PLANNING FOR SAME-SEX COUPLES

NAEPC National Convention

Orlando, Florida

November 8, 2012

Caryn B. Keppler, Esq., EPLS, AEP®

Putney, Twombly, Hall & Hirson LLP

521 Fifth Avenue

New York, New York 10175

(212) 682-0020

PLANNING FOR SAME-SEX COUPLES[1]

I. <u>The Defense of Marriage Act</u>

The Defense of Marriage Act ("DOMA")[2] was enacted by Congress and signed into law by President Bill Clinton on September 21, 1996. DOMA defines marriage as "the legal union of one man and one woman." Section 2 of DOMA[3] gives each State the ability to choose to recognize a marital relationship between two members of the same sex:

> No State, territory, or possession of the United States, or Indian tribe, shall be required to give effect to any public act, record, or judicial proceeding of any other State, territory, possession, or tribe respecting a relationship between persons of the same sex that is treated as a marriage under the laws of such other State, territory, possession, or tribe, or a right or claim arising from such relationship.

Section 3 of DOMA[4] provides that same sex marital relationships will not be recognized for federal purposes:

> In determining the meaning of any Act of Congress, or of any ruling, regulation, or interpretation of the various administrative bureaus and agencies of the United States, the word "marriage" means only a legal union between one man and one woman as husband and wife, and the word "spouse" refers only to a person of the different-sex who is a husband or a wife.

DOMA was passed in response to the decision in *Baehr v. Miike*[5], in which the Supreme Court of Hawaii ruled that the denial of marriage licenses to three same sex couples was

---

[1] The author extends gratitude to Shaina J. Schallop, an associate attorney with Putney, Twombly, Hall & Hirson LLP, and Ann Hiat, a law student enrolled at Benjamin N.Cardozo School of Law and a summer associate of Putney, Twombly, Hall & Hirson LLP, for their assistance in the preparation of these materials.

[2] Pub. L. 104-188, 110 Stat. 2419, 1. U.S.C. §7 and 28 U.S. C. §1738C

[3] 28 U.S.C. §1738C

[4] 1 U.S.C. §7

[5] 74 Haw. 530, 852 P.2d 44 (1993)

discrimination based on sex and therefore subject to "strict scrutiny" under the provisions of the Hawaii State Constitution. Opponents of same-sex marriage, concerned that same-sex marriage might become legal in Hawaii and that other states would be forced to recognize those marriages under the Full Faith and Credit Clause of the United States Constitution,[6] pushed for the introduction of a federal law clarifying each state's ability to refuse to recognize a same-sex marriage legally solemnized in another state. The bill, introduced on May 7, 1996, moved quickly through Congress and met with overwhelming approval in both houses passing by a vote of 85–14 in the U.S. Senate and a vote of 342–67 in the U.S. House of Representatives.

A common misconception is that DOMA is contrary to the "Full Faith and Credit" Clause of the U.S. Constitution. Marriage, however, is a contractual relationship authorized by state legislative acts. In contrast, the Full Faith and Credit Clause only applies to judgments and orders issued by a court of another state. Full Faith and Credit does not prevent a state from making its own policy decisions with respect to legislative acts of another state.[7]

As of September 1, 2012, same-sex couples may marry in 7 jurisdictions (Connecticut, Iowa, Massachusetts, New Hampshire, New York, Vermont and the District of Columbia). An additional 3 states (Maryland, New Mexico and Rhode Island) will recognize a same-sex marriage legally solemnized under the laws of another jurisdiction. Same-sex married couples in those jurisdictions are entitled to all of the rights and responsibilities afforded different-sex couples under the laws of that state.

Five states authorize same sex couples to enter into a civil union (Delaware, Hawaii, Illinois, New Jersey and Rhode Island) and four states authorize them to enter into a domestic

[6] Article IV, Section 1, of the U.S. Constitution provides: "Full Faith and Credit shall be given in each State to the public Acts, Records and judicial Proceedings of every other State."

[7] *See Baker v. General Motors Corp.*, 522 U.S. 222 (1998)

partnership (California, Nevada, Oregon and Washington State). Similarly, in those states, both civil unions and domestic partnerships afford same-sex couples all the rights and responsibilities granted under the law specific to that state without the label of "marriage."

Four states (Colorado, Maine, Maryland and Wisconsin) offer the option of a domestic partnership and/or civil union which afford some but not all of the benefits of marriage under state law.

Thirty-seven states have enacted mini-DOMA's specifically defining marriage within their borders (whether or not legally solemnized under the laws of another jurisdiction) as between one man and one woman. Eleven states have enacted constitutional amendments banning marriage between same-sex couples and twenty states have enacted constitutional amendments banning any legal or quasi-legal relationship (i.e., marriage, domestic partnerships and civil unions) between same-sex couples. *See Appendix A for a chart showing a state by state breakdown of recognition and/or non-recognition of legal and quasi-legal relationships between same-sex couples.*

II. <u>State Legislative Activity</u>

There has, however, been a flurry of state legislative activity in this area in the last year. The following is a list of the most recent state legislative developments (as of the close of the state legislative sessions in June 2012):

1. **<u>Colorado:</u>** Legislation recognizing same-sex civil unions was introduced on January 11, 2012. The bill died.

2. **<u>Illinois:</u>** Legislation recognizing same-sex marriage was introduced on February 8, 2012. The bill died.

3. **Maine: Pending Referendum:** A bill allowing same-sex marriage was signed into law on May 6, 2009. Opponents have successfully petitioned for a referendum scheduled for the November 6, 2012 election date.

4. **Maryland: Enacted, But Pending Referendum:** Legislation affording full marriage equality was signed by Governor Martin O'Malley on February 13, 2012 and is slated to become effective on January 1, 2013. However, opponents have garnered enough signatures to place the issue on the upcoming November ballot for a referendum. The Maryland Court of Appeals, in a unanimous decision, recently determined that a Maryland resident same-sex couple validly married out-of-state is entitled to obtain a divorce in Maryland.[8]

5. **Missouri:** A constitutional amendment to prohibit recognition of same-sex marriages was introduced on January 9, 2012. The bill died.

6. **New Jersey:** On January 10, 2012, a bill was introduced in New Jersey to recognize same sex marriage, in lieu of the civil union regime currently authorized under New Jersey law. The bill passed both houses of the New Jersey Legislature but was vetoed by Governor Chris Christie who challenged the legislature to put the issue to a referendum. No action has been taken to put the matter up for referendum.

7. **New Mexico:** A constitutional amendment to prohibit recognition of same-sex marriages was introduced on January 24, 2012. The bill died.

8. **North Carolina: Constitutional Amendment Enacted:** A constitutional amendment banning all legal relationships between same-sex couples was passed by the legislature and overwhelmingly approved by 60% of voters on May 8, 2012. The amendment specifically provides that a marriage between one man and one woman is the only domestic

[8] Port v. Cowan, 2012 Md. Lexis 283 (May 18, 2012).

union recognized in the state. A current state law also provides that marriage between individuals of the same sex is not valid in North Carolina. Because the legislation formally amended the definition of marriage in the state constitution, under North Carolina law this can only be changed by another voter referendum.

9. **Rhode Island:** Legislation recognizing same-sex marriage was introduced on February 16, 2012. The bill died. However, on May 14, 2012, Governor Lincoln Chafee issued Executive Order 12-02, which directed state agencies to recognize same-sex marriages performed out-of-state and, unless contrary to law, to extend to those same-sex spouses all the benefits and protections accorded to different-sex spouses. On May 17th, in response to the Governor's executive order, a bill was introduced in the Rhode Island Senate to formalize a public policy that discountenances same-sex marriage and would override any obligation of full faith and credit. The bill died.

10. **Vermont: Enacted (Dissolutions):** Vermont permits same-sex marriage and civil unions. However, a residency prerequisite to dissolving a marriage may cause particular difficulties for same-sex spouses if they later move to a state that does not recognize their marriage/union. Vermont has now enacted an exemption from the 6-month residency requirement to institute a proceeding for a divorce/dissolution provided the marriage/union was entered into in Vermont, neither party resides in a state that will dissolve the marriage/union, there are no minor children and the parties file a stipulation that resolves all issues in the action.[9]

11. **Washington State: Enacted, But Pending Referendum:** Legislation recognizing same-sex marriage was signed by Governor Chris Gregoire on February 13, 2012.

---

[9] 15 V.S.A. §1206(b)

Although the legislation has an effective date of June 7, 2012, it is not yet in force. The issue has now been placed on the November 6, 2012 ballot for a referendum.

12. **West Virginia:** A constitutional amendment to prohibit recognition of same-sex marriages was introduced on January 11, 2012. The bill died.

III. Litigation

There is a constant stream of litigation in this area as well. The cases fall into two categories: (i) challenges to DOMA as a violation of the United States Constitution (as a violation of the equal protection clause and/or rights reserved to the states), and (ii) challenges to specific state marriage equality legislation or mini-DOMA's.

A. Challenges as a Violation of the United States Constitution

1. *Golinksi v. United States Office of Personnel Management*[10]

Karen Golinski, a staff attorney for the United States Court of Appeals for the 9th Circuit (California), asked to add her new spouse, Amy Cunninghis, to her federal employee health insurance plan. The couple's minor child was already covered under that plan. Golinski's

[10] On February 23, 2011, while the court was still considering the original petition in *Golinski*, Attorney General Eric Holder announced that the Justice Department would no longer defend DOMA, but would help ensure Congress had a fair opportunity to defend the law. In response, the U.S. House of Representatives formed the Bipartisan Legal Advisory Group ("BLAG") to defend DOMA in this case, as well as *Gill v. Office of Personnel Management* and *Massachusetts v. United States Department of Health and Human Services*. On BLAG's behalf, former United States Solicitor General Paul Clement filed a motion to dismiss, raising arguments previously avoided by the Department of Justice that DOMA's definition of marriage is valid "because only a man and a woman can beget a child together, and because historical experience has shown that a family consisting of a married father and mother is an effective social structure for raising children." On July 1, 2011, the Department of Justice filed a brief in support of Golinski's suit, in which it argued that DOMA Section 3 fails to meet the standard of heightened scrutiny based on "a significant history of purposeful discrimination against gay and lesbian people, by governmental as well as private entities".

request was refused on the grounds that Section 3 of DOMA prevented the federal government from extending benefits to same-sex spouses of federal employees.

Golinski filed a complaint under the 9th Circuit's Employment Dispute Resolution Plan contending that the refusal to grant her health benefits was a violation of the Plan's non-discrimination requirements. By orders dated November 24, 2008 and January 13, 2009, Chief Judge Alex Kozinski ruled that the denial of benefits to the same-sex spouse of a federal employee was a violation of the 9th Circuit's employment policies prohibiting discrimination based on sexual orientation.[11]

Despite the decision, the United States Office of Personal Management ("OPM")—an agency of the executive branch—refused to extend health insurance benefits to Golinski's spouse, arguing that that Section 3 of DOMA barred the federal government from offering coverage to spouses of gay and lesbian federal employees.

On January 10, 2010, Golinski filed a writ of mandamus, in the U.S. District Court for the Northern District of California, directing OPM to enforce Kozinski's order. On March 17, 2011, U.S. District Judge Jeffrey White dismissed the suit on procedural grounds but invited Golinski to amend her complaint to include constitutional grounds. On April 14, 2011, Golinski amended her complaint attacking DOMA as a violation of her equal protection rights pursuant to the due process clause of the 5th Amendment.[12]

---

[11] *In re Karen Golinski et. ux.*, No. 09-80173 ORDER (9th Cir. 2009)

[12] The 5th Amendment reads as follows: "No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, **nor be deprived of life, liberty, or property, without due process of law**; nor shall private property be taken for public use, without just compensation." Whereas the due process clause of the 14th amendment guarantees that the states shall not deprive individuals of life, liberty and property without due process, the 5th amendment due process clause prevents the *federal government* from depriving individuals of due process.

On February 22, 2012, White found that Section 3 of DOMA could not pass the "heightened scrutiny" or "rational basis" test required for review and that accordingly, the denial of health insurance benefits to Golinski's spouse "violate(d) her right to equal protection of the law under the Fifth Amendment to the United States Constitution."[13]

OPM appealed. The case is currently slated for oral argument on September 10, 2012 before the 9th Circuit. On July 10th, House Minority Leader Nancy Pelosi (D-CA), along with Congressman Jerrold Nadler (D-NY) and 130 House members filed an amicus curiae ("friend of the court") brief in the case.

On July 3, 2012, the U.S. Department of Justice submitted a writ of certiorari with the United States Supreme Court asking for review of the decision prior to judgment. If the Supreme Court accepts jurisdiction, the case will be heard before the Court during the 2012-2013 term.[14]

2. ***Windsor v. United States***

Plaintiff, Edith Windsor, filed this case in the United States District Court for the Southern District of New York challenging the constitutionality of Section 3 of DOMA as a violation of the Fifth Amendment to the United States Constitution. Edith Windsor and her wife, Thea Spyer, were together for 44 years, engaged in 1967 and finally married in Toronto in 2007. Thea Spyer died in 2009. Because their marriage was not recognized, no federal estate tax marital deduction was allowed on property passing from Spyer to Windsor as a result of Spyer's

[13] *Golinski v. United States Office of Personnel Management,* 2012 WL 569685 (N.D. Cal. 2012)

[14] http://sblog.s3.amazonaws.com/wp-content/uploads/2012/07/DOMA-US-petition-Golinski-7-3-12.pdf

death, which resulted in the imposition of $363,000 in federal estate tax. Windsor, as Executor of Spyer's estate, filed a claim for refund with IRS, which was disallowed based on DOMA. [15]

Windsor's attorneys filed a motion for summary judgment on June 24, 2011. New York Attorney General Eric Schneiderman filed a brief supporting Windsor's claim on July 26, 2011, arguing that DOMA Section 3 cannot survive the scrutiny required for classifications based on sex and that DOMA constitutes "an intrusion on the power of the state to define marriage." On August 1, 2011, BLAG[16] filed its brief seeking summary judgment on the grounds that marriage is not a fundamental right and that classification based on sexual orientation is not subject to heightened scrutiny.

On June 6, 2012, Judge Barbara Jones ruled that based on rational basis review Section 3 of DOMA is unconstitutional and ordered Spyer's Estate receive a full tax refund of federal estate taxes paid.[17]

The case is currently being appealed to the Second Circuit Court of Appeals, by BLAG, which made a motion to dismiss and which argued, in part, that the Department of Justice does not have standing to appeal the case.

On July 16, 2012, Windsor's attorneys filed a writ of certiorari before judgment with the Supreme Court asking for the case to be considered without waiting for the Second Circuit's review, citing Edith Windsor's age and poor health.[18] Despite the Supreme Court filing, the Second Circuit has scheduled oral arguments for September 27, 2012.

---

[15] New York, which recognized their marriage, allowed a full marital deduction for assets passing to Windsor and thus no New York estate tax was imposed on Spyer's estate.

[16] The Obama administration refused to defend the case in February 2011.

[17] *Windsor v. United States*, No. 1:2010 Civ. 08435 (S.D.N.Y. 2010).

