BASIC ESTATE PLANNING
FOR LGBT CLIENTS

I. INTRODUCTION

In 2011, the Williams Institute at UCLA, using data from the 2010 U.S. Census Bureau, estimated that approximately 3.8% of adults in the United States identify as lesbian, gay or bisexual. That same review suggests that 0.3% identify as transgender.

The 2010 Census indicated there were 626,464 same-sex couples in the United States. Of those, 131,729 identified as married. And, most of same-sex couples were raising children.

The Williams Institute indicates there are almost 1000,000 LGBT adults living in Oklahoma with about a quarter of them raising children.[1]

In January 2013, there were nine marriage equality states. As of June 1, 2015, there are thirty-six[2]. In April 2015, the United States Supreme Court heard arguments in *Obergefell v. Hodges* on the issue of whether the fundamental right to marry applies to same-sex couples. The court is expected to decide that same-sex couples cannot be denied the right to marry and that states must recognize those marriages entered in other states. The decision is expected by the end of June. By July 1, 2015, marriage equality will exist nationwide.

The federal government has recognized same-sex marriages throughout the country since the U.S. Supreme Court's 2013 decision in *United States v. Windsor*[3]. The *Obergefell* decision will complete the process that started with *Romer v. Evans*[4] and *Lawrence v. Texas*[5].

These are challenging times for lawyers representing LGBT clients. The legal issues affecting these clients require innovative and creative responses.

There are an unknown number of civil unions, domestic partnership, registered domestic partnerships and marriages that have never been dissolved and the couples are no longer together. The number of lesbians and gay men who entered into new relationships, including marriages, without dissolving previous relationships is also unknown. All of these unknowns can affect the development of a comprehensive estate plan.

Too many members of the LGBT community believe those earlier marriages "didn't count" because they were not recognized. Others believe the civil unions and domestic partnerships "didn't count" because they were not marriages. Unfortunately, those legally recognized relationships continue to exist and must be dealt with by the parties involved.

Lawyers representing LGBT clients must inquire about previous relationships and ensure they were properly dissolved. Failure to do so can impact taxes, inheritance, beneficiary designations,

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[1] The Williams Institute, UCLA Law School, Los Angeles, CA
[2] The marriage situation remains complicated in: Kansas, Alabama and Missouri
[3] 570 U.S. _____, 133 S. Ct. 2675 (2013)
[4] 517 U.S. 620 (1996)
[5] 529 U.S. 558 (2003)

estate planning and any subsequent marriages.

Impact on Estate Plans

Divorce and dissolution issues impact on estate planning because the earlier marriage or other legally recognized relationship, if not properly dissolved, may interfere with the development of a comprehensive estate plan.

Some lesbian and gay couples married as a "political statement" many years ago and never dreamed it actually "counted." The couple may have ended that relationship and started a new one when they come to see you. Therefore, it is important to ask all lesbian and gay clients if they have ever been married or in a civil union or domestic partnership.

However, they are legal relationships and must be appropriately dissolved. Often the only place to dissolve the relationship is in the state of celebration. Consulting with a lawyer from the state of celebration is advisable.

Also, the time a couple spent in a civil union or domestic partnership may count toward the length of the marriage. That can have an impact on Social Security and other public benefits.

In addition, some states (Delaware, Minnesota, Washington, New Jersey and Connecticut) automatically upgraded civil unions and domestic partnerships to marriages. So, it is possible that a couple traveled to Washington state and entered into a registered domestic partnership then returned home and subsequently split up.

California has an opt-out provision for people in Registered Domestic Partnerships. Illinois allowed couples in civil unions to upgrade for one year following the effective date of the marriage legislation (June 1, 2014).

Automatic upgrades for couples in a Registered Domestic Partnership started in Washington State on July 1, 2014. Couples that are in the process of dissolving their RDP or have one party over age 62 were exempt from the upgrade.[6]

Over the past 10 years, lesbian and gay couples living in nonrecognition states entered into civil unions and domestic partnerships in other states. Those couples may be unaware that the earlier classification changed. Some of those couples may no longer be together but never formally terminated their legal relationship. And some have entered into new relationships. This can create a legal nightmare.

II. BASIC ESTATE DOCUMENTS FOR LGBT COUPLES/FAMILIES

Will
Trust
Designation of Agent with Funeral Instructions
Deeds
Beneficiary Designation
Living Will/Health Care Power of Attorney
HIPAA Authorization
General Durable Power of Attorney

[6] RCW 26.60.100

A. More than a will

Estate planning for LGBT clients involves more than the traditional documents. These clients require life-planning documents as well. They may also be considering starting a family and need to know the legal issues that will arise in that respect. These materials will address the various documents LGBT clients need for their estate plan.

B. Wills and Trusts

Many LGBT clients are estranged from their biological families. In some cases, decades may have passed since the client had any contact with their birth families. Those clients may benefit from a trust. This is particularly true if the client worries that her family may contest the will or challenge her partner's right to inherit the estate.

A trust may be helpful if the couple is raising children and only one of the adults is a legally recognized parent. The probate court may ignore the decedent's nomination of her surviving partner as the children's guardian. The court may select someone from the decedent's birth family even if the child has had no contact or relationship with that person. A trust with the surviving partner as the trustee helps ensure continued contact with the children by giving the partner control of the child's property.

Joint trusts can work for married lesbian and gay couples if they want to combine their separate and joint property. But, keeping separate property in separate trusts helps establish that certain property belongs only to one person.

C. Clauses identifying the relationship

Not all LGBT clients will get married. Like heterosexual couples, some lesbian and gay couples will decide that marriage does not meet their needs or creates more problems than they want to handle.

Including language concerning the testator's relationship with his partner is one way to deal with the situation. This language also covers the client for future developments. Since many clients fail to update their documents on a regular basis, language such as this can be helpful.

Because marriage equality is new, specifying when and where the marriage took place can be used to rebut challenges to a surviving spouse's rights.

Sample Clause #1:

"*I married John F. Randolph on September 14, 2008 in Provincetown, Massachusetts. I will refer to John as my "spouse" and when I refer to "spouse" I mean only him."*

Sample Clause #2:

Clients that identify as "domestic partners," but are not married, should include that language in their estate documents. The following is suggested language:

DOMESTIC PARTNER: Susanne E. Cutler is my closest friend and Domestic Partner and the primary beneficiary in my will. I share my life with her. [We jointly own our home]. We may elect to marry and if we take that step I wish this estate plan to remain in full force and effect. I enter

into this will [and estate plan] in contemplation of that later marriage. I make this will [trust and estate plan] in contemplation of such a future circumstance and my will shall remain effective under Oklahoma law.

D. Naming Beneficiaries

Clients must be encouraged to name beneficiaries on all assets where that is an option. This is one area where a client can retain significant control over her assets and prevent anyone from challenging her decisions. The beneficiary designation will control who receives the assets and is not trumped by the individual's will.

> **Practice Tip:** Make sure the client names beneficiaries. This includes having the client bring in copies of their most recent designations, listing all assets where beneficiaries are allowed and helping clients obtain the beneficiary designation forms.

Some clients made beneficiary designations many years earlier and those may no longer reflect their wishes. Clients should execute a new beneficiary designation form. This creates a useful paper trail that is up-to-date and removes questions about the client's intentions.

Real estate, investments, insurance are some of the assets that can pass by way of a beneficiary designation.

Twenty-four jurisdictions[7] allow "transfer on death" designations for real estate. Rather than risk gift tax consequences on significant assets, like a house, an unmarried client can execute the TOD affidavit and name his partner as the beneficiary.

