs' Equal Protection claims, the court denied a preliminary injunction on the plaintiffs' Title IX claims. *Id.* at 301.

e. ***Doe v. Boyertown Area School District*, 2017 U.S. Dist. LEXIS 137317, 2017 WL 2675418 (E.D. Penn. 2017).** On April 18, 2017, four (4) cisgender⁹ students in the Boyertown Area School District filed an action:

generally complain[ing] that the defendants' policy and practice of permitting transgender individuals (who are identified as members of the "opposite sex" instead of being identified as "transgender") to use restrooms, locker rooms, and shower facilities designated for the biological sex to which they identify violate[d] the plaintiffs' 'fundamental right to bodily privacy contrary to constitutional and statutory principles, including the Fourteenth Amendment, Title IX, invasion of seclusion [under Pennsylvania state law], and Pennsylvania's Public School Code of 1949, which requires separate facilities on the basis of sex.

Id., 2017 U.S. Dist. LEXIS 137317, at *6-7. On August 25, 2017, the court denied the plaintiffs' motion for a preliminary injunction finding the plaintiffs had not established their entitlement to such and further noting, among other things, that the plaintiffs alleged constitutional right of privacy was "very broad [and such a right] has never been recognized by another court even though courts have recognized that sex-segregated bathrooms provide for privacy protection from the opposite sex." *Id.*, 2017 U.S. Dist. LEXIS 137317, at *140-41

f. ***Whitaker v. Kenosha Unified School District*, 858 F.3d 1034 (7th Cir. 2017).** On July 19, 2016, a transgender high school student in the Kenosha Unified School District filed suit 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) disciplining 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

⁹ "'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>.

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.

B. 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).

As noted on the Department of Health and Human Services website:

The law prohibits discrimination on the basis of race, color, national origin, sex, age, or disability in certain health programs or activities. Section 1557 builds on long-standing and familiar Federal civil rights laws: Title VI of the Civil Rights Act of 1964, Title IX of the Education Amendments of 1972, Section 504 of the Rehabilitation Act of 1973 and the Age Discrimination Act of 1975. Section 1557 extends nondiscrimination protections to individuals participating in:

- Any health program or activity any part of which received funding from HHS
- Any health program or activity that HHS itself administers
- Health Insurance Marketplaces and all plans offered by issuers that participate in those Marketplaces.

Dep't of Health of Human Servs, *Section 1557 of the Patient Protection and Affordable Care Act*, <https://www.hhs.gov/civil-rights/for-individuals/section-1557/index.html>.

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 (“Final Rule”) to be effective on July 18, 2016. [Read the full text version published in the Federal Register](#). Section 92.206 (the non-discrimination protections of transgender people based upon their gender identity) and 92.207 (the non-discrimination protections prohibiting exclusions in healthcare policies for transgender care¹⁰) have been challenged and, on December 31, 2016, the United States District

¹⁰ The applicable section of the Final Rule is set forth below:

45 CFR § 92.206 Equal program access on the basis of sex.

A covered entity shall provide individuals equal access to its health programs or activities without discrimination on the basis of sex; and a covered entity shall treat individuals consistent with their gender identity, except that a covered entity may not deny or limit health services that are ordinarily or exclusively available to individuals of one sex, to a transgender individual based on the fact that the individual's sex assigned at birth, gender identity, or gender otherwise recorded is different from the one to which such health services are ordinarily or exclusively available.

•

§ 92.207 Nondiscrimination in health-related insurance and other health-related coverage.

(a) General. A covered entity shall not, in providing or administering health-related insurance or other health-related coverage, discriminate on the basis of race, color, national origin, sex, age, or disability.

(b) Discriminatory actions prohibited. A covered entity shall not, in providing or administering health-related insurance or other health-related coverage:

.....

(b)(3) Deny or limit coverage, deny or limit coverage of a claim, or impose additional cost sharing or other limitations or restrictions on coverage, for any health services that are ordinarily or exclusively available to individuals of one sex, to a transgender individual based on the fact that an individual's sex assigned at birth, gender identity, or gender otherwise recorded is different from the one to which such health services are ordinarily or exclusively available;

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 but retained jurisdiction over the case and clarified that the December 31, 2016 preliminary injunction remains in full force and effect. 2017 U.S. Dist. LEXIS 145416 (N.D. Tex, July 10, 2017).