[18] http://www.nyclu.org/files/releases/Windsor_cert_petition_7.16.12.pdf

On July 25, 2012, City of New York filed an amicus brief with the Supreme Court, arguing that DOMA's definition of marriage is unconstitutional.[19]

On August 8, 2012, the Department of Justice filed a reply brief in opposition to BLAG's motion to dismiss, arguing in part that they have standing to appeal as a part of the Executive Branch which enforces the laws, even though the District Court held Section 3 unconstitutional.[20]

3. *Gill v. Office of Personnel Management*

Gay & Lesbian Advocates & Defenders ("GLAD") filed this lawsuit in the U.S. District Court for the District of Massachusetts, on behalf of seven same-sex couples and three survivors of same-sex couples married in Massachusetts. The suit challenges the constitutionality of Section 3 of DOMA under the equal protection clause of the United States Constitution. All of the plaintiffs or their respective spouses had been denied federal benefits given to different-sex couples after making the appropriate request to a federal agency or authority.

On July 8, 2010, U.S. District Judge Joseph Tauro found for the plaintiffs holding that "Section 3 of DOMA as applied to Plaintiffs violates the equal protection principles embodied in the Fifth Amendment to the United States Constitution."[21] On May 31, 2012, the First Circuit Court of Appeals unanimously affirmed Tauro's ruling. [22]

---

[19][19] *Brief of the City of New York et. al. as Amici Curae In Support of Petitioner, Windsor,* No. 12-63 (July 25, 2012).

[20] *Windsor v. U.S.A., BLAG Intervenor-Defendant,* Opposition of the United States to Motion to Dismiss Appeal, No. 12-2435 (August 8, 2012).

[21] *Commonwealth of MA v. U.S. Dep't of Health and Human Services et. al.,* 699 F.Supp.2d at 377 (July 8, 2010).

[22] *Commonwealth of MA v. U.S. Dep't of Health and Human Services et. al.,* 2012 WL 1948017 (May 31, 2012).

On June 29, 2012 the BLAG filed a petition for certiorari with the United States Supreme Court in this case and in the related case *of Commonwealth of Massachusetts v. Department of Health & Human Services*.[23] The Department of Justice filed its request for review simultaneously with its request in *Golinski v. Office of Personnel Management*.[24]

4. *Pederson et. al. v. Office of Personnel Management*

On November 9, 2010, GLAD filed this lawsuit in the United States District Court for the District of Connecticut challenging Section 3 of DOMA. The lawsuit was brought on behalf of gay and lesbian couples in Connecticut, Vermont and New Hampshire who had been denied federal benefits offered to different-sex couples after making the appropriate requests to federal agencies. The plaintiffs allege that Section 3 of the Defense of Marriage Act is unconstitutional under the Fifth and Tenth Amendments of the United States Constitution[25].

This lawsuit challenges the federal government's denial of marriage-related protections in the areas of federal Family Medical Leave Act benefits and federal laws for private and state pension plans, as well as the same core issues addressed in GLAD's earlier case of *Gill v. Office of Personnel Management* (federal income taxation, social security benefits, and employment benefits for federal employees and retirees). All of the couples and widower in question were married in their home states and otherwise qualified for a particular program, but were denied those protections solely because of DOMA.

---

[23] http://www.scribd.com/doc/98691032/12-13-1

[24] http://www.glad.org/uploads/docs/cases/gill-v-office-of-personnel-management/08-02-2012-gill-v-opm-response-to-blag-cert-petition.pdf

[25] The Tenth Amendment provides that "Powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people."

On April 18, 2011, leaders of the U.S. House of Representatives announced they had selected former United States Solicitor General Paul Clement to defend the case on behalf of BLAG. On July 15, 2011 the plaintiffs submitted a motion for summary judgment. On June 20, 2012, BLAG asked for a stay pending the resolution of related cases, *Massachusetts v. United States Department of Health and Human Services* and *Gill v. Office of Personnel Management*, which are expected to be heard before the Supreme Court during its Fall 2012 term. On July 4, 2012, the Court denied the request for a stay.[26]

On July 31st, 2012, United States District Judge Vanessa Bryant, for the District of Connecticut, ruled that Section 3 of DOMA is an unconstitutional violation of the equal protection guarantees embodied in the Fifth Amendment.[27]

On August 17, 2012, Pederson filed a petition of certiorari before the United States Supreme Court.[28]

4. ***Dragovich v. U.S. Dept. of Treasury*, 764 F. Supp. 2d 1178, 1188**

On April 13, 2010, several employees of the State of California with same-sex domestic partners or spouses recognized under California law filed a class action lawsuit in the U.S. District Court for the Northern District of California alleging violations of the Fifth and Fourteenth Amendments, when, pursuant to Section 3 of DOMA, their same sex legal spouses and registered domestic partners were barred from enrolling in the CalPERS long-term care plan.

---

[26] *Pedersen v. OPM v. BLAG,* Order Denying Intervenor-Defendant's Motion to Stay, Civil Action No. 3:10 Civ. 1750(VLB) (July 4, 2012).

[27] *Pedersen v. Office v. OPM v. BLAG,* Memorandum of Decision Granting Plaintiff's Motion for Summary Judgment and Denying Intervenor-Defendant's Motion to Dismiss, No. 3:10 Civ 1750 (July 31, 2012).

[28] http://sblog.s3.amazonaws.com/wp-content/uploads/2012/08/DOMA-Pederson-petition-8-22-12.pdf

On May 24, 2012, District Court Judge Claudia Wilken granted the Plaintiff's motion for summary judgment and denied the cross-motions of defendants and defendant-intervenors. In her decision, Judge Wilken held that Section 3 of DOMA violates the Fifth Amendment to the United States Constitution with respect to same-sex spouses and that Section 7702B(f)(C) of the Internal Revenue Code (the "Code") violates the Fifth Amendment to the United States Constitution with respect to registered domestic partners. An injunction was issued prohibiting CalPERS from denying enrollment to same-sex spouses or registered domestic partners based on those provisions.[29]

BLAG filed a Notice of Appeal to the 9th Circuit on June 26, 2012.

5. ***Military Cases***

On October 27, 2011, the Servicemembers Legal Defense Network brought suit on behalf of several military servicemembers and veterans in same-sex marriages. The suit challenges Section 3 of DOMA and three other federal statutes granting spousal benefits to different-sex married couples that are denied to their same-sex counterparts. The Department of Justice refused to defend the suit. On May 1, 2012, BLAG filed a motion to intervene. The District Court has stayed further action pending final resolution of the outcome of *Gill v. Office of Personnel Management* and *Massachusetts v. United States Department of Health and Human Services*.[30]

On February 1, 2012, Tracey Cooper-Harris, a California army veteran, sued the Veterans Administration and the Department of Justice after her wife was denied benefits normally

[29] *Dragovich v. US Dept. of Treasury*, 764 F. Supp. 2d 1178, 1188 (N.D. Cal. 2011).

[30] *McLaughlin v. Panetta*, No. 1:2011 Civ. 11905 (D. MA 2011)

granted to spouses of disabled veterans. As it did in *McLaughlin*, BLAG is seeking a delay. A hearing was scheduled for July 23, 2012.[31]

7. ***Immigration Cases***

Bi-national gay and lesbian couples have a particular obstacle in the face of DOMA. For different-sex couples whose marriage is recognized by the federal government, the government affords the permanent residency to the non-U.S. citizen spouse by virtue of her marriage to a U.S. citizen. For those couples whose marriages are not recognized, however, the non-U.S. citizen cannot gain permanent residence status by marriage. In April 2011, however, Attorney General Eric Holder vacated a decision by the Board of Immigration Appeals, in the matter of Paul Wilson Dorman, who was seeking to cancel his spouse's deportation, which the Board of Appeals had denied pursuant to Section 3 of DOMA. In vacating this decision, United States Attorney General Holder, directed that the matter be remanded to the Immigration Board of Appeals to consider, in part, whether, "absent the requirements of DOMA, respondent's same-sex partnership or civil union would qualify him to be considered a "spouse" under the Immigration and Nationality Act; [and] whether, if he had a "qualifying relative," the respondent would be able to satisfy the exceptional and unusual hardship requirement for cancellation of removal."[32]

Following this order, an immigration Judge in Newark, New Jersey suspended the deportation of a non-U.S. citizen in a deportation hearing on May 4, 2011. On June 10, 2011, the U.S. Department of Homeland Security, U.S. Immigration and Customs Department, moved,

[31] *Cooper-Harris v. United States*, No. 2:2012 Civ.12-887 (C.D. Cal. 2012).

[32] *Matter of Paul Wilson Dorman, Respondent*, 25 I&N Dec. 485 (A.G. 2011).

unopposed, for an immediate closure on the case. An order closing the proceedings was issued on June 13, 2011.[33]

The Department of Justice filed a brief in opposition to a motion by BLAG to dismiss yet another deportation case, *Lui v. Holder*. Handi Lui, an Indonesian citizen, and Michael Roberts, a U.S. citizen, were legally married in Massachusetts and subsequently moved to California. Roberts petitioned to classify Lui as an "immediate relative" for the purposes of granting Lui legal permanent residence in the United States. His petition was denied. In September 2011, the Circuit Court granted both the U.S. Attorney General's partial motion to dismiss and a motion by BLAG, which filed as an intervener, to dismiss the DOMA challenge. The case is currently pending before the 9th Circuit Court of Appeals.[34]

On April 2, 2012, five bi-national gay and lesbian married couples filed suit in the Eastern District of New York against the U.S. Departments of Justice and Homeland Security arguing that, under DOMA, denying green cards for spouses of gay and lesbian Americans violates the Equal Protection guarantee of the U.S. Constitution.[35]

8. *Bankruptcy Cases*

In May 2011, DOMA-based challenges by the Department of Justice to joint petitions for bankruptcy by married same-sex couples were denied in the Southern District of New York (May 4, 2011) and in the Eastern District of California (May 31, 2011). On June 13, 2011, 20 of the 25 judges of the U.S. Bankruptcy Court for the Central District of California joined in

---

[33] *In the Matter of Henry Alejandro Velandia-Ferreira*

[34] *Lui v. Holder*, No. 09-72068 (9th Cir.) and 2:11-cv-01267 (C.D. Cal).

[35] *Blesch et. al. v. Holder et. al.*, No. 1:2012 Civ. 01578 (E.D.N.Y. 2012).

opinion dismissing BLAG's objections to a joint filing in the case of *In re Balas and Morales*.[36] BLAG has announced that it will not appeal the ruling. On July 7, 2011, the U.S. Bankruptcy Trustee withdrew its appeal, announcing that, after consultation with BLAG, it would no longer raise objections to "bankruptcy petitions filed jointly by same-sex couples married under state law."[37]

9. ***Full Faith & Credit Clause Cases***

The Tenth Circuit Court of Appeals has ordered Oklahoma to issue a revised birth certificate showing both parents to a child born in Oklahoma who had been adopted by a same-sex couple validly married in another state.[38]

The Fifth Circuit Court of Appeals has ruled that the Louisiana registrar's insistence that only one father's name can appear on a birth certificate does not violate the child's right to equal protection under the law or deny legal recognition of a New York adoption by both men.[39]

On October 2, 2009, a Texas judge granted a divorce to two men married in Massachusetts. The Fifth Circuit Court of Appeals reversed on August 31, 2010.[40]

On January 7, 2011, the Third Circuit allowed a divorce to a lesbian couple married in Massachusetts to stand on the ground that the Texas Attorney General did not have standing to intervene.[41]

---

[36] 499 B.R. 567 (C.D. Cal. 2011).

[37] http://thinkprogress.org/lgbt/2011/07/07/262734/department-of-justice-withdraws-appeal-in-doma-bankruptcy-case/

[38] *Finstuen v. Crutcher*, 496 F.3d 1139 (10th Cir. 2007).

[39] *Adar v. Smith*, 597 F.3d 697 (5th Cir. 2010).

[40] *J.B. v. H.B*, 326 S.W.3d 654 (5th Dist. 2010).

[41] *Texas v. Naylor and Daly*, No. 03-10-00237 Civ. (3rd Dist. 2011).

B. Challenges to Specific State Marriage Equality Legislation or Mini-DOMA's

1. *Hollingsworth v. Perry (formerly Perry v. Brown, formerly Perry v. Schwarzenegger)*

In May 2008, the California Supreme Court held that limiting marriage to different-sex couples was a violation of the California State Constitution.[42] In June 2008, same-sex marriage became legal in California. In November 2008, California's electorate passed Proposition 8, a state constitutional amendment that banned marriages between same-sex couples.

On May 23, 2009, the American Foundation for Equal Rights filed suit in the U.S. District Court for the Northern District of California on behalf of two same-sex couples who were denied licenses to marry. The plaintiffs challenged the validity of Proposition 8. On August 4, 2010, Judge Vaughn Walker ruled for the plaintiffs, declaring that Proposition 8 was an unconstitutional violation of the Due Process and Equal Protection Clauses of the Fourteenth Amendment of the U.S. Constitution and that California had no rational basis or vested interest in denying gays and lesbians marriage licenses.[43]

On August 4, 2010, the defendant-intervenors filed a notice of appeal to the Ninth Circuit. On February 7, 2012, a three-judge panel of the Ninth Circuit ruled 2-1 in favor of the plaintiffs, declaring Proposition 8 unconstitutional on extremely narrow grounds and rejecting proponent's arguments that same-sex marriage had negative effects on child-rearing and would affect the procreative behavior of different-sex couples. "Proposition 8 singles out same-sex couples for unequal treatment by taking away from them alone the right to marry", a "distinct

---

[42] *In re Marriage Cases*, 43 Cal.4th 757, 76 Cal.Rptr.3d 683, 183 P.3d 384 (2008).

[43] *Perry v. Schwarzenegger*, 704 F.Supp.2d 921 (N.D. Cal. 2010).

constitutional violation" in that it subjected a minority group to "the deprivation of an existing right without a legitimate reason."[44] On February 21, 2012, the defendant-intervenors requested an en banc review by the Ninth Circuit. On June 5, 2012, that request was denied.[45]

The defendants, proponents of Proposition 8, appealed the case to the U.S. Supreme Court on July 31, 2012, with the new case name of *Hollingsworth v. Perry.*[46]

2. ***Diaz v. Brewer (formerly Collins v. Brewer)***

In 2008, by administrative action, Arizona Governor Janet Napolitano expanded the health benefits offered to state employees by adding domestic partners to the category of qualified dependents. In November 2008, Arizona voters adopted a state constitutional amendment limiting marriage to the "union of one man and one woman." On September 4, 2009, Governor Jan Brewer signed legislation redefining "dependents" as "spouses" and children under age 19 (or age 23 if a full-time student).

On November 17, 2009, Lambda Legal filed suit in United States District Court for the District of Arizona on behalf of ten state employees asking for a preliminary injunction blocking Arizona from denying domestic partner health benefits to their families. In July 2010, Judge John W. Sedwick issued a preliminary injunction ordering Arizona to maintain family benefits for all state lesbian and gay employees during the case.[47] The injunction was upheld by the Ninth Circuit Court of Appeals on September 6, 2011.[48] Writing for the panel, Judge Mary M.

[44] *Perry v. Brown,* No. 10-16696 (9th Cir. 2012).

[45] *Perry v. Brown,* No. 10-16696; 11-16577, Denial of Petition for Rehearing En Banc (9th Cir. 2012).