With the implementation of marriage equality, married same-sex couples benefit from the marriage exemption under the Internal Revenue Code.

The house passes to the beneficiary, outside probate, and cannot be challenged by disgruntled heirs. Meanwhile, the grantor retains full control over the property during her lifetime and the beneficiary receives no present interest.

Some 401(k) plans restrict beneficiary designations to "spouse." Recent guidance from the U.S. Department of Labor has clarified that retirement plans recognizing "spouses" must include same-sex spouses.

Review the plan's provisions to determine how it works and make sure the client understands them. Knowing the plan specifics now means there will be no surprises later.

Under ERISA, the plan administrator pays the proceeds to the named beneficiary. State law does not apply. If the plan participant failed to name a beneficiary, the "spouse" is considered first. Knowing what the plan provides will help determine what steps the client needs to take.

[7] AK, AZ, AR, CO, DC, HI, IL, IN, KS, MN, MO, MT, NE, MV, NM, ND, OH, OK, OR, SD, VA, WA, WV, WI and WY

E. Executor

Most lesbian and gay couples name each other as executor. An alternate executor should also be named. If there is no named alternate, the probate court will name an administrator and that person may not be one the testator wants.

In some situations, the client may prefer naming someone other than their spouse/partner. Because most of these estate plans are prepared via joint representation, both clients will know of the other's decision. Some decide to select a friend, relative or corporate entity because the estate is complex or the partner/spouse is unable or unwilling to serve as Executor. This is another reason that naming an alternate is so important.

F. Guardians

Among many gay and lesbian couples that are raising children, there is only one legally recognized parent. The other partner may also have a strong parent-child relationship but state law does not recognize it.

A **guardian clause** in a will is particularly important for lesbian and gay couples raising minor children.

The guardian clause can include language for the testator to grant consent to the surviving partner to adopt the children. This rebuts an argument that the deceased parent would oppose such an adoption.

"I name my partner, Elizabeth R. Anderson, as guardian of our children, Robert and Emily. I appoint her guardian of their person and estate.

We have raised these children together from their birth. I consider her their parent. Ohio law does not appear to allow second parent adoption or we would have pursued that avenue. I waived my constitutional rights to the full care, custody and control of our children in favor of Elizabeth during my lifetime. I want her to continue to raise our children. I consent to Elizabeth adopting Robert and Emily. I ask that any probate court recognize this declaration as my consent to the adoption. It is in our children's best interest that they continue to be raised by their other parent, Elizabeth R. Anderson.

We executed a Shared Custody Agreement on December 10, 2003 after Robert was born. We amended the Agreement after Emily's birth. That Agreement was adopted by the _____ Court on August 7, 2009."

In situations where there is a fear the non-biological/adoptive parent will not be appointed as guardian, use a trust. Placing the children's inheritance into a trust will allow the surviving parent to continue having contact with the children. Think of this as the "Auntie Mame" clause--she got the kid; the bank controlled the money and maintained access to the kid.

An additional clause to consider names a **"bridge guardian."** This person takes the children until the court names a guardian. For lesbian and gay couples, this clause could prevent the children being removed from their home when their "legal" parent dies and placed in foster care or with relatives they do not know..

It is important to maintain continuity for the children. A bridge guardian may be one tool to accomplish that purpose.

G. Simultaneous Death & Survivorship Clauses

Simultaneous death clauses serve to clarify inheritance when the spouses/partners die at the same time. This clause helps avoid time-consuming and expensive challenges and court proceedings. The following language is very basic. The clause's provisions can be as explicit as the testator wants. These clauses are sometimes referred to as *Titanic clauses* because they came into vogue after that ship sank and there were many simultaneous deaths.

Sample Simultaneous Death clause:

If my partner/spouse Anne Kilbane and I should die simultaneously, or in a common accident, or under circumstances that the order of our deaths cannot be definitely established, it shall be presumed that I survived her (ALT: she survived me) and my estate shall be disposed of in accordance with this presumption.

It is also important to include a time frame for survivors. The time frame can vary. Here is some sample language: *No person shall have survived me if they die within 30 days of my death.*

H. Prevalidation of Will/Trust

Ohio[8], Alaska, Arkansas, Nevada and North Dakota allow you to prevalidate a will. Delaware[9] allows prevalidation of trusts.

These laws give prospective heirs or beneficiaries the opportunity to challenge the will or trust, in court, while the trustor or testator is alive. Once this is done, there can be no post-mortem challenge to the documents. In cases where the testator or trustee is estranged from his family, this may be a worthwhile tactic to use.

When the client fears a will challenge, this statute provides excellent protection.

The validated will is placed in a sealed envelope and deposited with the court. The testator is the only person with authority to remove it from the court. But, the validation is cancelled if the testator removes the will. Any new or modified wills must also go through the pre-validation process under the statute. A validated will cannot be contested after the testator dies.

I. Designation of Heir

Ohio appears to be the only state that has a Designation of Heir statute[10]. This statute allows a person to designate someone not named in the intestate succession statute as an heir-at-law. The named person falls into the "children" category. After one year, the testator may remove the designated heir if she chooses.

This statute can provide protection to lesbian and gay couples who fear a will contest. The designation cannot be changed for the first year after it goes into effect.

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[8] Ohio Rev. Code § 2107.081-085
[9] Del. Code tit. 12
[10] Ohio Rev. Code § 2105.15

J. Living Will and Health Care Power of Attorney

Each state has its own form that is recognized by health care providers. These forms should also be honored outside the client's home state. New federal Medicare regulations require every medical or health care facility that receives federal funds to honor the directives.

A more expansive document is an **Advanced Health Care Directive**. This document allows the client to specifically define the type of treatment she wants. California[11] has a form that includes information about the person's primary care physician, the agent's authority and when it becomes effective, the agent's post-death authority and end-of-life decisions. This form can be adapted and added to any Living Will and Health Care Power of Attorney.

Even though these documents are included in an estate plan, the client needs to discuss the choices with her doctor, especially if the client has a terminal illness or other significant medical condition.

The client should include as much information as possible in the Living Will and Health Care Power of Attorney to be sure her wishes are carried out and everyone knows what she wants done. Clients need to know this is not a time for secrecy or confidentiality. It is a time for absolute candor with the family.

Carrying these documents when travelling is important. Using electronic copies or placing them in a cloud-based environment (like Dropbox, iCloud, Google) makes it easier. Leaving copies with people at home is also helpful.

In 2010, President Obama ordered the Department of Health and Human Services to issue federal regulations requiring hospitals to guarantee the right of patients to determine who visited them.

In November 2010, HHS published the final rules.[12] Lesbian and gay individuals can name their partners as the persons with the right to visit them in hospitals. These rules apply to all medical and health facilities that participate in Medicare or Medicaid programs.

Even with these rules, there is no guarantee that hospital staffs or a patient's biological family, will honor them. A recent situation in Missouri brought that fact home. A family refused to allow the patient's partner access. The hospital supported the family's decision and ignored the Advance Directives.

Clients must be aware that all the legal documents available may not prevent ignorant people from refusing to accept them.

Compassion and Choices[13] is a non-profit organization that provides additional documents that allow a person to memorialize end-of-life wishes and decisions. The organization provides forms that provide for specific end-of-life treatment, instructions for situations involving dementia and being admitted to a healthcare facility that refuses to honor a person's wishes. These forms can guide clients as they consider these matters.