On January 30, 2017, the United States District Court for the District of Minnesota issued a stay on a transgender patient’s discrimination claims pursuant to Section 1557 in *Rumble v. Fairview Health Servs.*, No. 14-CV-2037, 2017 U.S. Dist. LEXIS 13316 (D. Minn. Jan. 30, 2017). The court in *Rumble* noted it was not only constrained by the nationwide injunction against Section 1557 discrimination claims issued in *Franciscan Alliance, Inc. v. Burwell*, it also found the question of whether transgender individuals were protected under Section 1557 would be best adjudicated after the Supreme Court made its final decision in *Gloucester County School Board v. G.G* on the “fundamental question of whether Title IX’s prohibition of embrace[d] gender identity.” *Id.*, 2017 U.S. Dist. LEXIS 13316, at *11. After the Supreme Court remanded *Gloucester County School Board v. G.G* to the Fourth Circuit Court of Appeals, *Rumble v. Fairview Health Servs.* was settled and dismissed with prejudice.

Practice Note: To date, the repeal of Section 1557 has not been part of any legislation in Congress to repeal and replace the Affordable Care Act. More importantly, there is considerable debate about the authority of lower federal courts to issue nationwide injunctions. *See also*, Andrew Kent, *Nationwide Injunctions and the Lower Federal Courts*, LAWFARE (Feb. 3, 2017), <https://www.lawfareblog.com/nationwide-injunctions-and-lower-federal-courts>

C. Military Ban on Transgender Servicemembers. On August 25, 2017, President Trump issued Memorandum to the Secretary of Defense and Secretary of Homeland Security (the latter with respect to the Coast Guard), extending the ban on transgender individuals serving in the

(b)(4) Have or implement a categorical coverage exclusion or limitation for all health services related to gender transition; or

(b)(5) Otherwise deny or limit coverage, deny or limit coverage of a claim, or impose additional cost sharing or other limitations or restrictions on coverage, for specific health services related to gender transition if such denial, limitation, or restriction results in discrimination against a transgender individual.

(c) The enumeration of specific forms of discrimination in paragraph (b) does not limit the general applicability of the prohibition in paragraph (a) of this section.

(d) Nothing in this section is intended to determine, or restrict a covered entity from determining, whether a particular health service is medically necessary or otherwise meets applicable coverage requirements in any individual case.

§ 92.209 Nondiscrimination on the basis of association.

A covered entity shall not exclude from participation in, deny the benefits of, or otherwise discriminate against an individual or entity in its health programs or activities on the basis of the race, color, national origin, sex, age, or disability of an individual with whom the individual or entity is known or believed to have a relationship or association.

military indefinitely (the ban was originally scheduled to expire on July 1, 2107, but extended by the Secretary of Defense and Secretary of Homeland Security until January 1, 2018) “until such time as the Secretary of Defense, after consulting with the Secretary of Homeland Security, provides a recommendation to the contrary that I [the President] find convincing...” The directive further orders that the Secretary of Defense and Secretary of Homeland Security “halt all use of DoD or DHS resources to fund sex reassignment surgical procedures for military personnel, except to the extent necessary to protect the health of an individual who has already begun a course of treatment to reassign his or her sex.” <https://www.whitehouse.gov/the-press-office/2017/08/25/presidential-memorandum-secretary-defense-and-secretary-homeland>.

However, the President’s rationale for extending the ban set forth in the Memorandum – lifting the ban would hinder military effectiveness, disrupt unit cohesion and tax military resources – is at odds with the Rand Corporation’s 2016 Study, *Assessing the Implications of Allowing Transgender Personnel to Serve Openly*, sponsored by the Office of the Under Secretary of Defense for Personnel and Readiness and conducted within the Forces and Resources Policy Center of the RAND National Defense Research Institute, a federally funded research and development center sponsored by the Office of the Secretary of Defense, the Joint Staff, the Unified Combatant Commands, the Navy, the Marine Corps, the defense agencies, and the defense Intelligence Community, calls into question. https://www.rand.org/content/dam/rand/pubs/research_reports/RR1500/RR1530/RAND_RR1530.pdf