[46] http://www.adfmedia.org/files/BrownCertPetition.pdf

[47] *Collins et. al. v. Brewer et. al.*, No. 2:2009 Civ. 02402 (D. Ariz. 2010).

[48] *Diaz v. Brewer*, No. 10-16797 (9th Cir. 2011) (rehearing denied, no. 10-16797, D.C. No. 2:09 Civ. 02402-JWS [9th Cir. Apr. 3 2012]).

Schroeder wrote that the District Court had properly applied the tests required for deciding whether or not to issue a preliminary injunction and that it was not necessary to consider whether heightened scrutiny was required, since the statute did not meet the "more searching" form of rational basis review that is required "when a classification adversely affects unpopular groups". A state may not provide health care "in an arbitrary or discriminatory manner that adversely affects particular groups that may be unpopular." The state's principal justification for its position -- an impact on state expenditures – was rightfully rejected since "the savings depend(ed) upon distinguishing between homosexual and heterosexual employees, similarly situated".

On July 2, 2012, Arizona asked the U.S. Supreme Court to consider the case.[49]

3. *New Yorkers for Constitutional Freedoms v. New York State Senate*[50]

On July 6, 2012, the Appellate Division, Fourth Department rejected a challenge to New York's marriage equality law, finding closed door negotiations among New York State senators and supporters, including Governor Andrew Cuomo and New York City Mayor Michael Bloomberg, did not violate the State's Open Meetings Law. The plaintiff, New Yorkers for Constitutional Freedoms, is a group of evangelical Protestants that lobbied against the passage of New York's Marriage Equality Law.

3. *Sevcik v. Sandoval (U.S. District Court, Nevada)*

The plaintiffs are eight same-sex Nevada couples who argue that Nevada's constitutional ban on marriage equality violates the Fourteenth Amendment to the U.S. Constitution. In their

[49] http://www.azgovernor.gov/dms/upload/PR_081011_ArizonaPFCProof.pdf

[50] 2012 NY Slip Op 05455 (4th Dep't 2012)

complaint, filed in the U.S. District Court for the District of Nevada on April 10, 2012, the plaintiffs also argue that Nevada's exclusion of marriage to same-sex couples, while relegating them to the 2nd class status of domestic partnership, violates their right to equal treatment under the U.S. Constitution. The lead plaintiffs, Beverly Sevcik and Mary Baranovich, have been together for over 40 years, raised three children together and are now grandmothers of four grandchildren. The plaintiffs are represented by Lambda Legal and pro bono co-counsel.

4. ***Darby v. Orr and Lazaro v. Orr* (Cook County Circuit Court Illinois)**

On May 30, 2012, two consolidated lawsuits were filed in Cook County Circuit Court by same-sex couples seeking the ability to marry. The Illinois Attorney General and the Cook County States Attorney announced that they would not defend the state's marriage ban because they believed that it was a violation of the Illinois Constitution. The Court allowed two other Illinois county clerks to intervene to defend the law.

The plaintiffs in *Darby* are 16 same-sex couples, who seek the right to marry in Illinois, and their children. They argue that the state statute prohibiting them from marrying violates the state constitution's equal protection and due process guarantees. They assert that current Illinois law relegating them to civil unions marks lesbian and gay couples as different and less worthy than other families. Lambda Legal represents the plaintiffs.

The plaintiffs in *Lazaro* are 9 same-sex couples, who seek the right to marry in Illinois, and their children. They argue that excluding same-sex couples from marriage violates the Illinois State Constitution in that civil unions do not afford gay and lesbian couples the same respect as marriage and mark their relationships as inferior. Lead plaintiffs, Tanya Lazaro and Elizabeth Matos, have been together for over 15 years and are raising 2 children. The American Civil Liberties Union of Illinois represents the plaintiffs.

5. *Garden State Equality v. Dow* (New Jersey State Superior Court)

Plaintiffs, who commenced their lawsuit in June 2011, are 7 New Jersey same-sex couples and Garden State Equality, a statewide LGBT advocacy organization. They argue that New Jersey's civil union law relegates them and other same-sex couples and their children to an inferior status and harms them in tangible ways, including but not limited to, denying work place benefits and protections equal to those accorded married people, blocking access to loved ones during medical emergencies, depriving them of certainty in their legal rights and status and often increasing financial burdens. The plaintiffs have brought claims under both state and federal law arguing that the New Jersey civil union statute violates both the New Jersey State Constitution and the Fourteenth Amendment to the United States Constitution. Lambda Legal represents the plaintiffs.

IV. Limitations on Rights Available to Same-Sex Couples

Marriage provides a plethora of federal and state rights for those who are able to legally enter into such a union. According to the U.S. Government Accountability Office ("GAO"), marriage provides 1,138 federal rights and protections to different-sex couples that are denied to same-sex couples because DOMA precludes federal recognition of marriage equality. For estate planning purposes, there are almost no tax benefits because the effect of DOMA is that same-sex couples are treated as strangers for tax purposes. In addition to rights and protections under federal law, each state confers specific rights, obligations and protections to married couples. In 2007, the Empire State Pride Agenda and the New York City Bar Association published "1,324 Reason for Marriage Equality in New York State" in which they catalogued the legal rights and duties that New York statutes and regulations confer on married individuals. Those legal rights and duties include, but are not limited to, (i) rights of inheritance, (ii) the presumed legitimacy of

a child born during a marriage for all purposes including, custody, visitation and child support, (iii) the right to sue for wrongful death, (iv) the right to refuse to testify against one's spouse, and (v) rights of continuing support, even after divorce.[51]

In general, the rights and obligations associated with civil unions and domestic partnerships do not cross state lines. That is, those rights are particular to the state in which they are granted. For instance, under the New Jersey Civil Union Act[52], civil unionized couples are provided all of the rights granted to married couples under New Jersey state law. However, since the New York Marriage Equality Act is specific to "marriage" it is unclear whether a New Jersey civil unionized couple is entitled to all of the rights and responsibilities afforded married couples under New York law.[53]

A. Income Taxes

1. Filing Status & Dependency Deductions

a. Non-Community Property States

Filing income tax returns is a significant issue for same-sex married couples. In non-community property states, since same-sex spouses are treated as strangers under the federal tax laws, they may not file federal income tax returns as "married filing joint" or "married filing separate." Instead, each member of a married same-sex couple must file as "single" or, if he meets the requirements, as "head of household".

To qualify for head of household status, the taxpayer must meet the following criteria:

[51] www.prideagenda.org/Portals/0/1324%20Rights%20and%20Responsibilities_FINAL.pdf.

[52] New Jersey Public Law 2006, c.103

[53] Section 10-A of the New York Marriage Equality Act, NY Senate A8354-2011, provides that "1. A marriage that is otherwise valid shall be valid regardless of whether the parties to the marriage are of the same or different sex."

- The taxpayer may not be married or be a surviving spouse at the end of the taxable year;
- The taxpayer must maintain a household which constitutes a principal residence of a child, step-child, or a descendant of a child of the taxpayer, or any other person who is a dependent of the taxpayer under Code Section 152, if the taxpayer is entitled to a dependency deduction for that person under Code Section 151; and
- The qualifying person must have lived with the taxpayer for more than half the year.

Head of household status does not depend on whether a state recognizes the relationship between a same-sex couple. Rather, head of household status should be available unless that status is illegal under local law.[54]

A taxpayer may claim a dependency deduction under Code Section 151 if:

- The cohabitant received 50% or more of his support from the taxpayer; and
- The relationship between the taxpayer and the co-habitant does not violate local law.

A non-relative may be considered a dependent if the taxpayer provides a majority of the non-relative's financial support and they are not claimed as a dependent on another person's return. Like head of household status, dependency exemptions are only allowed to cohabitants whose relationship does not violate local law.[55]

For same-sex married couples, whose federal filing status is required to be either "single" or "head of household", care must be given to determine which party will include a dependent on

---

[54] *See* Fla. Stat. §798.02; Mich. Comp. Laws. Serv. §750.335; Miss. Code Ann. §97-29-1; S.C. Code Ann. §16-15-50; Va. Code Ann. §18.2-345. The enforceability of any of these provisions is questionable after the Supreme Court's decision in *Lawrence v. Texas,* 539 U.S. 558 (2003).

[55] *See IRS Notice 2008-5, 2008-1 C.B. 256; Leonard v. Comm'r,* T.C. Summ. Op. 2008-141, 2008 WL 4822173 (U.S. Tax Ct. Nov. 4, 2008); Treas. Reg. §1.152-1(b).

his/her return. May one spouse claim the other as a dependent? Who claims the children as dependents?

How same-sex married couples file their state income tax returns is dependent on the manner in which the home state's tax law is structured and whether their home state recognizes their relationship. There are essentially three categories into which states fall with regard to the filing of state income taxes:

1. In states in which income tax filing status is tied to federal filing status, whether or not the state recognizes same-sex marriages, it is likely that the rule tying state filing status to federal filing status is binding and the couple may not file as "married joint" or "married separately."

2. In states in which income tax filing status is not tied to federal status and the state is a non-recognition state, each spouse will be required to file as unmarried, either "single" or, if he meets the requirements, "head of household".

3. In states in which income tax filing status is not tied to federal income tax filing status and the state is a recognition state, the couple will be required to file their state returns as "married joint" or "married separately." In order to prepare their state returns, they will have to prepare "dummy" federal "married joint" or "married separately" returns that will not be submitted to the Internal Revenue Service to assist and possibly attach to their state returns.[56]

[56] Note that some states, such as New Jersey, which afford civil unionized and domestic partnered couples the same recognition under state law as married couples, preparation of multiple returns will also be required.

b. Community Property Jurisdictions

Federal filing status in community property states may be treated differently. As a general rule, community property laws specify that income or property accumulated during a marriage belong to each spouse equally. There are 11 community property jurisdictions: Alaska, Arizona, California, Idaho, Louisiana, Nevada, New Mexico, Texas, Washington, Wisconsin and Puerto Rico.

Pursuant to a 2011 opinion by the now former New Mexico Attorney General Gary King, New Mexico currently recognizes same-sex marriages validly solemnized in other jurisdictions. Same-sex married couples residing in New Mexico are currently afforded full community property rights.

California recognizes registered domestic partners and as well as couples married during the four-month period in 2008 when same-sex couples were able to marry in California. California extends full community property rights to its registered domestic partners ("RDP").

In 2009, Nevada passed a domestic partnership law, patterned after the California statute. The Nevada law extends most rights, including the state's community property laws, enjoyed by different-sex couples to RDP's.

Washington adopted legislation that established state-registered domestic partnerships ("SRDP's"). SRDPs are the equivalent of marriage under Washington law and provides that SRDP's are entitled to the benefits of the state's community property laws.

In May 2010, the IRS issued Chief Counsel Advice 201021050 which provided that the holding of U.S. Supreme Court case, *Poe v. Seaborn*[57], applies to community property income of California RDP's. Gay and lesbian couples who are subject to the community property laws

[57] 282 U.S. 101 (1979)

must combine their income and each report half of it under their separate federal individual income tax returns.[58]

The IRS has provided guidance in Publication 555, describing in general terms, the rules for allocating property as community or separate.

2. **Obligations of Support**

Whereas different-sex married couples may make gifts and bequests to one another without incurring any transfer taxes, same-sex couples, whether married, civil unionized or in a domestic partnership, may incur gift taxes on their gifts to each other in excess of the annual exclusion amount. Despite the fact that legally joined same-sex couples may have a legal obligation to support each other under state law, support in excess of the annual exclusion amount from one partner to the other may still be characterized as a gift under Code Section 2503(b) or taxable compensation under Code Section 61.[59]

3. **Adoption Credits**

An adoption tax credit is available under Code Section 23, which allows an income tax credit on the first $12,650 of adoption expenses per taxpayer. The credit begins to phase out at incomes above $189,710 and is phased out completely at incomes of $229,710. A married different-sex couple is limited to one credit. The credit is not available for expenses incurred in the adoption of a different-sex spouse's child if the spouse does not concurrently give up parental

---

[58] *See Chief Counsel Advice Memorandum, CCA 201021050, 2010 WL 214782.*

[59] However, see TAM 8135032 (June 1, 1981) in which the IRS suggested that where a legal obligation of support exists under state law, certain transfers will not be treated as gift (note that the transfers at issue in this TAM were found not to be legal obligations under local law) and Private Ltr. Rul. 8225091 (March 25, 1982) in which the IRS determined that "to the extent the current income of the trust is applied in satisfaction of the donor's legal obligation to support or maintain his parents there is no gift."

rights.[60] However, since DOMA treats same-sex married partners as legal strangers, both partners are eligible for the credit, subject to qualifying adjusted gross income. In addition, when a same-sex married partner adopts his partner's child in a second parent adoption, the adopting parent is eligible for the full credit, subject to qualifying adjusted gross income.

4. Taxation of Domestic Partnership Benefits

When an employer provides health insurance or other benefits to the spouse or dependents of an employee, federal income tax law allows the value of the health insurance coverage to be excluded from the employee's gross income.[61] When an employer provides the same benefits for the partner or dependents of the partner of an employee, the fair market value of that coverage, including the employee's pre-tax contribution, is treated as imputed income to the employee.[62] Additionally, employees cannot use pre-tax dollars to pay for a domestic partner's coverage, precluding them from the full benefits of a Flexible Spending Account or Health Savings Account.

Since imputed income increases the employee's overall taxable income, inclusion of domestic partnership benefits in an employee's gross income will also increase the employer's payroll taxes (i.e., Social Security, Medicare and unemployment taxes).

However, if the employee's partner is a qualifying dependent, the value of the health insurance coverage may be eligible for exclusion from the employee's income as dependent coverage.

---

[60] I.R.C. §23(d)(1)(C).

[61] I.R.C. §106(a).

[62] I.R.C. §61(a) and Treas. Regs. §§1.61-21(a)(3) and (a)(4).

5. Federal Exemptions Upon Separation and Dissolution

Code Section 1041 provides for the non-recognition of gain or loss on transfers between former spouses that are incident to divorce. In addition, transfers of property between former spouses, payments between former spouses for support and payments for support of minor children, are deemed to be transfers for adequate consideration and are thus not a gift if the transfers and payments are made pursuant to a written agreement of property rights and the parties divorce within a three year period that begins after the agreement is executed.[63]

However, since legally bound same-sex couples are strangers for federal tax purposes, Code Sections 1041 and 2516 will not apply upon the dissolution of their marriage, civil union or domestic partnership. As a result, upon divorce or dissolution, gain and/or loss could be recognized on the transfer of property incident to divorce or dissolution and maintenance or alimony payments will be taxed as ordinary income to the recipient and non-deductible payments by the payor. Maintenance may also be treated as a taxable gift.

Although different-sex married couples may obtain a qualified domestic relations order ("QDRO") dividing their retirement plans with no income tax consequences upon divorce or dissolution of their marriage, same-sex spouses cannot. Section 3 of DOMA provides that ERISA preempts the application of state law to retirement plans owned by same-sex spouses. As a result, upon dissolution of a same-sex marriage, division of retirement plans will result in recognition of taxable income to the recipient same-sex spouse and may, in addition, result in a taxable gift to the extent that the amount transferred exceeds the annual exclusion.