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[11] ag.ca.gov/consumers/pdf/AHCDS1.pdf
[12] CFR Parts 482 and 485
[13] www.compassionandchoices.org

K. Physician Order for Life Sustaining Treatment & Transportable Physician Order for Patient Preferences

Living Wills and Health Care Powers of Attorney are the starting point for end-of-life discussions. Most state sanctioned advance directives do not address the advances in medical care that exist. The language is minimal at best. There needs to be a better and more in-depth conversation between people and among family members.

A recent example involved Casey Kasem. He had a terminal illness and continued treatment would not enhance his life--it would keep him alive. Half the family wanted to terminate treatment; the other half wanted to continue. There was a court battle, his daughter was named his guardian and she ended the treatment. He died in June 2014. The family rift may never heal. There needs to be a way to prevent these family battles.

There is a movement in the country to have people sign a **Physician Order for Life Sustaining Treatment (POLST)**. The document allows a person to spell out the kind of medical care she wants when she becomes too ill to communicate those wishes.

The POLST can be a one-page document that asks what you want to do if you stop breathing--do you want CPR. It also gives you the right to declare how much medical intervention you want--hospital and ICU, hospital but no ICU or no hospital. The form also asks about feeding tubes--yes or no.

A doctor or other provider signs the POLST. It overrides an EMT's legal obligation to provide treatment or other emergency care. This is not a document for healthy people. It is designed for end-of-life instructions.

A Transportable Physician Order for Patient Preferences (TPOPP) is designed for people with life-limited conditions or serious illnesses. Kansas and Missouri are developing these forms. Like a POLST, the TPOPP allows a person to indicate the types of medical treatment she wants at the end. They use a shocking pink form for these instructions.

These alternatives need to be considered. Even if your home state has not adopted either of these procedures, there is nothing to stop an individual from using one to clearly set forth their wishes and expectations. Not everyone wants to live forever.

L. Designation of Agent

The Designation of Agent form allows a lesbian or gay couple to name each other as the person to make funeral arrangements, pick up personal effects, take control of the remains after death and decide whether to authorize an autopsy. The form may also include language designating the agent as the person who controls hospital visitation. (Attachment #1)

M. HIPAA Authorization

The Health Insurance Portability and Accessibility Act is a federal law that prohibits medical personnel from discussing a patient's condition with anyone other than those authorized by the patient. Clients should execute this type of authorization as part of their Advance Directives. The client can limit the authorization to a partner, family member or other person.

Medical and hospital personnel continue to exhibit a cavalier attitude toward this law and the consent requirement. This seems especially true when "blood relatives" are present and the patient identifies as gay or lesbian. Doctors will discuss the patient with a "blood relative" while refusing to speak with the authorized representatives, including the patient's partner or spouse.

There is no individual cause of action for HIPAA violations. A complaint may be filed when the law is violated. There are no provisions in the law for damages or costs. However, a creative lawyer can find a way to make life difficult for a hospital or doctor that refuses to follow the law. (Attachment #2)

N. Power of Attorney

Some financial institutions require you to use their forms to establish a power of attorney. If a client has accounts with a particular institution or company, check to see if they have their own form and whether they will accept any other form of POA.

Failure to use the proper form may result in a company refusing to acknowledge an agent's authority over the account. If the account holder is disabled and the POA is deemed invalid, the only alternative may be a guardianship or other court action.

The **General Durable Power of Attorney for Finances** is generally recognized as an important part of the estate plan for LGBT clients. Because it is so powerful, clients need to carefully consider whom they name as the agent and successor agents.

If the couple married in a recognition state consider adding authority to transfer assets for Medicaid purposes, alter ownership of non-home assets to income streams, adjust Social Security provisions to claim or suspend survivor benefits and strategies regarding IRA and pension status.

Including a **guardian clause** in the POA allows the client to name the person she wants appointed if necessary. Having this clause gives evidence the client considered the matter. In lieu of merely naming someone, include language that explains why the person is being named.

O. Real Estate & Deeds

Many lesbian and gay men own real estate. When they enter into a relationship there seems to be an insatiable urge to put their partner's name on the deed--even if there is a mortgage--and rarely before speaking with a lawyer. If the clients jointly own property, find out how that happened. They may have created a gift tax issue.

For houses that have a mortgage, adding a non-spouse, without the written consent of the mortgage company can trigger the "due on sale" clause in the mortgage. That means the mortgagee can call in the entire note within 30 days. Any transfer constitutes a sale for purposes of this clause. Clients do not consider this situation when adding another name to the deed.

Drafting a document that reflects the contributions each made to the purchase of jointly held real estate will help defuse disputes later on. If the couple is unmarried, it will also be credible evidence for the IRS.

The IRS will presume 100% of the property to be in the estate of the first to die--unless the surviving partner can rebut that presumption. This is no longer a concern for married same-sex couples.

This concern may be less important with the current federal estate tax exemption in excess of $5 million. However, many states have estate tax laws and those laws may impact couples that own property outside Oklahoma.

The other issue that can arise involves gift taxes. Many same-sex couples add their partner to a deed without (1) considering the gift tax consequences; (2) filing a gift tax return or (3) notifying the mortgage holder before transferring an interest. The latter may be the most problematic.

Lenders include a "due on sale" clause in the contract. When the interest is transferred the clause is triggered. The mortgagee is able to immediately call in the note. This usually comes as a surprise to couples. Married couples should seek the lender's consent and it is (usually) readily given because of a spouse's dower rights. Unmarried couples will not be given the same consideration.

When clients present jointly held real estate be sure to ask how it got that way. And, take remedial steps.

A Transfer on Death deed (TOD) allows real estate to transfer to the named beneficiary outside of probate.

The following states permit this type of deed: Arkansas, Arizona, Colorado, Indiana, Kansas, Minnesota, Missouri, Montana, Nevada, New Mexico, Ohio, Oklahoma and Wisconsin. This may benefit clients that have real estate in one of these states.

Under a TOD deed or affidavit, there is no present interest in the real estate, so the beneficiary has no current rights to property and it does not constitute a gift. The deed can be revoked during the owner's lifetime.

Transfer on Death vehicle registration is similar to the TOD for real estate. The vehicle is transferred to the beneficiary outside of probate. Not all states have this type of registration.

The TOD Security Registration Act[14] allows owners of securities to transfer them to the named beneficiary outside of probate. Louisiana and Texas are the only states that have NOT adopted this uniform act.

As with the TOD for real estate, these documents can be revoked or changed at any time.

In some situations, the couple may benefit from holding property as Tenants in Common rather than Joint with Rights of Survivorship. Having the discussion with the clients, and explaining the difference, is part of the estate planning process. A Tenants in Common deed allows the clients to hold unequal shares in the property. If their individual contribution is unequal, this may be an optimal solution. Plus, as the contributions equalize over time, they can execute new deeds reflecting that fact.

Should it be determined that a Tenants in Common deed is preferable, the clients may also execute a Transfer on Death Affidavit. Each share can then be passed on after death without subjecting the property to probate.

[14] http://www.uniformlaws.org/Act.aspx?title=TOD%20Security%20Registration%20Act (last viewed April 2014)

P. Payable on Death Accounts (POD)

Payable on Death Accounts are a simple way for clients to remove assets from probate. The client/account owner designates those who will take the money after the owner dies. The client can be directed to her bank to create this type of account.

Creating a POD account usually involves checking a box and signing the card. The named beneficiaries have no current ownership interest in the account and cannot access it. This does not make the beneficiaries joint owners of the account.