On August 28, 2017, the ACLU and six military servicemembers filed a lawsuit against the President, Secretary Mattis (Department of Defense), Acting Secretary McCarthy (Department of the Army), Secretary Spencer (Department of the Navy), and Secretary Wilson (Department of Air Force). Citing the foregoing Rand Study, the Complaint alleges that: “Without input from the Department of Defense, and Joint Chiefs of Staff, and without any deliberative process, President Trump cast aside rigorous, evidence-based policy of the Open Service Directive, and replaced it with discredited myths, and stereotypes, uninformed speculation, and animus against people who are transgender. Plaintiffs bring this action to right this unconstitutional wrong.” https://www.aclu.org/sites/default/files/field_document/aclu_complaint_0.pdf

A similar lawsuit was filed on August 28, 2017 by a transgender staff sergeant currently serving in the Army, two transgender individuals who wish to serve in the military, the Human Rights Campaign, and the Gender Justice League against President Trump and Secretary Mattis. The Plaintiffs allege: “[T]he Ban and the current accessions bar violate the equal protection and due process guarantees of the Fifth Amendment and the free speech guarantee of the First Amendment. They are unsupported by any compelling, important, or even rational justification.” https://www.lambdalegal.org/sites/default/files/legal-docs/downloads/karnoski_us_20170828_complaint.pdf.

The National Center for Lesbian Rights and GLBTQ Legal Advocates and Defenders (GLAD), have also filed a lawsuit in response to President Trump’s Tweets and memorandum extolling the ban on transgender service members. <http://www.nclrights.org/press-room/press-release/nclr-and-glad-file-lawsuit-challenging-trumps-transgender-military-ban/>.

On September 15, 2017, Defense Secretary Mattis released new guidance to top military leaders making it clear that transgender servicemembers can re-enlist.

<https://apnews.com/f72fa423bb174c0999fabad54f9d101b/Transgender-troops-can-re-enlist-in-military--for-now>

On December 29, 2017, the Department of Justice announced that it would withdraw an appeal to the 9th Circuit and not seek an “emergency” stay from the Supreme Court to avoid complying with mandates from the federal courts to allow transgender individuals to begin enlisting in the U.S. Military starting January 1, 2018. *Doe 1 v. Trump*, 2017 U. S. App. LEXIS 26477, 2017 WL 6553389 (D.C. Cir. Dec. 22,2017); *Stockman V. Trump*, No. EDCV 17-1799 JGB (KKxc) (C.D. Cal. Dec. Dec. 22,2017); *Stone v. Trump*, 2017 U. S. Dist. LEXIS 212556 (D. Md. Dec. 28,2017)(denying motion to stay preliminary injunction); and *Karnoski v. Trump*, 2017 U.S. Dist. LEXIS 213420 (W.D. Wash. Dec. 29, 2017)(denying motion to stay preliminary injunction). The Department of Justice will, however, continue to litigate these cases on the merits in district court and a DOJ official upon the condition of anonymity stated to the press:

The Department of Defense has announced that it will be releasing an independent study of these issues in the coming weeks. So rather than litigate this interim appeal before that occurs, the administration has decided to wait for DOD’s study and will continue to defend the president’s lawful authority in District Court in the meantime.

<http://www.foxnews.com/politics/2017/12/29/doj-not-appealing-transgender-military-ruling-but-not-abandoning-case.html>

<https://slate.com/news-and-politics/2017/12/trump-administration-wont-appeal-trans-troops-ban-to-the-supreme-court.html>

On March 23, 2018, within twenty-four (24) hours after a court ordered deadline in one of the cases, *Karnoski v. Trump*, the Defendants, President Trump and Secretary of Defense Mattis, filed a request to dissolve the injunction on the military ban because Mr. Trump revoked his 2017 Memorandum Regarding Transgender Servicemembers. Mr. Trump announced that the Department of Defense would be adopting the recommendations of Secretary Mattis that "transgender persons with a history or diagnosis of gender dysphoria—individuals who the policies state may require substantial medical treatment, including medications and surgery—[be] disqualified from military service except under certain limited circumstances.”