[63] I.R.C. §2516

B. **Transfer Taxes**

1. **Gift Tax**

The federal marital deduction, which provides for the tax-free transfer of property between spouses, does not apply to same-sex married couples. Accordingly, lifetime transfers between same-sex spouses may be treated as taxable gifts if they exceed the annual exclusion amount under Code Section 2503(b) or are not excludable transfers for tuition or medical expenses under Code Section 2503(e). To the extent that such transfers are deemed to be taxable gifts, they will also reduce the available estate tax exclusion available upon death to estate of the transferor.[64]

As a result, when same-sex spouses share living expenses, with one party contributing more than the other, the party making the greater contribution may be deemed to be making a taxable gift to the lesser-contributing party. The result may be ameliorated if the spouses enter into a contractual arrangement providing for mutual and adequate consideration. However, in order to prevent the transfer from being deemed a gift, the consideration received must have an economic value equal to the property transferred. To the extent a net transfer from the greater-contributing spouse is viewed as being paid out of love, emotional support or other services that cannot be measured in money or money's worth, the transfer will be considered a gift.

If the contractual arrangement provides that the net transfer from the greater-contributing spouse to the lesser-contributing spouse is an advance payment to be repaid upon the happening of an event (i.e., the lesser-contributor obtaining a degree or becoming gainfully employed), the couple will be treated as debtor and creditor. In such event, the contract must provide for adequate stated interest and the advanced sums must actually be repaid. If the debt is never

[64] I.R.C. §2010(c)

repaid, the amount advanced will be treated as income to the debtor from the discharge of indebtedness.[65] If the interest rate is below market, interest income will be imputed to the creditor, resulting in the creditor being taxed as making a gift of the interest and denying the debtor's interest deductions.[66]

For many couples, joint tenancy and tenancy by the entireties (available to same-sex spouses in states that recognize their relationship) can be a valuable and efficient way to hold title to property. When both parties contribute equally to the property, there are no gift tax implications to the creation of a joint tenancy. However, when an asset, such as a house or apartment, is purchased with title to the property held in a joint tenancy or tenancy by the entirety and one same-sex spouse contributes more than the other, the creation of the tenancy will result in an immediate taxable gift of the value of the transfer in excess of the annual exclusion.[67]

2. Estate Tax

The federal estate tax marital deduction is not available to same-sex spouses, whether or not the surviving spouse is (or is not) a U.S. citizen. As a result, as in *Windsor v. United States* (discussed in Section III, *infra*), all transfers made to a same-sex spouse upon death will be subject to federal estate taxes to the extent they are not covered by the decedent's available federal exclusion amount. For decedents dying in 2012, the federal exclusion amount is $5,120,000 and the top federal estate tax rate is 35%.

---

[65] I.R.C. §61(a)(12)

[66] See I.R.C. §§ 163(h), 1274 and 7822. However, note the provisions of I.R.C. §7872(c)(2)(A) provide for a *de minimus* exception for gift loans between individuals for amounts of $10,000 or less.

[67] I.R.C. §2503(b) and Treas. Reg. §25.2511-1(h)(5).

Section 2040(b) of the Code provides for the exclusion from the gross estate of one-half of the value of a qualified joint interest owned by spouses.[68] Since same-sex spouses are treated as strangers under the federal tax laws, upon the death of the first spouse, 100% of the value of any jointly held property is includible in the estate of the first spouse to die unless contribution, in the form of "money or money's worth", by the surviving spouse can be shown. Same-sex spouses must keep detailed records of contribution to avoid the inclusion of 100% of the value of any jointly held property in the estate of the first spouse to die.

3. <u>Generation Skipping Transfer Tax</u>

In addition to the imposition of gift and estate taxes on transfers between same-sex spouses, care must be taken to avoid the imposition of generation skipping transfer tax ("GST"). The GST is a flat tax assessed at the highest marginal transfer rate[69] on transfers to individuals who are two or more generations younger than the transferor (referred to as "skip" persons). Each individual has a lifetime exemption that may be irrevocably allocated to transfers.[70] Once the allocation is made, either automatically or on a timely filed gift or estate tax return, to property transferred in trust, the trust property will be free of GST regardless of its appreciated value at the time of a GST would otherwise be imposed. GST is imposed on outright gifts, gifts in trust and distributions from a trust to a skip person. In the case of unrelated individuals, any recipient of assets who is between 12 ½ and 37 ½ years younger than the transferor is deemed to be in the first generation below the transferor. But if the recipient is more than 37 ½ years

---

[68] A "qualified joint interest" is "an interest in property held by the decedent and the decedent's spouse as...tenants by the entirety, or...joint tenants with right of survivorship, but only if the decedent and the spouse of the decedent are the only joint tenants." I.R.C. §2040(b)(2).

[69] 35% in 2012

[70] $5,120,000 in 2012

younger than the transferor, he will be considered to be two or more generations younger than the transferor and thus, the GST will apply.[71] Since same-sex spouses are treated as unmarried unrelated individuals under federal law, in addition to the gift and estate tax, a GST may be imposed on a transfer from an individual to his significantly younger same-sex spouse.

C. Inheritance Rights and Estate Planning

1. Intestate Succession

All states provide for the disposition of probate property[72] if the decedent does not specifically provide otherwise. In most non-community property states, statutes for intestate succession provide that, in the first instance, such property passes to the decedent's spouse and/or children. Since the definition of "spouse" is a matter of state law, intestate succession is not available to same-sex couples residing in non-recognition states. As a result, in non-recognition states, in the absence of estate planning documents that specifically provide otherwise, married same-sex couples, as well as civil unionized and domestic partners and lifelong companions, are not entitled to share in a decedent's estate.

In recognition states, on the other hand, same-sex married couples are treated equally with their different-sex counterparts for purposes of intestate succession. However, in recognition states that offer full marriage equality, intestate succession may not be available to civil unionized or domestic partners because they are not "married".

In a novel decision issued in July 2012, the County Court in Hennepin, Minnesota, has ruled that Minnesota's mini-DOMA does not preclude a same-sex spouse from inheriting under

[71] I.R.C. §2651(d)

[72] Generally defined as property in the decedent's individual name at the time of his or her death that does not pass by operation of law or pursuant to beneficiary designation.

Minnesota's intestacy law.[73] James Morrison and Thomas Proehl were married in California in 2008. Proehl died in 2012 without a Will, a resident of Minnesota. At the time Minnesota's mini-DOMA was drafted, other states were drafting adaptations of the DOMA legislation with broad "catch-all" prohibitions that stripped same-sex couples of all rights and benefits of marriage; however, Minnesota's mini-DOMA was restricted to contractual rights. Since rights in intestacy are statutory, and not contractual, in nature, the court referee ruled that James Morrison was entitled to inherit as an intestate distributee of Thomas Proehl's estate.

2. Community Property

Similarly in a non-recognition community property state, a same-sex married couple would not qualify as a spouse to take a share of community property upon the death of the first spouse to die.

3. Right of Election

All non-community property states provide some protection to a surviving spouse who is disinherited. If the surviving spouse does not receive at least a minimum share of his spouse's estate, he is entitled to elect against the Will or estate of the deceased spouse (generally referred to as a "right of election").

For same-sex couples residing in a non-recognition state, if the first spouse to die does not provide for the survivor either contractually or in estate planning documents, the survivor will likely receive nothing.

---

[73] *See* www.startribune.com/loca/164684526.html?refer+y and www.minnesota.publicradio.or/display/web/2012/08/02/news/hennepin-county-gay-couples-inheritance.

4. <u>Joint Representation</u>

Representation of couples, whether same-sex or different-sex may be fraught with conflict. An estate planning attorney must always consider whether it is appropriate to represent both spouses and a couple must consider whether it would be preferable to retain separate counsel if they do not agree on the disposition of their property. Model Rule of Professional Conduct 1.7, Conflict of Interest: Current Clients provides guidance:

> (a) Except as provided in paragraph (b), a lawyer shall not represent a client if the representation involves a concurrent conflict of interest. A concurrent conflict of interest exists if:
>
> (1) there is a significant risk that the representation of one or more clients will be materially limited by the lawyer's responsibilities to another client, a former client or a third person or by personal interest of the lawyer.
>
> (b) Notwithstanding the existence of a concurrent conflict of interest under paragraph (a), a lawyer may represent a client if:
>
> (1) the lawyer reasonably believes that the lawyer will be able to provide competent and diligent representation to each affected client;
>
> (2) the representation is not prohibited by law;
>
> (3) the representation does not involve the assertion of a claim by one client against another client represented by the lawyer in the same litigation or other proceeding before a tribunal; and
>
> (4) each affected client gives informed consent, confirmed in writing.

If an estate planning attorney is advising both spouses, whether same or different-sex, it is imperative that he obtain a written engagement letter which includes a waiver of all conflicts of interest and specifically states that there will be full disclosure to both spouses of all information provided to the attorney by either spouse. A similar engagement and waiver should also be contemplated if representing both parties to a civil union or domestic partnership.

D. Family Law Issues

Estate planning for same-sex couples is affected by a number of family law issues. Families who are not recognized as families by the federal government or by the state in which they reside, are limited in their ability to adopt children, to provide support to their children and spouses, to establish custody, and to obtain divorce.

1. Adoption

Same-sex couples may have children from prior marriages or relationships, foster children, adopted children or children as a result of assisted reproductive technology.

In the United States, a child born to a husband and wife during the marriage is the presumed natural child of both parents. However, with few exceptions, that presumption does not apply to same-sex spouses. In those states the status of legal parent is automatically conveyed to the parent who has a biological connection to the child, leaving the non-biological parent with no legal rights with respect to the child.

A judgment of adoption will ensure that the child is treated as the child of both same-sex spouses or partners regardless of the jurisdiction. Unlike marriage, an adoption is a judicial proceeding that terminates in an order or judgment of adoption. As noted earlier, judgments are entitled to full faith and credit under the U.S. Constitution. A second parent adoption – in which the second parent adopts without the first parent relinquishing parental rights -- will provide legally recognized parental status to both partners in a same-sex marriage when one parent is already the biological or adoptive parent of the child. Second parent adoption is not permitted in all states but it must be recognized in all states. *See Appendix B for a complete listing of jurisdictions that authorize second parent adoptions.*

A second parent adoption grants the adoptive parent the same rights to and creates rights in the child flowing from the second parent that include:

- custody to the second parent upon divorce or death;
- support flowing from the second parent to the child;
- federal benefits, such as social security survivorship benefits, if the second parent dies; and
- inheritance

2. Divorce

Although validly married under the laws of a jurisdiction that authorizes same-sex marriage, a couple which subsequently moves to a non-recognition jurisdiction may be unable to obtain a divorce. A non-recognition jurisdiction will not dissolve a relationship that it does not recognize and most states' divorce laws require at least one member to establish residency before commencing an action for divorce. Same-sex spouses may be able to file an action in a court of general jurisdiction to divide their property, but, unless one spouse can establish residency in a recognition state and file for divorce in that state, their marriage will remain intact. Two recognition jurisdictions have enacted legislation removing the residency requirement for same-sex couples married in their jurisdiction who subsequently move to a non-recognition jurisdiction.[74]

[74] Vermont will grant a divorce to a same-sex couple who were married in Vermont provided they cannot obtain relief in their own states, the divorce is uncontested and there are no minor children born or adopted during the marriage. 15 V.S.A. §1206(b). The District of Columbia will grant a divorce to a non-resident same-sex couple whose marriage was solemnized in the District of Columbia provided they are unable to obtain a divorce in the jurisdiction in which either or both reside. DC St. §16-902(b).

Leaving a couple unable to divorce will prevent them from entering into a new marital relationship and will leave intact property, support and inheritance rights created by the marriage.

V. Estate Planning

Same-sex spouses face unique challenges with respect to their estate planning including but not limited to:

- avoiding Will contests from hostile family members
- definitions of "partner", "spouse" and "children"
- unavailability of the federal estate and gift tax marital deduction
- unavailability of portability
- governing law
- cross-jurisdictional recognition

Estate planning documents for same-sex couples may be the same as those used for different-sex couples but they must incorporate specialized provisions to attempt to close the gap and avoid conflict and additional expense.

A. Avoiding Will Contests

1. Testamentary Substitutes

The Wills of same-sex partners (whether or not married, civil unionized or in a domestic partnership) are often subject to challenge by the decedent's relatives. If the decedent is married and living in a recognition jurisdiction at the time of death, family members will, in general, lack standing to contest a Will. However, if the decedent is married to a same-sex partner and residing in a non-recognition state at the time of death, family members may have standing to thwart the decedent's estate plans.

(a) Joint Tenancy and Tenancy by the Entirety

Same-sex couples may hold title to property as joint tenants with right of survivorship and same-sex married couples may be able to hold title to property as tenants by the entirety. Both forms of ownership allow property to pass, upon the death of one owner, by operation of law to the survivor.

(b) Beneficiary Designations

Clients should confirm their beneficiary designations for bank and investment accounts, life insurance and retirement account to ensure that those assets will pass as intended upon their death.

(c) Revocable Trusts

Consider whether your clients should establish revocable trusts to transfer assets to their partner or spouse outside of probate. Revocable trusts may also provide for the management of a client's assets in the event of incapacity. However, revocable trusts will only provide these benefits if all of a client's assets are transferred to the trust during his lifetime. To the extent that assets remain outside of the trust and in the client's individual name with no beneficiary designation, probate of a Will will still be necessary leaving open the opportunity for a Will contest, will still be necessary. Nevertheless, revocable trusts should always be combined with a simple, pour-over Will that provides for the transfer at death of any assets not transferred to the revocable trust during the client's lifetime.

(d) In Terrorem Clauses

An "in terrorem" clause is a Will provision that provides for the disinheritance of a person who contests the decedent's Will. Many states allow for the inclusion of an in terrorem clause in testamentary documents. However, most in terrorem clauses provide little more than

false security to the client since they are only useful if the contestant is in danger of losing something. If an intestate distributee contests a Will and succeeds, he or she may still be entitled to inherit in intestacy. Therefore, in order to be effective, in most instances, in addition to an in terrorem clause, a Will must provide some incentive to a named beneficiary to not raise an objection to the probate of the Will, i.e., a small bequest.

2. Definitions

Definitions need to be carefully considered. It is important to define "spouse" for use in each particular document. Although most states provide for the automatic revocation of provisions in a Will for a spouse upon divorce, many same-sex couples may not have access to a divorce and may therefore be stuck in state of perpetual non-legal separation if their relationship ends. In such instances, it is likely that they would want testamentary provisions for their spouse to be automatically revoked. In addition, there may be construction issues if the parties are married and then move to a non-recognition state. Will the non-recognition state accept the surviving same-sex spouse as a "spouse"? An appropriate definition will identify the spouse by name, provide that he will be recognized as a "spouse" to the full extent provided by law regardless of the jurisdiction and will specify the conditions under which his status as a "spouse" will terminate.

Same-sex couples who have entered into civil unions and/or domestic partnerships may wish for their partners to be treated like a "spouse" in their documents. Even in many recognition states, a civil unionized or domestic partner does not have the same rights as a spouse. For those clients, defining the relationship with his partner and the rights that attach to that relationship are imperative to effectuate the client's intent and wishes.