The beneficiaries provide a certified copy of the death certificate and the bank issues each person named an equal share.

Q. Funeral Arrangements

Some state laws allow an individual to name anyone they want to make funeral arrangements. Most states allow only the decedent's immediate family to make funeral arrangements. In the more restrictive states, the family has the right to overrule or ignore the decedent's wishes. They may also exclude the surviving partner from the memorial service and burial.[15]

R. Digital Assets

Everyone lives in a digital maze. Clients need to address the future of their digital identities and provide the information that allows their survivors to access those digital accounts. Taking a password to the grave is not a wise choice. Whether it is Facebook, Google, Instagram or online banking, clients need to write down the access information. Not doing so may mean some assets are forever lost.

S. Estate Planning Where One Spouse/Partner Is Not a U.S. Citizen

Foreign national spouses do not receive the same consideration from federal law as given to spouses that are U.S. citizens. These restrictions apply to married same-sex couples.

U.S. citizens or legal residents can transfer $145,000 (2014) to a non-citizen spouse without incurring gift or estate tax implications. Anything over that amount will be counted against the unified credit, currently at $5.34 million.

The foreign national spouse may not qualify for the marital deduction. Without it, there may be gift tax consequences on gifts made to the non-U.S. citizen spouse. Estate taxes continue to be an issue in some states and if the couple owns property in states that do have estate or inheritance taxes, there may be tax liability.

The marital deduction for non-citizen spouses ended in 1988. Congress was worried the surviving non-citizen spouse would return to their native country with the wealth they received tax-free. And, when they died, the IRS would not be able to get anything from them. Congress saw this as a loophole that would benefit wealthy couples.

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[15] *Bridegroom*, 2013 Tribeca Film Festival Best Picture: https://www.youtube.com/watch?v=RQIIwddt3N4

At the same time, Congress figured the surviving spouse would not leave the country and added a provision to the Internal Revenue Code that restored the marital deductions when bequests were made to a *Qualified Domestic Trust*. This trust is designed to allow the IRS to collect estate taxes. With the current federal estate tax at $5.34 million, most couples will not owe estate taxes. But, a QDOT remains the only way to preserve the marital deduction for non-citizen spouses.

There are rules and requirements that must be met for the trust to qualify for the marital deduction. The specifics are beyond the scope of this presentation. Estate taxes, if any are owed, are deferred until the surviving spouse dies. If she becomes a citizen the trust may distribute the principal without any estate tax liability.

Some of the questions to consider in this situation are:

1. Should you use a QDOT Trust?
2. Should the couple own property jointly? If so, how much?
3. How does the spouse's non-citizen status affect his beneficiary standing for life insurance, 401(k) accounts, IRAs or annuities?
4. Can a life insurance trust (ILIT) resolve any of the planning issues?

Now that married same-sex couples are treated the same under U.S. immigration law, estate planning issues involving citizen and non-citizen spouses may increase. The exemption amount for non-citizen spouses is significantly less than that for a citizen spouse. Consulting with an experienced tax professional is a prudent move.

T. Assisted Reproductive Technology, Posthumous Children and Consent to Parent

Some of the most fascinating issues are being raised in connection with assisted reproductive technology. Aside from the parenting and property issues, ART is having an impact on the estate planning process.

The intricacies involved became clearer in a Texas intestacy case[16] involving a two-year old little boy who inherited 11 frozen embryos from his deceased parents.

The parents were murdered and had no will and left no instructions concerning the disposition of the stored embryos. The Master in Chancery recommended that the clinic retain the embryos in storage until the child turns 18 at which time he will have the right to decide what to do with them. The estate will remain open until the child turns 18. The estate remains responsible for paying the storage costs. What happens if the storage costs exceed the estate assets? Do the needs of the surviving child trump those of the frozen embryos? If they are "property," can they be sold to provide for the existing child?

And, what happens when this heir turns 18? If he decides to use the embryos to create siblings, will they be entitled to inherit from the parents? Do those future heirs have a claim on the estate?

These questions remain unanswered but point out the problems that stored genetic materials can cause.

[16] *In the Estate of Yenenesh Abayneh Desta, Deceased*, No, PR 12-2856-1, Probate Court No.1, Dallas County, Texas.

Many same-sex couples use assisted reproductive technology to start families. Oklahoma law requires that a licensed physician perform the procedure when ART is involved[17]. The intended parents must consent, in writing, and the doctor must act to file the consent with the appropriate court.

Definitions become very important for clients who use ART. Defining "issue" and "descendants" to include any children, grandchildren or subsequent generations is important. Failure to do so can result in those children being deemed ineligible for a share of a decedent's estate.
And, if there is a successful will contest, an intestate decedent may find those offspring ineligible to receive Social Security surviving child benefits. The state intestate succession statute controls who is included.

The U.S. Supreme Court addressed this issue in *Astrue v. Capato*[18]. The case dealt with the right of a posthumously conceived child to qualify for Social Security survivor benefits. The Social Security Administration's position is that such children qualify for benefits only if they are entitled to inherit from their father under the state's intestacy statute. In a 9-0 decision, the Court agreed with the SSA's interpretation of the Social Security Act.

Children that are conceived and born after a parent dies must demonstrate eligibility to inherit under state law or satisfy a statutory alternative to the requirement. The Act's core purpose is to protect family members that depended on the decedent's income. This decision applies to all children including those born using ART techniques.

Under the Social Security Act, a child is a legal dependent and entitled to benefits if the deceased parent legally recognized the child, the parent was fully insured, the child is under 18 and was dependent on the decedent at the time of death. A posthumous child cannot meet those statutory requirements.

The decision means that a posthumous child's right to receive SSA survivor benefits will depend solely on that child's right to inherit under the state's intestacy law. Intestacy laws vary by state and those variances affect a posthumous child's entitled to these federal benefits.

The only way to overcome the Court's unanimous decision is for Congress to amend the Social Security Act and given the current state of inertia in Washington any such action is remote.

Posthumous children have the potential to affect the distribution of estate assets and the closing of an estate. Further, ART techniques are creating situations that make identifying a decedent's heirs difficult. A posthumous child's status is important because of the possibility that others left property "to the children" of the father in a will or if a child might me entitled to take from the estates of the father's relatives who die intestate[19].

Most states have not addressed these issues. Eleven states: Wyoming, Washington, Texas, Delaware, California, Ohio, Louisiana, North Dakota, Utah, Virginia and Florida have enacted statutes concerning the inheritance rights of posthumous children. Ohio's statute, O.R.C. § 2105.14 states that an intestate's descendants conceived before the person's death but born after are entitled to inherit. Any child conceived and born after the decedent's death cannot inherit.

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[17] 10 OS §556 (A)(1)
[18] 566 U.S. ____, 132 S.Ct. 2021, 182 L.Ed.2d 887 (2012)
[19] See *In re Estate of Kolacy*, 754 A.2d 1257 (N.J. Super. Ct. Ch. Div. 2000).

Some of those states ban a posthumous child from receiving an intestate share unless specific conditions are met: the deceased consented to have children using his genetic material, there is written evidence, the child must be conceived within a set time after death and the prospective mother must be the surviving spouse.

The intestacy situation must be addressed in light of property issues: (1) Did the decedent store genetic material. (2) Who is entitled to inherit that property? (3) Did the decedent make arrangements for the disposition of the material after he or she died? (4) Did the decedent intend to produce a child from the stored genetic material? These questions will undoubtedly lead to other questions and issues that have not yet been considered.