In their motion to dissolve the injunction in *Karnoski v. Trump*, the Defendants cited a February 22, 2018, report entitled *Department of Defense Report and Recommendations on Military Service by Transgender Person* (2018 DOD Report), which contains Secretary Mattis’ recommendations and is the basis of the Department’s new policy. The 2018 DOD Report questions the findings of the Rand Corporation’s 2016 Study.

<https://media.defense.gov/2018/Mar/23/2001894037/-1/-1/0/MILITARY-SERVICE-BY-TRANSGENDER-INDIVIDUALS.PDF>

On April 13, 2018, the United States District Court for the Western District of Washington ruled that (a) transgender people constitute a suspect class, (b) the court was unable to defer to the President and Department of Defense regarding the findings of the 2018 DOD Report until the Plaintiffs have an

opportunity to test or respond to the claims in the 2018 DOD Report justifying discriminating against transgender people (c) it could not rule on the constitutional claims prior to the presentation for evidence relating to the 2018 DOD Report, (d) the President is not immune from injunctive relief and (e) noted that the “Defendants to date have failed to identify even one General or military expert he consulted [in connection with his 2017 Twitter Announcement], despite having been ordered to do so repeatedly.” https://www.lambdalegal.org/sites/default/files/legal-docs/downloads/msj_order1.pdf

By separate order dated April 19, 2018, the district court denied the Motion for Protective Order filed by the President and Department of Defense and ordered discovery in the case to proceed. *Karnoski v. Trump*, 2:17-cv-01297-MJP (U.S.W.D. Wash. 4/19/18).

D. Do Non-Discrimination Laws Infringe Upon 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 to 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.

In September 2017, the Trump Administration filed an amicus brief supporting the right of Jack Phillips and his company, Masterpiece Cakeshop, Inc., to refuse to design and create a cake for Charlie Craig and David Mullins to celebrate their same-sex wedding upon the grounds that Colorado's public accommodation law violated his right to Free Speech under the First Amendment. The brief did not address the parties' arguments regarding the Free Exercise Clause. <https://assets.documentcloud.org/documents/3988525/16-111-United-States.pdf>.

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*, 2018 U.S. LEXIS 3386 (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 *33. More importantly, the Court recognized that the civil rights of gay persons and gay couples must 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 *18-19. 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. ___, 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 *19.

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 *72-73 (Ginsburg, J., dissenting).

On June 25, 2018, the Court vacated a Washington Supreme Court's judgment finding a florist who refused to provide services to a gay couple because of their sexual orientation violated Washington State's anti-discrimination protection laws. *Arlene's Flowers, Inc. v. Washington*, 2018 U.S. LEXIS 3950 (June 25, 2018). The Court did not suggest or opine that the Washington Supreme Court's decision was incorrect. Instead, the Court's remand resolved its earlier grant of certiorari.

E. 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.

Yet, other states have proposed legislation which will negatively impact LGBTQ people, including religious freedom restoration acts (RIFRAs) and super RIFRAs (creating private causes of action against private entities and persons and/or reducing the standard from "substantially burdening" to "burdening"), anti-transgender bills (restricting access to gender-segregated facilities or health care coverage), promoting conversion therapy, and nullifying local civil rights protections. *Id.*; Stephen Peters, *HRC Previews Anti-LGBTQ Action Anticipated in Statehouses During 2017*, HUM. RTS. CAMPAIGN (Jan. 23, 2017), <http://www.hrc.org/blog/hrc-previews-anti-lgbtq-action-anticipated-in-statehouses-during-2017>.

For an overview of state laws, see HRC 2016 State Equality Index. http://assets.hrc.org/files/assets/resources/SEI-2016-Report-FINAL.pdf?_ga=2.21841726.46407171.1504233550-1611237425.1502678696

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

1. North Carolina Senate Bill 2 (N.C. GEN. STAT. § 51-5.5 (2015)). In response to the *Obergefell* decision, the North Carolina General Assembly passed Senate Bill 2

which allows magistrates to recuse themselves from performing marriages, as well as allowing assistant and deputy registrar of deeds to recuse themselves from issuing marriage licenses, which are against “sincerely held religious objection.” N.C.G.S. § 51-5.5 (2015). Three couples filed a lawsuit challenging the constitutionality of § 51-5.5. *Ansley v. Warren*, No. 1:16-cv-00054-MOC-DLH, 2016 U.S. Dist. LEXIS 128081 (W.D.N.C. Sept. 20, 2016). The case was dismissed on September 20, 2016 for lack of subject matter jurisdiction due to the plaintiff’s failure to establish standing. However, the court noted:

A law that allows a state official to opt out of performing some of the duties of the office for sincerely held religious beliefs, while keeping it a secret that the official opted out, is fraught with potential harm that could be of constitutional magnitude. The fact that a judicial officer has a strongly held religious belief that is so strong it has caused them to decline to perform a lawful duty of their office, coupled with the inability of a litigant to discover that fact and request recusal, could provide a necessary injury. But such matters must be dealt with as they arise.

Id., 2016 U.S. Dist. LEXIS 128081, at *53-54. The Fourth Circuit affirmed the district court’s dismissal due to lack of standing, but similarly noted that the dismissal of the claim on procedural grounds was “in no way a comment on same-sex marriage as a social policy.” *Ansley v. Warren*, 861 F.3d 512, 2017 U.S. App. LEXIS 11511, at *20 (4th Cir. June 28, 2017).

2. House Bills 2 and 142. In March 2016, the North Carolina legislature enacted and its then Governor Pat McCrory signed into law House Bill 2, what became known as the “Bathroom Bill.” House Bill 2 (a) prohibited the use of restrooms of a designated sex by persons whose birth certificates reflect a different sex; (b) prohibited local governments from regulating employee wage levels, hours of labor, payment of earned wages, benefits, leave or well-being of minors in the workforce; and (c) prohibited local governments or other political subdivisions of the states from passing any regulation of discriminatory practices in places of public accommodation. H.B. 2, 2016 General Assemb., Second Extra Sess. (N.C. 2016). The Act also declared the public policy of the state:

[T]o protect and safeguard the right and opportunity of all individuals within the State to enjoy fully and equally the goods, services, facilities, privileges, advantages, and accommodations of places of public accommodation free of discrimination because of race, religion, color, national origin, or biological sex, *provided that designating multiple or single occupancy bathrooms or changing facilities according to biological sex, as defined in N.C.G.S. § 143-760(a)(1), (3), and (5), shall not be deemed to constitute discrimination.*

H.B. 2, 2016 General Assemb., Second Extra Sess. N.C.G.S. § 143-422.2(a) (N.C. 2016) (emphasis added), <http://www.ncleg.net/Sessions/2015E2/Bills/House/PDF/H2v1.pdf>.

One of the broader reaching provisions of House Bill 2, N.C.G.S. §143-422.13 — eliminating a private cause of action for employment discrimination – was repealed retroactively by House Bill 169. H.B. 169, 2016 General Assemb. Sess. 2015 (N.C. 2016) However, House Bill 169 added a

new one (1) year statute of limitations for wrongful discharge claims. H.B. 169, 2016 General Assemb. Sess. 2015 N.C.G.S. §1-54(12) (N.C. 2016).

On March 30, 2017, Governor Roy Cooper signed House Bill 142 as a compromise in lieu of the complete repeal of House Bill 2. Under House Bill 142, state agencies, including the University of North Carolina and the North Carolina Community College System, “are preempted from regulat[ing] [the] access to multiple occupancy restrooms, showers or changing facilities.” H.B. 142, General Assemb. Sess. 2017 (N.C. 2017). House Bill 142’s also bans local governments from enacting non-discrimination ordinances prior to December 1, 2020 H.B. 142, General Assemb. Sess. 2017 (N.C. 2017). N.C.G.S. §143-760.

Many LGBTQ advocacy groups have referred to HB142 as a “fake repeal.” HB142 has three sections:

Section 1 of House Bill 142. Repealed House Bill 2.

Section 2 of House Bill 142: State agencies, including the University of North Carolina and the North Carolina Community College System, are preempted from regulating the access to multiple occupancy restrooms, showers or changing facilities. H.B. 142, General Assemb. Sess. 2017 (N.C. 2017). [This section creates uncertainty for transgender people.]

Section 3 of House Bill 142: Bans local governments from enacting non-discrimination ordinances prior to December 1, 2020. H.B. 142, General Assemb. Sess. 2017 (N.C. 2017). N.C.G.S. §143-760.