Similarly, if the testator intends to provide for them, the terms "children", "descendants" and "issue" should be defined to include children of a partner, whether or not they are biologically related or adopted. Keep in mind that anti-lapse[75] and afterborn child[76] statutes may not protect descendants of a predeceased child of a partner. The client should also be consulted as to whether he wishes to provide for those children in the event the relationship ends.

3. Tax Apportionment

Since the federal estate tax marital deduction is currently unavailable to same-sex married couples, a federal estate tax will be imposed on the death of the first spouse if he dies with an adjusted taxable estate in excess of the federal exclusion amount. In addition, in many jurisdictions, a state marital deduction may also be unavailable for transfers to the surviving same-sex spouse. Although most states provide for a default pro rata tax apportionment against the assets passing to each beneficiary, because of the migratory nature of clients and the fact that the laws of multiple states may apply, it is better practice to clearly state the client's intention with respect to the apportionment of taxes.

B. Planning Techniques

1. Drafting for the Marital Deduction

Although not currently available under the Internal Revenue Code and in many states, consider drafting documents to provide for the application of a federal and/or state marital deduction. Although leaving an entire estate outright to a same-sex spouse will, if and when the

[75] An anti-lapse statute prevents a predeceased beneficiary's gift from lapsing by substituting the beneficiary's issue. The application of an anti-lapse statute is usually restricted to close family relatives such as children and siblings.

[76] An afterborn child statute will include a descendant born after the execution of the Will in a class of designated beneficiaries described in the Will. Such statutes usually restrict the potential class of beneficiaries to close family relatives such as children and siblings.

federal marital deduction is available, result in the decedent's estate passing free of tax to the surviving spouse, it may result in the loss of the federal exclusion amount of the first spouse to die. Consider the following alternatives:

- Leaving the entire estate in a qualified terminal interest property (QTIP) trust for the benefit of the surviving spouse and relying on the Executor to make effective and efficient use of the QTIP election;
- Leaving the entire estate in a QTIP with *Clayton* provisions, directing that to the extent a marital deduction is not taken by the Executor, the assets will instead be distributed to a credit trust, providing discretionary income provisions, or even outright to the surviving spouse.[77]

Note however that for state marital deduction purposes, traditional disclaimer marital deduction planning (everything outright to the surviving spouse subject to a qualified disclaimer into a trust of which the spouse is a beneficiary) may not be available for same-sex married couples because a same-sex spouse may not be able to make a "qualified" disclaimer to a trust for his benefit. For instance, the New York State estate tax system largely relies on the provisions of the Internal Revenue Code. However on July 29, 2011, the New York State Department of Taxation and Finance released guidance with respect to the tax treatment of same-sex spouses, which provides as follows:

> The New York taxable estate of an individual in a marriage with a same-sex spouse must be computed in the same manner as if the deceased individual were married for federal estate tax purposes. Accordingly, the same deductions and elections allowed for

[77] *Est. of Clayton v. Comm'r*, 976 F.2d 1486 (5th Cir 1992) acquiesced by the Internal Revenue Service in Treas. Reg. §20.2056(b)-7-(d)(3).

opposite-sex spouses are allowed for same-sex spouses, whether or not a federal estate tax return is filed.[78]

In order to be "qualified", a disclaimer must be valid under state law and meet the requirements set forth in Code §2518(b), which provides as follows:

> ...the term "qualified disclaimer" means an irrevocable and unqualified refusal by a person to accept an interest in property but only if –
> (1) such refusal is in writing,
> (2) such writing is received by the transferor of the interest, his legal representative, the holder of legal title to the property to which the interest relates not later than the date which is 9 months after the later of –
> (A) the day on which the transfer creating the interest in such person is made, or
> (B) the day on which such person attains age 21,
> (3) such person has not accepted the interest or any of its benefits, and
> (4) as a result of such refusal, the interest passes without any direction on the part of the person making the disclaimer and passes either –
> (A) to the spouse of the decedent, or
> (B) to a person other than the person making the disclaimer.

If a disclaimer is not "qualified", it results in the disclaimant making a taxable gift to the individual whose interest is accelerated as a result of the disclaimer. Under DOMA, the Code provisions trump New York State law. It is therefore unlikely that a same-sex surviving spouse may make a "qualified" disclaimer into a trust of which she is a beneficiary.

2. **Portability**

"Portability" was enacted as part of the Tax Relief, Unemployment, Reauthorization and Job Creation Act of 2010. Code Section 2010(c) now provides that a surviving spouse of a decedent who dies after December 31, 2010 may utilize any unused estate tax exclusion of the decedent if the estate of the decedent made the appropriate election on a timely filed estate tax return. As currently enacted "portability" will sunset on December 31, 2012. However bills

[78] New York State Department of Taxation and Finance, TSB-M-11(8)M, 7/29/2011

have already been introduced to extend the portability rules and the Obama Administration Fiscal Year 2013 budget includes a proposal to make the portability rules permanent.[79]

How does one preserve portability for a surviving spouse who is considered a stranger pursuant to the federal tax laws? Consider filing a federal estate tax return to elect portability upon the death of the first to die of same-sex marriage even if the estate is below the federal exclusion amount.

3. Outright Gifts

Since the transfer tax is imposed at graduated rates, total cumulative estate taxes may be minimized if assets are transferred from the monied spouse to the non-monied spouse. Although transfers between same-sex spouses may be subject to federal transfer tax, clients should consider moving assets from one spouse to the other during their lifetime in order to fund the non-monied spouse's federal estate tax exclusion amount.

Smaller amounts may be transferred using annual exclusion gifts[80] and excluded transfers for the payment of educational, health and dental expenses (including health insurance premiums) so long as they are made directly to the provider. [81] If the monied spouse is comfortable enough to make a sizeable gift, he may give up to $5,120,000 in 2012 without incurring any gift tax.[82] To the extent that the monied spouse gives away property in excess of that amount, he will pay federal gift tax. By giving away property during his lifetime, the donor

---

[79] General Explanations of the Administration's Fiscal Year 2013 Revenue Proposals, Department of the Treasury, released February 13,2012 ("As reflected in the Administration's adjusted baseline projection, the portability of unused estate and gift tax exclusion between spouses would be made permanent.

[80] Currently $13,000 per donee each year

[81] I.R.C. §2503(e).

[82] Connecticut is the only state that currently imposes a gift tax. Unless the donor resides in Connecticut or is gifting Connecticut situs property, no state gift tax will be imposed on the transfer.

removes the property and appreciation plus any gift tax paid[83] from his estate. If the donor spouse is making gifts to his same-sex spouse consider filing a protective claim, along with the federal gift tax return, so that if Section 3 of DOMA is overturned, he will seek a reinstatement of any federal transfer tax exclusion used and a refund of any federal gift tax paid with respect to the transfer based on the availability of the federal unlimited marital deduction.

4. Charitable Planning

Although the unlimited marital deduction is not available to same-sex married couples, charitable planning may actually allow them to transfer significant wealth to each other with minimal transfer tax consequences through the use of charitable remainder and lead trusts. In addition, if initiated during lifetime, charitable planning will have the added benefit of avoiding probate, thereby reducing the likelihood of challenges from a hostile family member.

(a) Charitable Remainder Trusts

A charitable remainder trust ("CRT") is an irrevocable trust that provides for payments to one or more beneficiaries, at least one of which is not a charitable entity, for a term of not more than 20 years, or for the life or lives of the individual beneficiaries. When the non-charitable interest terminates, the remainder interest passes to one or more qualified charitable organizations.

A CRT may be either a charitable annuity trust ("CRAT") or a charitable remainder unitrust ("CRUT"). A CRAT pays the non-charitable beneficiary a fixed annuity that is neither less than 5% nor more than 50% of the initial value of the trust assets. A CRUT pays the non-

[83] Assuming the donor spouse survives the gift by three years

charitable beneficiary a fixed percentage of no less than 5% and no more than 50% of the value of the trust property valued on an annual basis.

The donor (or the donor's estate in the case of a testamentary trust) is entitled to a charitable deduction for the actuarial value of the remainder interest passing to charity at the end of the CRT term. Thus even though the unlimited marital deduction is not available for the life or term interest given to a same-sex spouse, the use of a CRT may provide significant leverage in the form of a gift tax charitable deduction while at the same time providing for the ongoing support or transfer of assets to a same-sex spouse.

b. Charitable Lead Trusts

A charitable lead trust ("CLT") may be created during lifetime or at death. A CLT provides a stream of payments to one or more charities for a term of years or for the life or lives of one or more individuals. At the end of the charitable lead trust term, the trust terminates and the remaining trust assets may be paid to the same-sex spouse or children. A CLT may be structured to pay an annuity ("CLAT") or a unitrust amount ("CLUT"). In either event, the actuarial value of the payment to charity may not be less than 5% or more than 50% of the value of the trust assets. The charitable term may be for the life of a designated individual or a term of years not to exceed 20 years.

If the CLT is structured as a grantor trust, the grantor will receive an income tax deduction in the year the trust is funded, for the actuarial present value of the payments to be made to charity. But all income produced by the trust during the trust term will be taxed to the grantor without a corresponding income tax charitable deduction. A gift tax may be due on the value of the remainder interest passing to the non-charitable beneficiaries. If the total rate of return on the trust property outperforms the prevailing §7520 rate at the time of the gift, then the

non-charitable beneficiaries will receive more than the gift tax value of their interest at the termination of the charitable term, free of all estate and gift taxes.

If the CLT is structured as a non-grantor trust, then the trust will be taxed as a complex trust and all payments due to charity will be income tax free during the term of the trust. The grantor will not receive a charitable income tax deduction but the gift or estate tax value of the non-charitable remainder interest will be reduced by the actuarial value of the interest passing to charity.

5. Life Insurance Planning

Life insurance is an excellent means to provide liquidity for the payment of estate taxes and provide support for a surviving partner or same-sex spouse. The estate tax inclusion of life insurance proceeds may be avoided if the owner/insured gives up all incidents of ownership in a policy (i.e., the right to surrender, revoke, assign, pledge or borrow against the policy and to change the beneficiary). Transfer of a policy to a same-sex partner or spouse is problematic in two respects: (1) if the relationship ends, the partner will still have control over the policy, and (2) if the relationship does not end the policy proceeds will be taxed in the estate of the surviving partner or spouse. It is therefore preferable that life insurance be held in an irrevocable life insurance trust which can provide for the possibility of the end of the relationship and, if the proceeds are held in trust after the death of the insured, exclude the policy proceeds from the estate of the survivor.

Note that pursuant to Code Section 2040, the policy proceeds will be includible in the estate of the insured/owner if incidents of ownership were relinquished within three years of death.

6. GRATs and GRUTs

A grantor retained annuity trust ("GRAT") or a grantor retained unitrust ("GRUT") is an irrevocable trust in which the grantor transfers assets in trust but retains an income interest for a term of years. At the end of the trust term, the assets pass to remainder beneficiaries. Since the grantor retains an interest in the trust for a term of years, the value of the gift is not the full fair market value of the trust assets at the time of the transfer, but the discounted right to receive the trust assets at the end of the term. The discounted value will depend on the length of the term, the age of the grantor, the size of the retained interest and the §7520 rate to be applied to the transfer. In a GRAT, the grantor retains the right to receive a fixed dollar amount during the term. In a GRUT, the grantor retains the right to a fixed percentage of the trust assets valued annually. The higher the §7520 rate, the lower the value of the gift, but the less likely that the assets will generate sufficient income and growth to pay the required retained distributions without exhausting the principal. The lower the §7520 rate, the higher the value of the gift and the more likely that the assets will out perform the "hurdle" rate and produce more income and growth than is required to make the retained distributions. The longer the term of the GRAT or GRUT, the smaller the value of the gift and the less likely the grantor will survive the term. If the grantor does not survive the term, the fair market value of the trust principal remaining at his death is includible in his estate for estate tax purposes.

Recent budget proposals include (i) changing the minimum term of a GRAT or GRUT to 10 years, thereby increasing the risk that the grantor will not survive the term and the assets will be includible in his estate and (ii) preventing the zeroing out of GRATs, thereby making it necessary for the actuarial value of the grantor's retained interest to be less than the full value of the property he transferred to the GRAT or GRUT.

7. Limited Liability Companies

One way to leverage transfers is to establish a limited liability company for federal income tax purposes. Given a good faith business venture[84], a same-sex couple could enter into an operating agreement, open an LLC account, acquire a taxpayer identification number from the Internal Revenue Service and file returns for their entity.

LLCs offer asset protection to creditors and may also serve as a deterrent to hostile family members. If certain conditions are met, the couple can take advantage of the non-recognition provisions contained in Subchapter K of the Code, such as the ability to distribute out LLC assets without the recognition of gain or loss, so long as the value of the assets received by a partner do not exceed his basis in the entity.[85]

LLCs can also provide a mechanism for gifting property without giving up control and if structured properly, for leveraging gifts that are discounted for lack of control and/or lack of marketability. In addition, so long as DOMA remains in force and same-sex spouses are legal strangers under the Internal Revenue Code, they are not subject to the limitation on restrictive agreements imposed under Code §2703 (see below).

8. Estate Freezes and Planning Under Chapter 14 of the Code

Chapter 14 was added to the Internal Revenue Code in 1990 and to address perceived abuses in "estate freeze" transactions among traditional family members. In the typical "estate freeze" transaction a member of the older generation made a restricted gift to members of a younger generation. The restrictions "froze" the value of the gift at its gift tax value. Any future

---

[84] A bona fide business venture must exist. A joint undertaking merely to share expenses is not a partnership absent a business purpose. *See* Treas. Reg. §1.761-1(a).

[85] I.R.C. §731(a)

appreciation was removed from the donor's gross estate and shifted to the younger generation donees. The purpose of Chapter 14 was to ensure that the value assigned to the retained interest or restriction for gift tax purposes comported with the economic reality of the transaction.

So long as DOMA remains on the books, same-sex spouses are able to take advantage of planning opportunities that are unavailable to different-sex married couples because of the application of Chapter 14.

(a) Grantor Retained Income Trusts

A grantor retained income trust ("GRIT") is an irrevocable trust in which the grantor retains an income interest for a term of years, and, if the grantor is living, at the end of the trust term, the trust principal is paid to a named individual or individuals (typically the grantor's partner, same-sex spouse or the partner/spouse's children). GRITs were extremely popular before the enactment of Chapter 14, which eliminated their use if the remainder beneficiary was a "family member". Because a same-sex spouse is not a "family member" within the meaning of Code Section 2702(e), a GRIT may be used by a wealthier same-sex spouse to provide an income stream during the trust term and allow the principal to pass to the non-wealthier same-sex spouse at a reduced gift tax value. The length of the term retained by the grantor must be carefully chosen since if the grantor dies during the trust term, the full value of the trust property will be included in his estate for estate tax purposes.

(b) Qualified Personal Residence Trust

Code Section 2702(a)(3)(A) provides special valuation rules for a "Qualified Personal Residence Trust" ("QPRT"). A QPRT may be used to transfer a grantor's residence out of the grantor's estate at a leveraged gift tax value. The grantor gifts his residence to an irrevocable

trust for his own benefit for a term of years. At the end of the term, the residence passes to beneficiaries specified in the trust agreement Once the trust is funded with the grantor's residence, if the grantor survives the term, the residence and any future appreciation will be excluded from the grantor's estate. If the grantor does not survive the term, the entire value of the residence, at its fair market value on the date of the grantor's death, will be included in his estate for estate tax purposes under Section 2036 of the Code.