Surviving spouses have an advantage in the intestacy process because there is a presumption that a deceased spouse would want the surviving spouse to receive a portion of the estate. And, following that assumption, it is likely that a surviving spouse can make a legitimate claim to the stored genetic material.

This assumption may also play out in cases where the decedent has no surviving spouse or children and the parents want to make all decisions concerning the disposition of the estate assets. Those assets would include the stored genetic material. The number of cases involving requests to extract sperm from deceased men is increasing--from surviving spouses, partner, girlfriends and parents. Without statutory guidance, the courts are figuring out how to resolve these requests.

Because state legislatures have failed to resolve the issue of whether a posthumous child can inherit from a decedent, the courts have stepped in to fill the void. The rationale used by most courts is a balancing act: the rights of the posthumous child to inherit, the state's interest in an orderly probate process, the rights of the existing heirs and the decedent's stated intent or preference. It must be noted that the existing case decisions deal with male decedents. However, the same arguments can be made for female decedents who stored eggs or fertilized embryos.

There is a need for finality in the probate process. Most of the cases deal with children who were actually born after the parent's death. A more difficult question deals with the right of a surviving spouse, partner or parent to litigate in an effort to keep an estate open pending a future conception and birth. Because probate can be a difficult and expensive process, states are reluctant to leave a case open indefinitely. A decedent's existing heirs would be denied their inheritance pending the possibility of another heir being born at some point in the future.

The Supreme Courts in New Hampshire, Arkansas and Michigan have decided in the past few years that posthumous children do not qualify to inherit under the state intestacy statute because they were not considered "in being" when the decedent died[20].

California, Colorado, Iowa, Louisiana, North Dakota, Texas and Virginia provide intestate succession rights to posthumous children with certain conditions.

Iowa requires a genetic relationship between parent and child, written consent signed by the decedent and the child must be born within two years of the parent's death.

[20] See, *Eng Khabbas v. Commissioner of Social Security*, 930 A.2d 1180 (N.H. 2007); *Finley v. Astrue*, 270 S.W.3d 849 (Ark. 2008); *Mattison v. Social Security Commissioner*, 825 N.W.2d 566 (Mich. 2012). In each case the posthumous children were applying for Social Security survivor benefits.

Louisiana law allows the child to be born within three years of the parent's death and allows other heirs to challenge the inclusion of a posthumous child.

North Dakota treats a posthumous child as a life in being if in utero up to 36 months or born within 45 months after the decedent's death.

In Virginia, intestate succession is permitted if the embryo is implanted before the physician is notified of the death or the decedent consented, in writing, to becoming a parent before implantation.

1. Consent to Be a Parent

The Uniform Parentage Act, Section 707 requires written consent to be a parent of a posthumous child. In states that adopted this section, probate is not delayed if there is no written consent.

Colorado, Alabama, Texas and Utah require written consent if the spouse dies before the eggs, sperm or embryo is implanted. Delaware, Washington and Wyoming adopted the 2002 version of the UPA's Section 707 that applies to any individual rather than being limited to a spouse who gives written consent. New Mexico and North Dakota adopted a hybrid approach and use language from the 2000 and 2002 versions. As a result, it is unclear whether those state laws apply only to married couples or to unmarried persons as well.

Utah's Supreme Court decided that a Semen Storage Agreement did not satisfy the consent requirement[21]. And, Florida requires the decedent to specify that posthumous children are included in the will. No other written consent is recognized.

Colorado and North Dakota allows consent to be proven either by a writing or by clear and convincing evidence. And, the child is considered in gestation at the time of death if the pregnancy exists no later than 36 months or born no later than 45 months after the decedent's death.

Connecticut and Maryland require written consent. And, Connecticut requires that the child must be in utero no later than one year after the decedent's death. Maryland requires the child to be born within two years of the death and does not require that the decedent be married.

For estate planning purposes, it is essential that the testator clearly state whether they consent or intend to become parents after they die. This consent needs to be in writing to forestall any disputes or misunderstanding.

The will or trust must contain clear language indicating whether postmortem children will be included in the definition of "heirs" or "descendants" and whether the testator intends those children inherit. Further, the estate plan documents must clearly establish the length of time an estate shall remain open pending the birth of a postmortem child.

2. Postmortem extraction of eggs and sperm

Now that it is possible to extract eggs and sperm from a deceased individual or one in a persistent, vegetative state, estate planners must consider these possibilities when drafting estate documents. There is a finite amount of time available to perform this extraction from a decedent.

[21] See, *Burns v. Astrue* 289 P.3d 551 (Utah 2002).

But consider the ABA Model Act on Assisted Reproduction that states that, except in an emergency (§205(2)), gametes or embryos shall not be collected from a deceased or incompetent person without consent given (§102(33)) before death or incompetency or expressly authorized by a fiduciary with the authority to give such consent (§205(1)).

Discussing this possibility with clients is becoming a standard part of estate planning. Many clients may not have considered the idea and may discount it out of hand. Elderly clients may wonder why it is necessary to discuss the matter since they are beyond childbearing years. However, it is important to discuss the matter if the clients have children or grandchildren for whom they are providing. Younger couples also need to consider the matter in light of the current state of medical science as well as future advances.

Consider the matter in light of the provisions of the Uniform Probate Code. Section 2-120 creates a rebuttable presumption that the decedent consented to be a parent if he or she was married at the time of death and no divorce was pending and the surviving spouse conceived the child within 36 months or gives birth within 45 months after death. There is no requirement that the decedent had deposited the genetic material before death.

Because time is of the essence in an extraction scenario, it is incumbent upon the lawyer to determine the decedent's intent concerning postmortem extraction. Was there consent? Was there ever a discussion? An Iowa court determined that the decedent's execution of an organ donor form created implied consent to the retrieval of sperm following the donor's death[22].

3. Financial Considerations

Situations involving postmortem extraction raise additional issues such as who pays for the extraction. It is unlikely the decedent's health insurance will approve the bill.

Clients must also consider other post-mortem questions. Is the sperm, once extracted, an estate asset subject to probate? Is the estate liable for the expenses involved? If it is property, are estate creditors able to submit a claim and argue that the genetic material should be sold to pay the decedent's debts? The next question is whether the estate must remain open pending the birth of a child and for how long. Must other heirs wait for their inheritance until the posthumous child is born? Who pays the expenses of keeping the estate open? Does the executor have a fiduciary duty to existing heirs or to them and the yet unborn child?

How does a testator address these financial issues? Do all men need to specify their wishes concerning postmortem extraction? Do women need to do so as well?

The Hecht case in California addresses the issue of cryopreserved genetic materials and whether they are estate assets. That case also raises the issues of who inherits the material and who is responsible for paying the storage bill.

States that have no laws addressing whether a posthumous child should inherit generally consider whether keeping the estate open would pose an unreasonable burden on the orderly administration of the estate or the other heirs.

[22] See, *In re Daniel Thomas Christy,* No. EQVO68545 (Sept. 14, 2007).

V. LIFE PLANNING DOCUMENTS

Domestic Partnership Agreement
Pre-nuptial Agreement/Post-nuptial Agreement
Shared Custody/Parenting Agreement
Egg/Sperm Donor Agreement

A. Relationship Agreements

Representing LGBT clients in estate planning means lawyers must also be conversant with family law issues. There is significant crossover between these areas of law and few issues are mutually exclusive.