Effect of House Bill 142. In North Carolina, local governments cannot enact non-discrimination ordinances to protect LGBTQ people from discrimination until January 1, 2020.

October 18, 2017, in *Carcaño v. McCrory*, a joint motion for approval of a consent order was filed by the Plaintiffs and Executive Branch Defendants. The consent order, if entered, will confirm the right of transgender people to use restrooms that match their gender identity. However, the Legislative Branch Defendants oppose the consent order and the court has not ruled on the Motion to Approve Consent Order. Governor Cooper issued an executive order at the state government level that provides nondiscrimination protections for LGBT state Employees and affirms equal rights for transgender North Carolinians.

3. Michigan House Bills 4188-4190, Texas House Bill 3859, and Senate Bills 3 and 91; Alabama House Bill 24. Similar to North Carolina, the Texas and Alabama legislatures have taken up anti-LGBTQ bills in their 2017 legislative sessions.

a. Michigan House Bills 4188-4190 - MICH COMP. L. §§ 400.5a, 722.124e, 722.124f, and 701.23g (2015). On June 11, 2015, Michigan’s House Bill 4188, 4189 and 4190 were signed into law. The bills allow the Michigan Department of Health and Human Services (“DHHS”) to contract out public adoption and foster care services to private agencies and

reimburse the agencies with taxpayer funds, despite a private agency's refusal to provide services that "conflict with the child placing agency's sincerely held religious beliefs." Mich. Comp. L. §722.124e(7)(b). On September 29, 2017, five (5) plaintiff's filed suit against the Director for the Michigan Department of Health and Human Services and the Michigan Children's Services Agency for a declaratory judgment that such state laws violate the First and Fourteenth Amendments to the United States Constitution and 42 U.S.C. §1983, and for an injunction against the defendants prohibiting the use of taxpayer funding to private child placing agencies that exclude same-sex couples from consideration as foster and adoptive parents or otherwise employ religious criteria in decisions regarding the screening of prospective foster and adoptive parents, and to direct the defendants to treat lesbian and gay individuals and couples the same as heterosexual individuals and couples. *Dumont, Busk-Sutton, and Ludolph v. Lyon and McCall*, (ED.MICH. 9-20-17). <https://www.aclu.org/legal-document/dumont-v-lyon-complaint>

b. Alabama House Bill 24 and Texas House Bill 3859. Alabama's House Bill 24 and Texas' House Bill 3859 were signed into law in 2017. In general, both bills allow child welfare organizations, including adoption and foster care agencies, to discriminate against prospective adoptive and foster parents, including LGBTQ couples, based upon "sincerely held religious beliefs" and further allow child welfare organizations to provide "conversion therapy" to LGBTQ children if based upon "sincerely held religious beliefs." <http://www.capitol.state.tx.us/tlodocs/85R/billtext/pdf/HB03859F.pdf#navpanes=0https://legiscan.com/AL/bill/HB24/2017>

c. Texas Senate Bills 3 and 91. These two bills provided that in public building multi-occupancy restrooms, showers, and changing facilities, including public and charter schools, be designated for use by persons of the same sex as stated on their birth certificate. Neither bill was enacted before the Texas legislature was adjourned. <http://www.capitol.state.tx.us/tlodocs/85R/billtext/pdf/SB00003E.pdf#navpanes=0> and <http://www.capitol.state.tx.us/tlodocs/85R/billtext/pdf/SB00091E.pdf#navpanes=0>

F. Do *Obergefell* and *Pavan* Mean That All The Benefits Of Marriage Are Protected Or Something Less?

1. Arizona Supreme Court Says *Obergefell* and *Pavan* Must Afford Married Same-Sex Parents on an Equal Basis with Opposite-Sex Married Parents. On September 19, 2017, the Arizona Supreme Court held that the non-biological lesbian parent of a child born through artificial insemination was entitled to a presumption of legal parenthood under a state statute providing that "[a] man is presumed to be the father of their child if...[he] and the mother of the child were married at any time in the ten months immediately preceding the birth of the child or the child is born within ten months after the marriage is terminated..." ARIZ. REV. STAT. §25-814(A)(1). Noting that the court had a choice to either declare the statute a nullity as violating the Equal Protection or extending the coverage of the class to both the original class intended and the class aggrieved by the unconstitutional exclusion, the court choose the latter. *McLaughlin v. Jones*, 2017 Ariz. LEXIS 263, at *16 (Ariz. Sept. 19, 2017), citing *Califano v.*