Since the grantor retains the right to the use of the residence for the term, the amount of the gift to the beneficiaries is not the fair market value of the residence, but the present value of the right to receive the residence at the end of the term. The exact discount to be applied will depend upon the prevailing §7520 rate at the time of the transfer, the length of the term and the age of the grantor at the time of the transfer. The longer the term of the QPRT, the smaller the value of the gift but the less likely the grantor will survive the term.

If the grantor survives the term, the beneficiaries will receive the residence with no step-up in basis. Nevertheless, a QPRT may be an effective means to transfer a low-basis asset since the capital gains rate is significantly lower than the effective estate tax rate.

At the end of the term, the grantor may continue to reside in the residence by renting the residence from the trust pursuant to a lease for fair market value rent.

When a QPRT is created for the benefit of family members, the grantor is precluded from purchasing back the residence from the trust prior to the expiration of the term. However, so long as same-sex spouses are legal strangers under the Internal Revenue Code, this prohibition will not apply and the grantor may purchase the residence at no gain or loss[86] just prior to the expiration of the trust term. By doing so, cash or other assets may pass to the remaindermen in

[86] Since the transaction will be between the grantor and his wholly owned grantor trust, the grantor recognizes no gain or loss.

place of the residence and the residence can then be passed to the beneficiaries at the grantor's death with a step-up in basis.

It is not entirely clear whether unrelated parties may establish QPRT's with co-tenancy interests in a residence. The issue arises because: (i) the property must have as its primary purpose the grantor's residence, (ii) the grantor must have the exclusive right of occupancy during the trust term, and (iii) the property may not be used other than as a residence when the grantor is not there. Shared occupancy is permissible, so long as it is at the sufferance of the grantor. There are no rulings concerning QPRT's established by co-tenants who are not also spouses.[87] The regulations suggest that the exclusive right of occupancy requirement may preclude the establishment of a QPRT with co-tenancy interests if the co-tenants are not also spouses – as same-sex spouses are considered under federal law. One approach to accomplish the co-tenancy requirement would be to have the co-tenant lease the property from the other co-tenant during the QPRT term.[88]

(c) Split Interest Purchases

Since QPRT's pose some disadvantages, clients may want to consider the alternative of a split-interest purchase. In a split interest purchase, one person contributes an amount equal to the value of his life interest in the property or for a term of years, while the other person contributes an amount equal to the value of the remainder interest following the termination of the life or term interest. If the joint purchasers are applicable family members under Code Section 2702, then the person acquiring the term interest is treated as acquiring the entire property and then

[87] Natalie B. Choate, *The QPRT Manual: The Estate Planner's Guide to Qualified Personal Residence Trusts ¶2.3.02 (2004)*

[88] Natalie B. Choate, *supra* note 305, at ¶2.3.02.

transferring the remainder to the other purchaser, and the retained interest is value at zero (unless it constitutes a "qualified interest".

Since the property will be acquired in a purchase, if the life tenant pays full value for his life interest, Code Section 2036 should not apply. At the death of the same-sex spouse life tenant, the property will not be includible in the life tenant's estate for estate tax purposes.

Since same-sex spouses are not applicable family members, the valuation rules of Code Section 2702 do not apply to the transaction.[89]

(d) Sale of a Remainder Interest

Another alternative to a QPRT is the sale of a remainder interest. The sale of remainder interest allows the seller to retain use of the residence for life, instead of a term of years, rent-free and avoids the possibility that the grantor may not survive the QPRT term.

In order to avoid inclusion of the value of the property in the estate of the life tenant, the remainder must be purchased for its fair market value. Undervaluation of the interest could cause the entire interest to be brought back into the life tenant's estate under Code Section 2036. The funds used to purchase the remainder interest must not be funds received as a gift just prior to the transaction. If the sale of the remainder interest is to a trust, then the remainder interest must also comply with the personal residence trust and qualified personal residence trust regulations set forth in Treas. Reg. §25.2702-5(a).[90]

---

[89] I.R.C. §2702(c)(2).

[90] *See* PLR 200840028 (Oct. 3, 2008)-5

(e) Valuation of Business Entities

Code Sections 2703 and 2704 were enacted to limit the use of valuation discounts for certain options, rights and restrictions that attach to business interests transferred to family members.

Section 2703 provides, generally, that a right, option or agreement that restricts the sale or use of property is disregarded for valuation purposes unless: (i) it is a bona fide business arrangement; (ii) it is not a device to transfer such property to members of the decedent's family for less than full and adequate consideration in money or money's worth; and (iii) its terms are comparable to similar arrangements entered into by persons in an arm's length transaction.[91] If an agreement meets all three tests, the IRS will consider the agreement in determining value. If unrelated individuals own more than 50% of the business entity, the tests are deemed to be satisfied.[92]

The lapse of certain rights and restrictions in a business entity may be treated as a taxable transfer under Code §2704. Between family members, if a lapse occurs at death, the value of the lapsed right, in addition to the individual's interest in the business entity, is included in the individual's estate. In addition, Code §2704 provides that "applicable restrictions"[93] on the ability of an entity to liquidate if family members possess the power to remove the applicable restriction are disregarded for gift tax purposes.

---

[91] I.R.C. §§2703(a) and 2703(b)

[92] Treas. Reg. §25-2703-1(b)(3).

[93] An "applicable restriction" is one that limits the ability of an entity to liquidate if: (i) the restriction lapses, in whole or in part, after a transfer of an interest to or for the benefit of the transferor's family; or (ii) after the transfer, the transferor or any member of the transferor's family has the right to remove the restriction. I.R.C. §2704(b)(2); Treas. Reg.§25.2704-2(b).

So long as DOMA remains in effect and same-sex spouses are legal strangers under the federal tax laws, the valuation rules contained in Code §§2703 and 2704 should not apply to transfers between same-sex spouses. Same-sex spouses should be able to take advantage of substantial discounting opportunities through the use of partnerships, LLCs, and other entities with restrictive provisions, allowing interests in those entities to be transferred between spouses during life or at death at a highly leveraged transfer tax cost.

C. Assets Requiring Special Planning

1. Pension and Retirement Plans

Pension and retirement plans are subject to both income and estate tax at death. As a result, the value of retirement assets in the hands of the beneficiary can be reduced by more than half.

A different-sex surviving spouse may rollover a deceased spouse's qualified plan or individual retirement account into his own plan with a new designated beneficiary. However, since spousal rollovers are a product of federal law and federal law treats a same-sex spouse as a stranger, spousal rollovers are not available to the same-sex surviving spouse. A surviving same-sex spouse is limited to effectuating a plan-to-plan transfer to an inherited individual retirement account on a tax-free basis.

An inherited IRA is less favorable because it is more restrictive than a new IRA in the spouse's name. In addition to not being able to retitle the account in the surviving spouse's name, the same-sex spouse beneficiary must immediately begin taking Required Minimum Distributions. If the spouse/owner of the account died on or after his Required Beginning date, the Required Minimum Distribution will be based on the longer of the life expectancy of the (i) deceased spouse, (ii) surviving spouse, or (iii) oldest of multiple beneficiaries (if more than one

beneficiary). If the spouse/owner died before his Required Beginning Date, the Required Minimum Distribution is based upon the life expectancy of the (i) surviving spouse, or (ii) the oldest beneficiary (if there is more than one beneficiary).

As a result, for same-sex couples, alternate estate planning strategies should be considered when planning for retirement assets. First, if the client is charitably inclined, retirement assets should be the first assets used to make charitable gifts. If a retirement plan passes to charity, it will pass free of income and estate taxes.

Another alternative is to "stretch" the payments out over the lifetimes of the owner and younger beneficiaries. Although subject to estate tax upon the death of the owner, income tax recognition will be stretched out over the lifetime of the younger beneficiaries, with continued tax-free growth over the period.

2. Life Insurance

As noted above, if the client owns or plans to own life insurance, he should consider creating an irrevocable life insurance trust to own or purchase the policies. If the insured transfers an existing life insurance policy to the trust and survives three years, the policy proceeds will pass free of estate tax to the trust and its underlying beneficiaries. If the insured transfers money to the trust and the trustees purchase a life insurance policy on the life of the insured, the policy proceeds will not be includible in the insured's estate even if he dies within three years of the purchase.

Without the federal unlimited marital deduction, assets passing to or for the benefit of a surviving same-sex spouse will be subject to federal estate tax. The policy proceeds held by the trust can provide needed liquidity to pay the estate taxes in the estate of the first spouse to die.

Life insurance proceeds are also useful sources for wealth creation and/or income replacement and can thus be used to provide ongoing support for a surviving spouse and children.

D. Prenuptial, Postnuptial and Cohabitation Agreements

A formal written agreement can provide same-sex couples with legal protections based on contract law. So long as the agreement does not involve an illegal activity, the contract should be enforced.

Since so many states prohibit recognition of same-sex relationships, it is advisable for all committed same-sex couples, whether married, civil unionized, in a domestic partnership or none of the above, enter into a written agreement that reflects their understanding of their relationship.

A full discussion of contractual arrangements between same-sex spouses and partner are beyond the scope of these materials but the following is a brief outline of the benefits such agreements may provide to same-sex couples.

1. Prenuptial and Postnuptial Agreements

Although many same-sex spouses reject the idea of a prenuptial or postnuptial agreement because they believe that their marriage should be recognized, the fact is that in many instances, it is not. Unlike different-sex-couples, many same-sex couples that have been in longstanding committed relationships but recently married, a prenuptial or postnuptial agreement will enable them to "opt in" to a marital property regime with respect to property that they have accumulated together over the course of their relationship.

Prenuptial and postnuptial agreements for same-sex couples are held to the same standards of stringency as prenuptial and postnuptial agreements for different-sex couples,

including the necessity for full disclosure and separate representation, and may include, but are not limited to, provisions for the following:

- definitions of separate, marital and community property and debts
- character of gifts between the parties
- disposition of property upon dissolution of the relationship
- payment of health care benefits in the event the marriage dissolves
- disposition of property upon death
- obligations of support, including alimony, maintenance
- agreements regarding the payment of individual and household expenses
- dissolution of the marriage, including a possible waiver of jurisdictional requirements to obtaining a divorce

Because of non-recognition issues, qualifying language must be added to the agreement to ensure the agreement in enforceable in a jurisdiction that may not recognize the parties' relationship.

2. Cohabitation Agreements

Cohabitation agreements operate similarly to prenuptial agreements, in that they contain provisions with respect to the ownership and division of property both during the relationship or if the relationship breaks down. The cohabitation agreement sets forth a couple's intent to live together, though they may not get married, and sets out how each member of the couple retains ownership over their respective property and assets, contributes to financial obligations which arise out of living together (for instance, paying for household expenses), and the distribution of financial assets acquired before and during cohabitation, should the cohabitation end. The

agreement may also include provisions for the payment of health insurance premiums and for the repayment of debt.

E. Ancillary Documents

1. Adult Guardian/Conservator

As with other facets of planning for the future, it is important for same-sex couples to express their wishes with respect to the appointment of a guardian or conservator to handle their affairs in the event of incapacity. In the absence of a written designation, in a non-recognition jurisdiction, a court may appoint a family member other than the same-sex spouse. In some states, the designation of a guardian may be in a power of attorney. In other states, the designation must be in a separate document.

Note that in non-recognition states, a divorce may not automatically revoke a designation of a guardian or conservator granted to a same-sex spouse during the course of the marriage.

2. Power of Attorney

A power of attorney is a document in which an individual (the "principal") designates another individual (called the "agent") to act on his behalf with respect to financial and legal affairs. A power of attorney may be limited to specific actions or grant broad authority to the agent to take all appropriate actions with respect to the principal's assets. The principal must be competent at the time he executes the power of attorney but the power of attorney will not survive the future incompetence of the principal unless it is "durable". A power of attorney may be immediately effective or it may be "springing" in that it is only effective upon the happening of a certain event, usually the incapacity of the principal. Third parties may be hesitant to accept a springing power of attorney because it will require them to make a determination of whether

there is incapacity. Third parties are often reluctant to accept a power of attorney that is not on their form. Although some states have enacted statutory penalties for refusal to accept the "statutory" form, the penalties, in most cases, lack the "teeth" to force a third party's acceptance.

A power of attorney that is valid in one state may not be valid in other states. Therefore if parties spend time in more than one jurisdiction, it may be advisable to have them execute powers of attorney for all of those jurisdictions.

Florida and New York have recently enacted legislation requiring specific powers and/or forms to be made part of a power of attorney before the agent may make gifts on behalf of the principal.

Committed same-sex couples should execute reciprocal powers of attorney so that they may make financial and legal decisions for each other. A validly executed durable power of attorney, along with a validly executed health care directive, should also avoid the necessity for the appointment of a guardian or conservator in the event of incapacity.

The granting of a power of attorney to a same-sex partner or spouse is also an effective evidentiary tool to demonstrate that the principal and agent are in a committed relationship.

Note that in non-recognition states, a divorce may not automatically revoke a durable power of attorney granted to a same-sex spouse during the marriage.

3. Health Care Directives

As with powers of attorney, state law governs advance directives (i.e., living will and health care powers of attorney or proxies). Written instructions given by an individual may be challenged but under limited circumstances.

Generally, hospitals and other health care providers will honor the expressed, written directions of an individual. For a same-sex partner or spouse who may be denied access to their

partner's health care, including hospital visits[94] and decision-making, in favor of the patient's blood relatives, these documents are of utmost importance.

A living will is a written expression of an individual's wishes and intent with respect to their medical care and treatment in the event of their incompetence. In a living will, the individual may express his wishes with respect to the types of treatment he would authorize or would want withheld and the specific circumstances under which his wishes should be applied. Many states provide that artificial hydration and nutrition will not be withheld unless the patient's wishes with respect to this treatment are specifically set forth in health care directives.

In a health care power of attorney or proxy, an individual designates a person to make health care decisions on his behalf if he is unable to make those decisions on his own. In addition, if it includes a HIPAA release, a health care power of attorney authorizes physicians and other health care providers to discuss a patient's medical treatment with a named agent, even though the agent is not related or married to the patient.

---

[94] On April 15, 2010, President Obama issued a Memorandum on Hospital Visitation to the Secretary of Health and Human Services ("HHS") (www.whitehouse.gov/the-press-office/presidential-memorandum-hospital-visitation). This memorandum required HHS to promulgate rules directing hospitals to address a patient's rights to choose visitors. HHS issued the new regulations, *Medicare and Medicaid Programs: Changes to the Hospital and Critical Access Hospital Conditions of Participation to Ensure Visitation Right for All Patients* (42 CFR pts. 428, 485) in November 2010. The regulations became effective in January 2011. The regulations require all hospitals that accept Medicare or Medicaid funds to comply. Since all hospitals accept these funds, these regulations apply across the board.

In 2011, the Joint Commission (TJC), formerly the Joint Commission on Accreditation of Healthcare Organizations (JCAHO), an independent organization that accredits over 19,000 U.S. health care programs and organizations, issued new regulations that apply to hospitals. The new regulations specifically require TJC accredited medical care facilities to notify a patient has the right to visitation by his domestic partner, including a same-sex domestic partner.