Clients need an understanding of the family law issues in order to appreciate the complexity of the relationship. State law is not changing as rapidly as needed to keep up with recognition of nontraditional families. Lawyers must be ready to explain things to clients.

PRACTICE TIP: Do not mention the parties' sexual relationship. Doing so can invalidate the entire agreement. The court may find a "meretricious relationship" and void the agreement as against public policy.

B. Domestic Partnership Agreements (DPA); Prenuptial Agreements

Domestic Partnership Agreements can be an important part of the estate plan for married and unmarried same-sex couples. This document reflects the parties' intentions concerning their relationship. It is also a vehicle to provide the mechanism by which the couple may end their relationship. Mediation clauses allow the clients to agree to resolve disputes without resorting to costly litigation or arbitration.

These agreements are often negotiated, drafted and signed after the relationship is in place. Some take the form of "property agreements" and do not reflect details concerning the couple's daily routines.

Prenuptial agreements are a new development within the LGBT community. These documents while similar to DPAs, must predate a marriage. Each party is required to disclose all assets. Failure to do so can nullify the agreement and prevent enforcement. A prenuptial agreement can provide for a distribution of assets in a cost effective and fair manner.

Independent counsel must represent both prospective spouses. One lawyer should not represent both parties. Without separate counsel, a judge may void the agreement if the unrepresented party raises questions later. Having two lawyers involved results in less chance the agreement will be declared unenforceable and neither party will have a viable claim for "duress."

The first step with these types of agreements is for the couple to discuss the agreement between themselves. Giving them a checklist of things to consider or a questionnaire can be helpful.

1. **Some issues to address in the agreements.**

- Describe jointly held property, if any, including how property purchased in the future will be titled. If the couple has purchased real estate together explain each person's contribution to the purchase of the property. Include the down payment, maintenance

costs, property taxes, insurance and utilities;

- Identify the property each party brings to the relationship. This can be done by attachment to the main document. Have each party identify, as specifically as possible, their personal property, real estate, investment and retirement accounts, bank accounts and inheritances.

- Include a provision for gifts between the parties;

- Describe how real estate will be divided upon sale or termination of the relationship (appraisals, refinancing and procedures to establish current fair market value);

- Include provisions for ending the relationship. If the parties are married, discuss how they will terminate the marriage. The couple can consider whether mediation, arbitration or collaborative law is a better option and include it in the agreement;

- Provide for the death of either party during the relationship or during the process of dissolving the relationship;

- Full disclosure is essential. If one party fails to comply with the full disclosure requirements, she may find that a court refuses to enforce any part of the document;
- Confidentiality and privacy provision;

- Changed financial circumstances and how it affects the parties' financial agreement;

- Include an agreement about responsibility for individual and household expenses, debts, etc.;

- Describe how inherited property or gifts received during the relationship will be treated;

- Custody, visitation and support for any pets;

- If there are children refer to and incorporate the agreement concerning custody, support and visitation;

- If the couple is unsure whether they will have children, include a provision allowing the parties to revisit the issue later. For those couples that plan to start a family, include language addressing how they intend to proceed: IVF, surrogacy, known/unknown donor; egg donor, etc.;

- Provisions for current and future support

The prenuptial is companion agreement for a shared custody or co-parenting agreement, surrogacy agreement (gestational or traditional) or a Donor Agreement. Recent cases show the error of couples that decide to save money and go the DIY route.[23]

[23] Kansas "Craigslist" case: no lawyer; no doctor = donor is the father & ordered to pay child support; Texas Gestational (but we're really good friends) case: no lawyer, no written contract = gestational surrogate declared the mother & father's same-sex partner is left with no parental rights.

C. Joint Representation

Joint representation in estate planning is common. Most couples, straight and gay, ask the attorney to provide services to both. Rarely does a couple want to hire separate counsel to prepare their estate documents. Joint representation is an ongoing matter of concern for lawyers representing lesbian and gay couples.

The issue of joint representation is an ongoing debate within the LGBT legal community. In most cases, the clients will not seek separate counsel. Therefore, we must have the language in our retainer agreement and discuss the matter with clients.

The key is to have an explicit Joint Representation letter drafted. Review it with the clients and make it clear that the lawyer will withdraw from the matter if a conflict arises. Make it clear that no secrets will be kept from the other partner. Have both partners and the lawyer sign the letter and give copies of the letter to each one. Including a provision that specifies both clients are waiving any conflicts that may exist by having one lawyer represent both in the process.

The agreement must spell out the limitations and terms of the representation. Discuss the parameters under which you are operating as the attorney. What is the scope of the work the attorney will perform? What is the fee? Specify the clients' responsibilities regarding cooperation and providing information and documents. And determine under what circumstances the agreement is deemed completed.

Review the agreement with the client at the earliest point. Each one must understand that, if a conflict comes up, you will withdraw and cannot represent either party.

Document all calls, emails or other communications you have with the clients. Communicate with both simultaneously. Do not meet with either individually. Tell them that you cannot keep secrets from the other. Whatever one tells you, the other will know.

Joint representation is not recommended when pre-nuptials are involved. If the couple wants the agreement, they must have separate counsel.

D. Family Issues

Lesbian and gay couples must devote considerable time, effort and resources when starting a family. The proverbial "one-night stand" does not apply when it comes to pregnancy.

1. Artificial Reproductive Technology (ART)

Artificial Reproductive Technology and surrogacy are specialized areas of law. It may be worthwhile to bring in an experienced lawyer to assist you in the process.

ART requires the couple to locate a donor, usually through a reproductive clinic. This is an expensive and time-consuming process. Using a legitimate clinic is in the client's best interest. When clients contract with a clinic for ART, they sign a clinic-prepared agreement. Clinics are notorious for downloading agreements from the Internet or using the tried and true "cut and paste" school of drafting. Encourage clients to bring the contract for review before they sign it. They can negotiate the terms and include or exclude clauses that do not apply.

2. Known v. Unknown Egg/Sperm Donors

Some lesbian couples may decide to use a known sperm donor. This is never a good idea. A known donor creates an identifiable biological father. This can preclude the biological mother's lesbian partner from achieving even a modicum of legal recognition.

The biological father will have specific and identifiable legal rights and responsibilities to the child--even if he does not want them and agrees to relinquish them in writing. And, this is true even if the couple releases him from all obligations. Most courts will NOT relieve a biological father from his legal obligations and responsibilities.

The known donor may surface at some future date and demand a relationship with the child, even if everyone agreed otherwise before the birth. If there has been no adoption, the father would have specific rights.

An unknown donor is preferred because it is more of an arm's length situation. Many lawyers refuse to work with a couple using a known sperm donor. There may be no way to protect the non-biological parent.

There have been cases where the biological custodial parent seeks child support from the donors even if there was an agreement not to do so. The custodial parent may find herself in a financially distressed situation where child support is needed. In some cases, the parent has ended her relationship with the co-parent. Since the former partner has no legal obligation to support the child, the biological parent may look to the donor.

Gay men may experience a similar situation if they use a known egg donor and a gestational surrogate. The egg donor may surface later and demand her parental rights or access to the child. For some reason, however, there are no reported cases of this happening.

When the donor or surrogate is married, always include the spouse as a party to the agreement. Likewise, the intended donee's partner should also be included in the agreement.

4. Fertilized Eggs or Sperm held in storage

Issues involving ownership rights in the embryos, eggs or sperm that is being held in storage as it applies to lesbian and gay couples are beginning to be litigated. And, the time is ripe to consider what happens to this property when a relationship ends.