Westcott, 443 U.S. 76, 89 (1979). In its analysis, the Arizona Supreme Court noted that *Obergefell* recognized that the myriad of benefits of marriage were part of marital equality.¹¹

The court also took note that the judiciary was not the only branch of government that was obliged to follow the Constitution:

Like the judiciary, the legislative and executive branches are obliged to follow the United States Constitution. U.S. Const. art. VI, cl. 2 (stating that the U.S. Constitution is “the supreme Law of the Land”); Ariz. Const. Art. II, §3 (same). Through legislative enactments and rulemaking, our coordinate branches of government can forestall unnecessary litigation and help ensure that Arizona law guarantees same-sex spouses the dignity and equality the Constitution requires – namely, the same benefits afforded couples in opposite-sex marriages.

McLaughlin, at *22.

2. The Supreme Court of Texas – Remands Case to Determine Whether Marriage Equality Includes Public Employee Benefits. A recent decision by the Texas Supreme Court exemplifies the view and continued efforts by opponents of LGBTQ equality to limit the rights of and discriminate against LGBTQ people, despite *Windsor*, *Obergefell*, and *Pavan*. In response to *Windsor*, on November 19, 2013, the Mayor of Houston, with the advice of the city attorney counsel, directed that the City of Houston extend employee benefits to same-sex spouses who were legally married in states outside Texas (at that time known as marriage recognition states). On December 13, 2013 (18 months before the *Obergefell* decision), two taxpayers from Houston filed suit in Texas State Court against the City of Houston and its mayor upon the theories that the mayor was spending public money on “illegal activity” [same-sex marriages] and that the extension of employee benefits to same-sex married couples violated the same-sex marriage bans of both Texas and Houston. *Parker v. Pidgeon*, 477 S.W.3d 353 (2015). The trial court entered a temporary injunction in the case prior to *Obergefell* decision. The City of Houston appealed to the Texas Court of Appeals. While the appeal was pending, *Obergefell* was decided and, less than a week later on July 1, 2015, the Fifth Circuit Court of Appeals struck down Texas’ same-sex marriage bans as unconstitutional. *De Leon v. Abbott*, 791 F.3d 619 (5th Cir. 2015). On July 28, 2015, the Texas Court of Appeals reversed the trial court’s temporary injunction and remanded the case for proceedings consistent with *Obergefell* and *DeLeon*.

On September 2, 2016, the Texas Supreme Court denied the plaintiffs’ petition for review of the Court of Appeals’ reversal of the injunction. *Pidgeon v. Turner*, No. 15-0688, 2016 Tex. LEXIS

¹¹ “[J]ust as a couple vows to support each other, so does society pledge to support the couple, offering symbolic recognition and material benefits to protect and nourish the union. Indeed, while the States are in general free to vary the benefits they confer on all married couples, they have throughout our history made marriage the basis for an expanding list of governmental rights, benefits, and responsibilities. These aspects of marital status include: taxation; inheritance and property rights; rules of intestate succession; spousal privilege in the law of evidence; hospital access; medical decision-making authority; adoption rights; the rights and benefits of survivors; birth and death certificates; professional ethics rules; campaign finance restrictions; workers’ compensation benefits; health insurance; and child custody, support, and visitation rules.” *Obergefell v. Hodges*, 135 S. Ct. 2584, 2601 (2015).

760 (2016). However, Justice John Devine filed a dissenting opinion from the denial of the petition stating, in part:

Yet, the fact remains that, at most, the majority [in *Obergefell*] merely *described* the benefits that states confer on married couples and *assumed* states would extend them to all married couples. Generalized assumptions about state laws do not constitute a legal holding, much less sweep aside well-established standards of review.

Pidgeon v. Turner, No. 15-0688, 2016 Tex. LEXIS 799, at *8-9 (2016) (Devine, J., dissenting).