Unfortunately, enforcement has been sporadic and some hospitals still maintain policies that limit visitation to "immediate family only", which may not include same-sex partners and spouses.

As noted above, coupled with a durable power of attorney, a health care power of attorney can help avoid a costly judicial proceeding for the appointment of a guardian or conservator, which may be contested by the family.

In non-recognition states, divorce may not automatically revoke a health care power of attorney granted to a same-sex spouse during the marriage.

4. **HIPAA Release**

The Health Insurance Portability and Accountability Act protects the privacy of patients by limiting the release of medical records and patient information by health care providers. In a HIPAA release, a patient may designate an individual to receive this information on his behalf.

A validly executed HIPAA release will allow a same-sex spouse or partner to speak with his spouse/partner's physicians, consent to medical procedures and surgery and access medical information for all purposes.

5. **Funeral and Burial Instructions**

U.S. law establishes quasi-property rights, vested in the next of kin, for the limited purpose of burial and disposal of remains. It is imperative that same-sex couples ensure that their funeral arrangements are being managed by the people and in the manner of their choosing since in many jurisdictions, "next of kin" will not include a same-sex spouse or partner. *See Appendix B for a breakdown of the states that will allow an individual to designate an agent to make funeral and burial arrangements.*

Appendix A

State by State Treatment of Same Sex Relationships

	Marriage	Full Recognition	Civil Union	Domestic Partners	Limited Domestic Partnership/Civil Unions	Legislation	State Constitutional Amendment Marriage	State Constitutional Amendment All Same-Sex Relationships
Alabama						x		x
Alaska						x	x	
Arizona						x	x	
Arkansas						x		x
California				x		x	x	
Colorado					x	x	x	
Connecticut	x	x						
Delaware			x			x		
District of Columbia	x	x						
Florida						x		x
Georgia						x		x
Hawaii			x			x		
Idaho						x		x
Illinois			x			x		
Indiana						x		
Iowa	x	x						
Kansas						x		x
Kentucky						x		x
Louisiana						x		x
Maine					x	x		
Maryland		x			x	x		
Massachusetts	x	x						
Michigan						x		x
Missouri						x	x	
Mississippi						x	x	
Minnesota						x		
Montana						x	x	
Nebraska								x
Nevada				x			x	
New Hampshire	x	x						
New Jersey			x					
New Mexico		x						

New York	x	x						
North Carolina						x		x
North Dakota						x		x
Oregon				x			x	
Ohio						x		x
Oklahoma						x		x
Pennsylvania						x		x
Rhode Island		x	x					
South Carolina						x		x
South Dakota						x		x
Tennessee						x	x	
Texas						x		x
Utah						x		x
Vermont	x	x						
Virginia						x		x
Washington				x		x		
West Virginia						x		
Wisconsin					x	x		x
Wyoming						x		

Appendix B

	A	B	C	D
1	State	Second Parent Adoptions	Residency Requirements for Divorce	Funeral Arrangements
2	Alabama		When the defendant is a nonresident, the other party to the marriage must have been a bona fide resident of this state for six months next before the filing of the complaint. Complaints for divorce may be filed in the circuit court of the county in which the defendant resides, or in the circuit court of the county in which the parties resided when the separation occurred, or if the defendant is a nonresident, then in the circuit court of the county in which the other party to the marriage resides. (Code of Alabama - Title 30 - Chapters: 2-4 and 2-5)	Desginated Agent Law
3	Alaska		The spouse who is filing for the dissolution of marriage must be a resident of the state of Alaska at the time of filing. A person serving in a military branch of the United States government who has been continuously stationed at a military base or installation in the state for at least 30 days is considered a resident of the state. (Alaska Dissolution Statutes- Sections: 22.10.030, 25-24-080, 25.24.090)	No designated agent right, or right to expect funeral wishes to be honored.
4	Arizona		That one of the parties, at the time the action was commenced, was domiciled in this state, or was stationed in this state while a member of the armed services, and that in either case the domicile or military presence has been maintained for ninety days prior to filing the petition for dissolution of marriage. That one of the parties, at the time the action was commenced, was domiciled in this state, or was stationed in this state while a member of the armed services, and that in either case the domicile or military presence has been maintained for ninety days prior to filing the petition for dissolution of marriage. (Arizona Statutes - Title 12 - Chapters: 401 and Title 25 - Chapters: 312, 329)	designated agent and personal preference, but the law has conflicting language over whether surviving spouse or designated agent has the ultimate authority.
5	Arkansas		A spouse must be a resident of the state of Arkansas for at least 60 days prior to filing for the divorce and the divorce will not be finalized until a 3 months waiting period has passed after the initial filing. The proceedings shall be in the county where the complainant resides unless the complainant is a nonresident of the State of Arkansas and the defendant is a resident of the state, in which case the proceedings shall be in the county where the defendant resides, and, in any event, the process may be directed to any county in the state. (Arkansas Code - Title 9 - Chapters: 12-301 and 12-303)	Specify funeral wishes in advanced and designate an agent to carry them out

	A	B	C	D
6	California	x	A judgment of dissolution of marriage may not be entered unless one of the parties to the marriage has been a resident of this state for six months and of the county in which the proceeding is filed for three months next preceding the filing of the petition. For the purpose of a proceeding for dissolution of marriage, the husband and wife each may have a separate domicile or residence depending upon proof of the fact and not upon legal presumptions. (California Code - Sections: 297, 298, 2320, 2339)	Personal Preference/Designated Agent
7	Colorado	x	The district court shall enter a decree of dissolution of marriage when: The court finds that one of the parties has been domiciled in this state for ninety days next preceding the commencement of the proceeding. The dissolution of marriage may be filed in the county in which the petitioner or respondent reside. (Colorado Statutes - Article 10 - Sections: 14-10-106)	personal preference and designated agent law
8	Connecticut	x	A decree dissolving a marriage or granting a legal separation may be entered if: (1) One of the parties to the marriage has been a resident of this state for at least the twelve months next preceding the date of the filing of the complaint or next preceding the date of the decree; or (2) one of the parties was domiciled in this state at the time of the marriage and returned to this state with the intention of permanently remaining before the filing of the complaint; or (3) the cause for the dissolution of the marriage arose after either party moved into this state. For the purposes of this section, any person who has served or is serving with the armed forces, as defined by section 27-103, or the merchant marine, and who was a resident of this state at the time of his or her entry shall be deemed to have continuously resided in this state during the time he or she has served or is serving with the armed forces or merchant marine. (Connecticut General Statutes - Title 46b - Chapter 44)	can declare own wishes for disposition of their bodies and appoint agent to carry out directions.
9	Delaware		The Family Court of the State has jurisdiction over all actions for divorce and annulment of marriage where either petitioner or respondent, at the time the action was commenced, actually resided in this State, or was stationed in this State as a member of the armed services of the United States, continuously for 6 or more months immediately preceding the commencement of the action. The divorce may be filed in the county in which either spouse resides. (Delaware Code Title 13 - Chapters: 1504, 1507)	personal preference and designated agent

	A	B	C	D
10	District of Columbia	x	Either spouse must be a resident for at least 6 months prior to filing for a divorce. All active military members that are stationed in Washington D.C. are considered residents so long as they have been stationed for at least 6 months (District of Columbia Code -Title 16- Chapter 9 - Section 902); Residency requirements will be waived for a non-resident same-sex couple providing their marriage was solemnized in the District of Columbia and they are unable to obtain a divorce in the jurisdiction in which either or both reside (D.C. St. §16-902(b)	designated agent to decide how to dispose of the body and provide written directions to supersede anyone else's wishes.
11	Florida		To obtain a dissolution of marriage, one of the parties to the marriage must reside 6 months in the state before the filing of the petition. The dissolution of marriage can be filed in the county in which either or both spouses reside. (Florida Statutes - Chapters: 61.021)	personal preference
12	Georgia		No court shall grant a divorce to any person who has not been a bona fide resident of this state for six months before the filing of the petition for divorce, provided that any person who has been a resident of any United States army post or military reservation within this state for one year next preceding the filing of the petition may bring an action for divorce in any county adjacent to the United States army post or military reservation; and provided, further, that a nonresident of this state may file a petition for divorce, in the county of residence of the respondent, against any person who has been a resident of this state and of the county in which the action is brought for a period of six months prior to the filing of the petition. (Georgia Code - Sections: 19-5-5)	appointed agent
13	Hawaii		No absolute divorce from the bond of matrimony shall be granted for any cause unless either party to the marriage has been domiciled or has been physically present in the State for a continuous period of at least six months prior to filing for the divorce. A person who may be residing on any military or federal base, installation, or reservation within the State or who may be present in the State under military orders shall not thereby be prohibited the above mentioned requirements. The divorce should be filed in the judicial district the plaintiff resides or the judicial district the spouses last lived together as a married couple. (Hawaii Statutes - Title 580 - Chapters: 1)	Default judgment to next of kin, but if the deceased indicated beforehand that another unrelated person make the decisions regarding funeral arrangements and put this in a will and letter to the deceased's personal representative, this indication will be honored.
14	Idaho		A divorce must not be granted unless the plaintiff has been a resident of the state for six (6) full weeks next preceding the commencement of the action. The divorce may be filed in the county in which either the husband or the wife reside. If either spouse is not a resident of the state, the divorce must be filed in the county in which the plaintiff resides. (Idaho Code - Title 5 - Chapters: 404)	can write up a doc naming a person to carry out funeral wishes that is acknowledged like instruments conveying personal property. Alternatively, can appoint Durable Power of Attorney for healthcare to make disposition arrangements

	A	B	C	D
15	Illinois	x	The court shall enter a judgment of dissolution of marriage as long as one of the spouses was a resident of this State or was stationed in this State while a member of the armed services, and the residence or military presence had been maintained for 90 days prior to filing. The proceedings shall be had in the county where the plaintiff or defendant resides. (750 Illinois Compiled Statutes - Chapter 5 - Sections: 104 and 401)	declare disposition wishes in a written document or designated agent to carry out these wishes or make decisions in absence of instructions
16	Indiana	x	At the time of the filing of a petition, at least one (1) of the parties must have been: (1) a resident of Indiana; or (2) stationed at a United States military installation within Indiana; for six (6) months immediately preceding the filing of the petition. At the time of the filing of a petition, at least one (1) of the parties must have been: (1) a resident of the county; or (2) stationed at a United States military installation within the county; where the petition is filed for three (3) months immediately preceding the filing of the petition. (Indiana Code - Title 31 - Article 15 - Chapters: 2-6)	personal preference and designated agent
17	Iowa		There is a 1 year residency requirement for all spouses filing in the state, unless the plaintiff in the case is not a resident, then he or she does not have a residency requirement in order to file for a dissolution of marriage. The parties shall file for a dissolution of marriage in the county where either party resides. No decree dissolving a marriage shall be granted in any proceeding before ninety days shall have elapsed from the day the original notice is served. (Iowa Code - Sections 598.2, 598.6 and 598.19)	Name an agent to make arrangements for disposition. Must attach form to durable health care power of attorney for it to be effective.
18	Kansas		The petitioner or respondent in an action for divorce must have been an actual resident of the state for 60 days immediately preceding the filing of the petition. Military residence. Any person who has been a resident of or stationed at a United States post or military reservation within the state for 60 days immediately preceding the filing of the petition may file an action for divorce in any county adjacent to the post or reservation. (Kansas Statutes - Chapter 60 - Article 16 - Subject: 607 and 1603)	designated agent law
19	Kentucky		Court may enter decree of dissolution or separation. (1) The Circuit Court shall enter a decree of dissolution of marriage if: (a) The court finds that one (1) of the parties, at the time the action was commenced, resided in this state, or was stationed in this state while a member of the armed services, and that the residence or military presence has been maintained for 180 days next preceding the filing of the petition. (Kentucky Statutes - Title 35 - Chapters: 403.140 and 452.470)	Authorizing agent - unclear who this agent is, whether it can be someone other than the next of kin and - if so - whether the agent or next of kin has legal authority over the other.

	A	B	C	D
20	Louisiana		The filing spouse must be a resident for at least 12 months prior to filing. The divorce shall be filed in the parish in which either spouse resides. Except in the case of a covenant marriage, a divorce shall be granted upon motion of a spouse when either spouse has filed a petition for divorce and upon proof that one hundred eighty days have elapsed from the service of the petition. (Louisiana Code of Civil Procedure - Article: 42)	wishes of deceased prevail if written and notarized
21	Maine	x	A person seeking a divorce may file a complaint for divorce in the District Court if: A. The plaintiff has resided in good faith in this State for 6 months prior to the commencement of the action; B. The plaintiff is a resident of this State and the parties were married in this State; C. The plaintiff is a resident of this State and the parties resided in this State when the cause of divorce accrued; or D. The defendant is a resident of this State. The divorce may be filed in either county in which the parties reside. The right to file a complaint or bring a petition may not be denied a person for failure to meet a residency requirement if the person is a member of the Armed Forces of the United States on active duty stationed in this State or the spouse of that member or a parent of a child of that member. The member is deemed to be a resident either of the county in which the military installation, or other place at which the member has been stationed, is located or of the county in which the member has sojourned. (Maine Revised Statutes - Title 4 - Sections: 155 and Title 19-A - Section 902)	agent to fulfill personal preferences
22	Maryland		There is a 1 year requirement if the grounds for the divorce occurred outside the state of Maryland, otherwise if either spouse is a resident of the state of Maryland, he or she may file in the county in which either spouse resides. If you are filing for divorce under the grounds of insanity, the residency requirement is increased to 2 years. (Maryland Code - Family Law Chapter - Section: 7-103)	agent
23	Massachusetts	x	One of the spouses must be a resident of the state of Massachusetts if the grounds for divorce occurred in Massachusetts. If the grounds for divorce occurred outside the state of Massachusetts then one spouse must be a resident of the state for at least 1 year. Actions for divorce shall be filed, heard and determined in the probate court, held for the county where one of the parties lives, except that if either party still resides in the county where the parties last lived together, the action shall be heard and determined in a court for that county. In the event of hardship or inconvenience to either party, the court having jurisdiction may transfer such action for hearing to a court in a county in which such party resides. (Massachusetts General Laws - Chapter 208 - Sections: 4,5 & 6)	prepaid funeral contract only - otherwise, next of kin controls