The estate plan must consider future inheritance rights of any children born as a result of ART after a couple ends their relationship. Who owns this property? Must the owner obtain permission from the former partner before using these stored items to have a child? What is the legal and financial obligation of the non-parent? Is there a difference? Can it be destroyed? What are the considerations concerning disposition of genetic material when an estate or trust owns it? Are these assets?

There is case law involving former heterosexual spouses and even unmarried partners. Those cases may give some indication of what will happen. Still, this is unmarked territory. At the very least, lawyers must find out if the clients have anything in storage and what, if anything, they plan to do with that property.

5. Surrogacy

State law controls whether surrogacy agreements are permitted and enforceable. Not all states favor surrogacy. Clients need to consult a lawyer before they attempt a surrogacy arrangement.

A surrogacy agreement is always required. The agreement allows you to provide specific language about the rights, responsibilities, obligations and understanding between the parties. All parties must sign these contracts: surrogate, donor, prospective parents and their spouses or partners. Collaborating with an experienced lawyer in this complex area is advisable.

A traditional surrogacy involves a woman using her own egg and she is, therefore, the biological mother. Many lawyers will not touch traditional surrogacy arrangements because there are too many pitfalls.

A gestational surrogacy involves a surrogate who has no biological connection to the child. This involves an egg and sperm donor. Gay men often use this type of surrogacy.

In 2008, the ABA adopted a model act[24] addressing reproductive technologies, including surrogacy. This model proposes two alternatives to handling surrogacy agreements. One requires pre-approval by a judge for any agreement where neither prospective parent has a genetic tie to the child. The other introduces an administrative procedure. This would be used in cases where at least one of the prospective parents has a genetic tie to the child. All parties are required to submit to specific requirements, including a mental health evaluation, health insurance coverage and legal consultation.

Lawyers involved in a surrogacy practice have begun seeking judicial approval of surrogacy contracts. With all parties represented by counsel, such a move lessens the chance of problems.

6. Shared Custody Agreements

Shared Custody Agreements are particularly important as lawyers representing LGBT clients negotiate the new world of post-marriage equality. These agreements allow the prospective parents to stipulate their acceptance of certain obligations and their rights in relation to the children.

With time, these agreements may become less necessary. However, there may be considerable backlash following the Obergefell decision and lawyers need to take steps to protect clients and their families while the matter is sorted out.

There is no guarantee that all states, even with marriage equality, will apply the "marital presumption" to children born during a marriage involving same-sex parents.

Be careful when using the term "parent" in the agreement because the term may have a specific statutory definition under state law. States may be reluctant to view the existing definition of "parent" as including same-sex parents when only one is genetically related to the child.

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[24] American Bar Association Model Act Governing Assisted Reproductive Technology (February 2008); http://search.americanbar.org/search?q=reproductive+technology+model+rule&client=default_rontend&proxystylesheet=default_frontend&site=default_collection&output=xml_no_dtd&oe=UTF-8&ie=UTF8&ud=1

Lawyers should be familiar with the state laws that affect children. This will place you in a good position to advise the clients about what they need to consider.

Biological or adoptive parents have a right, under the U.S. Constitution, to the full care, custody and control of their children. However, these parents can waive those rights in favor of another person. Shared custody agreements should include language that addresses the waiver of these rights.

Many states recognize only the biological or adoptive parent in a same-sex relationship. In this situation, should the couple end their relationship, the non-recognized partner may be denied contact with the child. In the alternative, the legally recognized parent may have no recourse to obtain continued support from the non-recognized former partner. The former is more likely to happen than the latter situation.

E. Adoption

Adoption is a statutory creature and is strictly construed. How adoption statutes will be viewed in relation to same-sex couples is not yet known. Some states may continue to refuse to treat same-sex couples the same as opposite sex couples under the adoption statutes.

F. Adoption Credit

The Internal Revenue Code, Section 36C, authorizes an adoption credit for qualified adoption expenses. The taxpayer must pay the expenses. The credit does not apply if the expenses were paid for with a grant or by an employer's plan.

The expenses involved in the adoption of any child under 18 are deductible under this section of the code. There are exclusions from this credit that includes expenses incurred for carrying out surrogate parenting agreements.
Unmarried couples are able to claim federal adoption credit because their relationship--even if a formal civil union or domestic partnership--is not recognized by the IRS. Married same-sex couples, however, are ineligible for the credit because the "stepparent" exclusion applies.

G. Social Security

The Social Security Administration Act provides myriad benefits. This includes benefits for retirement and surviving spouse and dependents.

The SSA system of benefits can be confusing and the agency's website[25] has information, pamphlets and all necessary forms to help people understand the process.

People can start applying for SSA retirement at age 62. This results in a permanent reduction in benefits paid. Full retirement age (FRA) varies and is based on the applicant's birth year. The maximum benefit is available at 70.

1. Retirement Spousal Benefit

The non-earning or lower-earning spouse can receive this benefit on the other spouse's SSA account. A spouse is eligible only if their retirement benefit is less than half that of their spouse or

[25] www.ssa.gov

when they delay applying for retirement on their own account. A spouse can apply for an receive benefits on the other spouse's account and delay filing on her own account up to age 70.

The spousal benefit for single earner couple is 50% while both spouses are alive. When both spouses have earned benefits, the lower-earning spouse can receive her own benefit plus a spousal benefit up to 50% of the higher earner's amount.

The couple must be married for at least 12 months before applying for spousal benefits. The spouse must be at least 62 to be eligible. The exception is when the couple has a child under 16 or who is disabled. Then the spouse can apply at any age.

The spouse's benefit on her own record cannot be greater than 50% of her spouse's. The exception is if she is delaying application on her own record.

2. Surviving Spouse

The SSA also uses the wage earner's state of domicile at the time of death to determine a surviving spouse's eligibility.

In order for a surviving spouse to be eligible for retirement benefits, she must be at least 60 and married 9 months. There are exceptions to this rule, such as if the wage earner's death resulted from an accident.

The surviving spouse must be at least 50 and disabled or any age if she has the worker's child in her care who is under 16 or disabled. And, the couple must have been living together. Exceptions include the deceased spouse being in a hospital or nursing home.

There are some other things to consider. The "surviving spouse" cannot have remarried before age 60 or 50 if disabled unless that subsequent marriage ended when the application is filed. The Social Security Administration issued new guidelines on June 11, 2014 address benefits for aged spouses in same-sex marriages.[26]

3. Disability Spousal Benefit

If the worker qualifies for SSA disability benefits, the spouse may receive a benefit up to 50% of the worker's amount. The eligibility requirements are similar to those for retirement benefits.

4. Lump Sum Benefit

The SSA pays out a one-time lump sum of $255 to the surviving spouse or, if there is none, to a minor child. However, there are conditions that must be met. The lump sum is not paid to other family members. The surviving spouse can apply for this lump sum benefit up to two years after the death.

5. Child's Benefit

A worker's children at eligible for assistance if one or both parents are disabled, retired or deceased. The agency uses state law to determine whether a parent-child relationship is recognized.

[26] SSA POMS GN 00210.100

This can create a problem for same-sex couples if their state of residence does not recognize a parent-child relationship with the deceased parent. It is another reason why same-sex couples should consider formalizing the parent-child relationship through adoption.

Married same-sex couples that move from a recognition to a non-recognition state may find they lose rights when they cross the border. Even if the child was born during the marriage, absent an adoption, the parental rights of the non-biological parent may not be recognized by the new state of domicile. And, Social Security may deny benefits if the state does not recognize the parent-child relationship. The SSA uses the law of the state of residence to determine recognition of a parent-child relationship and an adoption will qualify.