On January 20, 2017, the Texas Supreme Court issued an order withdrawing its September 2, 2016 denial of the petition for review, reinstating the petition and granted the same. *Pidgeon v. Turner*, No. 15-0688, 2017, Tex. LEXIS 54 (2017). On June 30, 2017, the Texas Supreme Court reversed the 2015 decision of the Court of Appeals, vacated the trial court's orders and remanded the case to the trial court for proceedings consistent with its opinion and judgement which read in part:

We agree with the Mayor that any effort to resolve whether and the extent to which the Constitution requires states or cities to provide tax-funded benefits to same-sex couples without considering *Obergefell* would simply be erroneous. On the other hand, we agree with Pidgeon that the Supreme Court did not address and resolve that specific issue in *Obergefell*. "Whatever ramifications *Obergefell* may have for sexual relations beyond the approval of same-sex marriage are unstated at best" *Coker v. Whittington*, 858 F.3d 304, 307 (5th Cir. 2017)¹². The Supreme Court held in *Obergefell* that the Constitution requires states to license and recognize same-sex marriages to the same extent that they license and recognize opposite-sex marriages, but it did not hold that states must provide the same publicly funded benefits to all married persons, and—unlike the Fifth Circuit in *De Leon*—it did not hold that the Texas DOMAs are unconstitutional.

Of course, that does not mean that the Texas DOMAs *are* constitutional or that the City may constitutionally deny benefits to its employees' same-sex spouses. Those

¹² *Coker v. Whittington* was not a case involving the constitutional right and freedom to marry. Instead, the case involved two married deputies of Bossier Parish, Louisiana who were removed from office for failing to obey their Sheriff's demand that they not cohabit with each other's wives prior to obtaining divorces from their respective wives. The court rejected the deputies arguments that their dismissals were unconstitutional under the Supreme Court's decision in *Lawrence v. Texas*, 539 U.S. 558 (2003) (holding that private consensual sex between adults could not be criminalized). The court noted that *Lawrence v. Texas* did not suggest "that the deputies, as public employees of law enforcement agencies, have constitutional rights to "associate" with each other's spouses before formal divorce. *Coker v. Whittington*, 858 F.3d 304, 306 (5th Cir. 2017).

Interestingly, the complete quote of the Fifth Circuit Court upon which the Texas Supreme Court premised its questioning of the breadth of *Obergefell* reads:

The Supreme Court's recent decision in *Obergefell v. Hodges* does not alter applicable law. 135 S. Ct. 2584, 2598, 192 L. Ed. 2d 609 (2015). Whatever ramifications *Obergefell* may have for sexual relations beyond the approval of same-sex marriage are unstated at best, *but Obergefell is expressly premised on the unique and special bond created by the formal marital relationship and children of that relationship. Id. at 2594-95. Obergefell does not create "rights" based on relationships that mock marriage, and no court has so held.* *Coker*, 858 F.3d at 307 (emphasis added).

are the issues that this case now presents in light of *Obergefell*. We need not instruct to the trial court to "narrowly construe" *Obergefell* to confirm that *Obergefell* did not directly and expressly resolve those issues. But neither will we instruct the trial court to construe *Obergefell* in any manner that makes it irrelevant to these issues. Pidgeon contends that neither the Constitution nor *Obergefell* requires citizens to support same-sex marriages with their tax dollars, but he has not yet had the opportunity to make his case. And the Mayor has not yet had the opportunity to oppose it. Both are entitled to a full and fair opportunity to litigate their positions on remand.

Pidgeon v. Turner, 2017 Tex. LEXIS 654, 2017 WL 2829350, at *24-26 (2017), *cert. denied*, 138 S. Ct 505, 2017 LEXIS 7230, 86 U.S.L.W. 3280 (2017).

Regardless of whether one considers the proposition that employee benefits provided to public employees in opposite sex marriages may be denied public employees in same-sex marriages specious or meritorious, the *Pidgeon v. Turner* litigation makes clear that the fight for LGBTQ equality is far from over and representation of LGBTQ clients in the context of estate and trust planning and administration is neither static nor simple. *See also*, Shannon Price Minter, "Déjà Vu All Over Again": *The Recourse to Biology By Opponents of Transgender Equality*, 95 N.C.L. Rev. 1161 (2017).