	A	B	C	D
24	Michigan		A judgment of divorce shall not be granted by a court in this state in an action for divorce unless the complainant or defendant has resided in this state for 180 days immediately preceding the filing of the complaint, the complainant or defendant has resided in the county in which the complaint is filed for 10 days immediately preceding the filing of the complaint. (Michigan Compiled Laws - Section: 552.9)	next of kin can override wishes made in will
25	Missouri		One party must be a resident of the state of Missouri, or is a member of the armed services who has been stationed in this state, for ninety days immediately preceding the commencement of the proceeding and thirty days must have elapsed since the filing of the petition before the dissolution of marriage will be granted. An original proceeding shall be commenced in the county in which the petitioner resides or in the county in which the respondent resides. (Missouri Statutes - Title 30 - Chapter 452 - Sections: 300 and 305)	designated agent law
26	Mississippi		A spouse must be a resident of the state of Mississippi for a least 6 months prior to filing. If a member of the armed forces is stationed in Mississippi, he or she and his or her spouse is considered a resident. The divorce should be filed in the county in which either spouse resides if they are both residents and if the plaintiff is the only resident then in the county in which he or his resides. (Mississippi Code - Section 93 - Chapters: 5-5, 5-11)	prepaid funeral contract
27	Minnesota		No dissolution shall be granted unless (1) one of the parties has resided in this state, or has been a member of the armed services stationed in this state, for not less than 180 days immediately preceding the commencement of the proceeding; or (2) one of the parties has been a domiciliary of this state for not less than 180 days immediately preceding commencement of the proceeding. (Minnesota Statutes - Chapters: 518.07, 518.09)	personal preference and designated agent, can use advanced medical directive
28	Montana		The district court shall enter a decree of dissolution of marriage if: the court finds that one of the parties, at the time the dissolution of marriage was filed, was a resident of this state, or was stationed in this state while a member of the armed services, and that the domicile or military presence has been maintained for 90 days preceding the filing of the action. (Montana Code - Section 25 - Titles: 2-118 and Section 40 - Titles: 4-104)	designated agent law

	A	B	C	D
29	Nebraska		No action for dissolution of marriage may be brought unless at least one of the parties has had actual residence in this state with a bona fide intention of making this state his or her permanent home for at least one year prior to the filing of the complaint, or unless the marriage was solemnized in this state and either party has resided in this state from the time of marriage to filing the complaint. Persons serving in the armed forces of the United States who have been continuously stationed at any military base or installation in this state for one year or, if the marriage was solemnized in this state, have resided in this state from the time of marriage to the filing of the complaint. The dissolution of marriage may be filed in either county in which the spouse resides and there is a 60 day waiting period after the dissolution is filed until the court will grant the dissolution. (Nebraska Statutes - Chapter 42 - Sections: 342, 349)	written and oral wishes of the deceased must be honored, and designated agent
30	Nevada	x	Divorce from the bonds of matrimony may be obtained by verified complaint to the district court of any county: (a) In which the cause therefor accrued; (b) In which the defendant resides or may be found; (c) In which the plaintiff resides; (d) In which the parties last cohabited; or (e) If plaintiff resided 6 weeks in the State before suit was brought. Unless the cause of action accrued within the county while the plaintiff and defendant were actually domiciled therein, no court has jurisdiction to grant a divorce unless either the plaintiff or defendant has been resident of the State for a period of not less than 6 weeks preceding the commencement of the action. (Nevada Statutes - Chapter 125 - Sections: 020)	designated agent law
31	New Hampshire	x	In order to file for a divorce, the parties must: I. both be residents of the state and the filing spouse must be a resident for a least 1 year prior to filing or; the grounds must have occurred in the state and one of the spouses must be a resident for at least 1 year prior to filing. The divorce shall be filed in the county in which either spouse resides. (New Hampshire Statutes - Chapters: 458:5, 458:6, 458:9)	designated agent law
32	New Jersey	x	Jurisdiction in actions for divorce, either absolute or from bed and board, may be acquired when process is served upon the defendant as prescribed by the rules of the Supreme Court, and: 1. When, at the time the cause of action arose, either party was a bona fide resident of this State, and has continued so to be down to the time of the commencement of the action; except that no action for absolute divorce shall be commenced for any cause other than adultery, unless one of the parties has been for the 1 year next preceding the commencement of the action a bona fide resident of this State; or 2. When, since the cause of action arose, either party has become, and for at least 1 year next preceding the commencement of the action has continued to be, a bona fide resident of this State. (New Jersey Statutes - Title 2 A - Chapters: 34-8, 34.10)	designated agent law

	A	B	C	D
33	New Mexico		The district court has jurisdiction to decree a dissolution of marriage when at the time of filing the petition either party has resided in this state for at least six months immediately preceding the date of the filing and has a domicile in New Mexico. The petition is to be filed in the county in which either spouse reside. Persons serving in any military branch of the United States government who have been continuously stationed in any military base or installation in New Mexico for such period of six months shall, for the purposes hereof, be deemed to have a domicile of the state and county where such military base or installation is located. (New Mexico Statutes - Article 4 - Sections: 40-4-5)	personal preference and designated agent
34	New York	x	Required residence of parties. An action to annul a marriage, or to declare the nullity of a void marriage, or for divorce or separation may be maintained only when: 1. The parties were married in the state and either party is a resident thereof when the action is commenced and has been a resident for a continuous period of one year immediately preceding, or 2. The parties have resided in this state as husband and wife and either party is a resident thereof when the action is commenced and has been a resident for a continuous period of one year immediately preceding, or 3. The cause occurred in the state and either party has been a resident thereof for a continuous period of at least one year immediately preceding the commencement of the action, or 4. The cause occurred in the state and both parties are residents thereof at the time of the commencement of the action, or 5. Either party has been a resident of the state for a continuous period of at least two years immediately preceding the commencement of the action. (Consolidated Laws of New York - Domestic Relations Laws - Article 13 - Sections: 230 and 231)	designated agent law
35	North Carolina		The plaintiff or defendant in the suit for divorce must have resided in the State for a period of six months prior to filing. The divorce may be filed in the either county in which the parties reside. (North Carolina Statutes - Chapter 50 - Sections: 50-8)	irrevocable prepaid funeral arrangement. Can also give health care power of attorney the right to make decisions about funeral, cremation, burial and anatomical donation.
36	North Dakota		A separation or divorce may not be granted unless the plaintiff in good faith has been a resident of the state for six months next preceding commencement of the action. If the plaintiff has not been a resident of this state for the six months preceding commencement of the action, a separation or divorce may be granted if the plaintiff in good faith has been a resident of this state for the six months immediately preceding entry of the decree of separation or divorce. (North Dakota Century Code - Volume 3A - Chapters: 14-05-17 and 28-04-05)	no right to personal preference

	A	B	C	D
37	Oregon	x	The parties may file for a dissolution of marriage in Oregon if: The marriage took place in the state and either party is a resident of or domiciled in the state or at least one party must be a resident of or be domiciled in this state at the time the suit is commenced and continuously for a period of six months prior thereto. A petition for marital annulment, dissolution or separation may be filed only in a county in which the petitioner or respondent resides. (Oregon Statutes - Volume 2 - Sections: 14.070, 107.065, 107.075)	personal preference and designated agent
38	Ohio		The plaintiff in actions for divorce and annulment shall have been a resident of the state at least six months immediately before filing the complaint. Actions for divorce and annulment shall be brought in the proper county for commencement of action pursuant to the Rules of Civil Procedure. The court of common pleas shall hear and determine the case, whether the marriage took place, or the cause of divorce or annulment occurred, within or without the state. Actions for legal separation shall be brought in the proper county for commencement of actions pursuant to the Rules of Civil Procedure. (Ohio Code - Sections: 3105.03)	designated agent law
39	Oklahoma		Either the plaintiff or the defendant in an action for divorce must have been an actual resident, in good faith, of the state, for six (6) months next preceding the filing of the petition. Provided, any person who has been a resident of any United States army post or military reservation within the State of Oklahoma, for six (6) months next preceding the filing of the petition, may bring action for divorce or may be sued for divorce. (Oklahoma Statutes - Title 43 - Sections: 102 and 103)	personal preference and designated agent
40	Pennsylvania	x	Either spouse must be a resident of the state of Pennsylvania for at least six months prior to filing. A proceeding for divorce or annulment may be brought in the county: 1.where the defendant resides; 2.if the defendant resides outside of this Commonwealth, where the plaintiff resides; 3.of matrimonial domicile, if the plaintiff has continuously resided in the county; 4.prior to six months after the date of final separation and with agreement of the defendant, where the plaintiff resides or, if neither party continues to reside in the county of matrimonial domicile, where either party resides; or 5.after six months after the date of final separation, where either party resides. (Pennsylvania Consolidated Statutes - Title 23 - Sections: 3104)	designated agent law
41	Rhode Island	x	No complaint for divorce from the bond of marriage shall be granted unless the plaintiff has been a domiciled inhabitant of this state and has resided in this state for a period of one year next before the filing of the complaint. The divorce would be filed in the county in which the plaintiff resides or in the county in which the defendant resides if he or she meets the 1 years residency requirement. (General Laws of Rhode Island - Title 15 , Chapter 15-5-12)	designated agent law

	A	B	C	D
42	South Carolina		In order to institute an action for divorce from the bonds of matrimony the plaintiff must have resided in this State at least one year prior to the commencement of the action or, if the plaintiff is a nonresident, the defendant must have so resided in this State for this period; provided, that when both parties are residents of the State when the action is commenced, the plaintiff must have resided in this State only three months prior to commencement of the action. Actions for divorce from the bonds of matrimony or for separate support and maintenance must be tried in the county (a) in which the defendant resides at the time of the commencement of the action, (b) in which the plaintiff resides if the defendant is a nonresident or after due diligence cannot be found, or (c) in which the parties last resided together as husband and wife unless the plaintiff is a nonresident, in which case it must be brought in the county in which the defendant resides. (Code of Laws for South Carolina - Chapter 3; Sections 20-3-30, 20-3-60, 20-3-80)	personal preference . Can also designate someone - does not have to be next of kin - to carry out preferences.
43	South Dakota		The plaintiff in an action for divorce or separate maintenance must, at the time the action is commenced, be a resident of this state, or be stationed in this state while a member of the armed services, and in order that each party be entitled to the entry of a decree or judgment of divorce or separate maintenance, that residence or military presence must be maintained until the decree is entered. The divorce may be filed in the county in which either spouse resides. The defendant has a legal right to have the case transferred to his or her county if desired. There is also a 60 day waiting period that must elapse after the date of filing before the divorce will be granted. (South Dakota Laws - Volume 9A - Title 25 - Chapters: 25-4-30, 25-4-30.1, and 25-4-34)	personal preference law and forms that make these preferences legally binding.
44	Tennessee		The spouse filing for the divorce must be a resident of the state at the time the grounds for divorce took place. If the grounds took place outside the state of Tennessee, one of the spouses must be a resident for 6 months prior to filing. The divorce shall be filed in the county in which both spouses reside if they are both residents; or the county in which the respondent resides if he or she is a resident; or the county in which the petitioner resides. (Tennessee Code - Volume 6A, Title 36, Sections 36-4-104 and 36-4-105)	power of attorney to carry out personal preference

	A	B	C	D
45	Texas		A suit for divorce may not be maintained in this state unless at the time the suit is filed either the petitioner or the respondent has been: (1) a domiciliary of this state for the preceding six-month period; and (2) a resident of the county in which the suit is filed for the preceding 90-day period. If one spouse has been a domiciliary of this state for at least the last six months, a spouse domiciled in another state or nation may file a suit for divorce in the county in which the domiciliary spouse resides at the time the petition is filed. A person not previously a resident of this state who is serving in the armed forces of the United States and has been stationed at one or more military installations in this state for at least the last six months and at a military installation in a county of this state for at least the last 90 days is considered to be a Texas domiciliary and a resident of that county for those periods for the purpose of filing suit for dissolution of a marriage. (Texas Code - Family Code - Chapters: 6.301)	personal preference
46	Utah		The court may decree a dissolution of the marriage contract between the petitioner and respondent where the petitioner or respondent has been an actual and bona fide resident for 3 months of this state and of the county where the action is brought. This also applys to members of the armed forces of the United States who are not legal residents of this state, where the petitioner has been stationed in this state under military orders. Unless the court, for good cause shown and set forth in the findings, otherwise orders, no hearing for decree of divorce shall be held by the court until 90 days shall have elapsed from the filing of the complaint, provided the court may make such interim orders as may be just and equitable. The 90-day period shall not apply in any case where both parties have completed the mandatory educational course for divorcing parents. (Utah Code - Sections: 30-3-1, 30-3-18)	designated agent law

	A	B	C	D
47	Vermont	x	A complaint for divorce or annulment of marriage may be brought if either party to the marriage has resided within the state for a period of six months or more, but a divorce shall not be decreed for any cause, unless the plaintiff or the defendant has resided in the state one year next preceding the date of final hearing. Temporary absence from the state because of illness, employment without the state, service as a member of the armed forces of the United States, or other legitimate and bona fide cause, shall not affect the six months' period or the one year period specified in the preceding sentence, provided the person has otherwise retained residence in this state. The divorce may be filed in the county in which either the husband, wife or both reside. (Vermont Statutes - Title 15 - Section 555); For a civil union, residency requirements will be waived if: the parties entered into a civil union in Vermont, neither party's state of legal residence recognizes the couple's Vermont civil union for purposes of a dissolution, there are no minor children born or adopted during the civil union, and the parties file a stipulation with their complaint that resolves all issues in the dissolution action. 15 V.S.A. §1206(b)	personal preference and designated agent
48	Virginia		In suits for annulment, affirmance, or divorce, the county or city in which the parties last cohabited, or at the option of the plaintiff, in the county or city in which the defendant resides, if a resident of this Commonwealth, and in cases in which an order of publication may be issued against the defendant under 8.01-316, venue may also be in the county or city in which the plaintiff resides. (Virginia Code - Title 8 - Sections: 8.01-261)	designated agent law, and statutory duty to comply with wishes of deceased.
49	Washington	x	When a party who (1) is a resident of this state, or (2) is a member of the armed forces and is stationed in this state, or (3) is married to a party who is a resident of this state or who is a member of the armed forces and is stationed in this state. Petitions for a dissolution of marriage, and alleges that the marriage is irretrievably broken will not be acted upon by the court until 90 days has elapsed since the filing and the service of summons on the respondent. (Revised Code of Washington - Title 26 - Chapters: 26.09.010, 26.09.030)	statutory duty to comply with written wishes of deceased
50	West Virginia		In an action for divorce at least one of the spouses must have been a resident of the state for at least 1 year, except if the marriage took place in West Virginia, the 1 year residency requirement is waived. The divorce shall be filed as follows: (a) If the respondent in an action for divorce is a resident of this state, the petitioner has an option to bring the action in the county in which the parties last cohabited or in the county where the respondent resides. (b) If the respondent in an action for divorce is not a resident of this state, the petitioner has an option to bring the action in the county in which the parties last cohabited or in the county where the petitioner resides. (West Virginia Code - Sections: 48-5-201)	advanced medical directive to express funeral wishes and appointed person to carry them out

	A	B	C	D
51	Wisconsin		One of the spouses must a be a resident of the state of Wisconsin for at least 6 months and a resident of the county in which they file for at least 30 days immediately prior to filing for the divorce. A hearing will not be scheduled by the clerk until the expiration of 120 days after service of the summons and petition upon the respondent or the expiration of 120 days after the filing of the joint petition. (Wisconsin Statutes - Sections: 767.05, 767.083)	designated agent law
52	Wyoming		No divorce shall be granted unless the plaintiff has resided in this state for sixty (60) days immediately preceding the time of filing the complaint, or the marriage was solemnized in this state and the plaintiff has resided in this state from the time of the marriage until the filing of the complaint. A married person who at the time of filing a complaint for divorce resides in this state is a resident although his spouse may reside elsewhere. A divorce may be filed in the district court of the county in which either party resides. (Wyoming Statutes - Title 20 - Chapters: 20-2-104, 20-2-107 and 20-2-108)	designated agent law
53				