Children born after a worker's death may not be eligible for surviving dependent benefits unless they qualify as an heir under the state's intestate succession statute. In *Astrue v. Capato*[27], the United States Supreme Court ruled that children conceived and born after a parent's death are not entitled to survivor benefits if state law prohibits it.

This decision applies to children born via ART procedures if the conception and birth occur after the worker-parent's death and the child is not included in the state's intestate succession statute.

7. Divorced Spouses

A divorced spouse can apply for benefits on the former spouse's record if the marriage lasted at least 10 years. The divorced spouse cannot be presently married. He will also need to meet the other requirements specified above. However, the benefits will stop if the divorced spouse remarries after age 60 and the former spouse is alive.

There is no reduction in benefits for either the worker or her current spouse if a former spouse applies for benefits.

If the divorced couple had a civil union and registered domestic partnership, the length of that relationship can be used to meet the 10-year duration requirement. A major caveat is whether the state of residence recognizes those other types of relationships.

8. Preserving Rights

If an application for benefits is denied, the applicant must file an appeal. The first level is a "Request for Reconsideration." There are specific time limits for filing an appeal. If the appeal is not filed within those limits the claim is closed. The applicant can file a new claim but any past due benefits will start from that date and not the earlier one.

Keeping the application open is important if the applicant or the worker lives in a state that refuses to recognize same-sex marriages. File appeal as close to the deadline as possible to prolong the appeal period. If the appeal process has run its course, the applicant may be able to refile the application once the law changes.

Given the current state of Congress it is unlikely there will be a legislative fix. The change will come via an agreement between Justice and the SSA or a court decision.

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[27] 566 _____ (2012)

9. Transgender Spouses

SSA has released guidance affecting transgender and same-sex spouses. The SSA now recognizes that gender transition does not affect the validity of an existing marriage. Marriage related benefits are based on the law in the claimant's state of domicile.

The agency has had a policy of requiring a legal opinion from its Regional Chief Counsel whenever there was an application for benefits from a married couple and at least one of the spouses was transgender. The new policy eliminates the legal opinion requirement. The policy applies to situations when a spouse or surviving spouse if applying for benefits.

When the transition occurred before the marriage, the new policy requires:

- The SSA clerk will where the spouse whose record is the benefit source lived when the application was made or at the time of death.

- A legal opinion will be sought regarding the validity of the marriage if any of the following states are involved: FL, ID, KS, OH, OK, TN and TX. These states have specific laws that impact the validity of a marriage involving transgender spouses.

- If the marriage was celebrated in a state where same-sex couples cannot marry, the marriage will be assumed a different-sex marriage and the application can be processed.

- If celebrated in a marriage equality jurisdiction the clerk will ask if it was a same or different sex marriage.

- If the marriage was different-sex the application will be processed.

- If it was a same-sex marriage, the application can only be processed if the state where the account holder lived at the time or application or marriage recognized the marriage.

A post-marriage transition by a transgender spouse does not affect the validity of the marriage. Nor does it affect eligibility for benefits.

H. Medicare

Medicare started processing some applications for married same-sex couples, requests for Special Enrollment Periods (SEP) and requests for reductions in late-enrollment penalties in April 2014. This is a change in procedure. Medicare was not recognizing same-sex marriages--even after the Windsor decision. This newly announced policy applies to all same-sex couples without regard to state of domicile. The applicants must meet the other eligibility criteria.

Couples in civil unions and Domestic Partnership are not eligible because these relationships are not viewed as marriages. That may change, especially if state law views a civil union or domestic partnership as synonymous with marriage. If state law applies and the end result is the same, then SSA will be hard pressed to find a legal argument to ignore state law.

Medicare is the health insurance program for persons 65 and older. It includes Part A: Hospital; Part B: Medical; Part C: Medicare Advantage Programs (private health care plans); and Part D: Prescription Drug Coverage.

As with Social Security benefits, the agency will consider the law of the state of domicile to determine whether a marriage is valid. Either the state recognizes the marriage or allows the spouses to inherit from the other under the state's intestate succession statute[28]. This means that married same-sex couples, living in non-recognition jurisdictions, will be treated differently than similar couples living in marriage equality jurisdictions.

There should be no interruption of benefits if they started while the applicant lived in a recognition jurisdiction and later moved to a non-recognition jurisdiction.

One of the advantages of marriage is the opportunity to delay enrolling in Medicare Part B without penalty if the spouse is on an employee-spouse's group health care plan.

PRACTICE NOTE: if clients applied for a special enrollment period (SEP) after May 2013 and had their applications placed on hold, it will be granted provided all criteria are met.

If the client's SEP request was denied because Medicare did not recognize the marriage a new SEP request can be submitted, provided:

1. The client filed the original SEP request after October 2013;
2. The SEP ended between June 2013 and April 2014;
3. The second SEP request is received before 2014

The normal General Enrollment Period (GEP) is from January 1 - March 31 and coverage starts on July 1. The GEP for 2014 has been extended to May 31, 2014 because SSA delayed in releasing this guidance[29].

Clients in a same-sex marriage who were charged penalties and previously had coverage through a spouse's employer may seek a rollback[30].

1. Part A

This is the hospital insurance portion of Medicare.

The importance of spousal recognition comes into play if one person does not have enough work credits. Each person must have 40 quarters (roughly 10 years) of work history to qualify for Part A benefits and not be required to pay a premium. The premium can be several hundred dollars.

If a person does not have enough credits on his own record, he may qualify for Part A and either no premium or a reduced premium if it is based on his spouse's record.

Qualifying for Part A, without a premium, on a spouse's record the other spouse must: be at least 65, a U.S. citizen or legal resident for 5 years and have a current spouse who is at least 62 and receives or is eligible to receive Social Security or Railroad Retirement benefits. And, current

[28] 42 U.S.C.A. §416 (h)(1)(A)(i)
[29] https://secure.ssa.gov/poms.nsf/lnx/0200210700 (last viewed June 2014); GN 00210.700 *Same-Sex Marriage - Eligibility for Medicare Special Enrollment Period (SEP)*
[30] https://secure.ssa.gov/poms.nsf/lnx/0200210701 (last viewed June 2014); GN 00210.701 *Same-Sex Marriage - Premium Surcharge Rollback*

spouses must have been married at least 1 year; divorce spouses must meet the 10-year rule and widows must meet the 9-month requirement.

While a premium waiver requires 40 quarters of work history, a reduced premium requires 30 quarters. The rest of the requirements are the same.

A situation may present where an individual has been paying Part A premiums because DOMA prevented recognition of her same-sex marriage. She may be entitled to recover those past premiums. It is possible to seek equitable relief when a person has "been prejudiced by the error, misrepresentation, action or inaction of an employee or agent of the government. This relief may include, but is not limited to, providing special enrollment and/or coverage periods and appropriate adjustment of premium liability."[31]

2. Part B

Applications for Part B must take place when the person turns 65. This insurance covers doctors. If enrollment does not occur at 65, there is a 10% lifetime penalty for every year without enrollment. There is a seven-month window around turning age 65 to apply.

The exceptions are: the person is working and remains on the employer's health plan. That can continue for up to 8 months after leaving the employment or if the person is on his spouse's current employment-based health plan. Under these circumstances there are no penalties.

To qualify for the spousal exemption, you must a valid, recognized marriage. This leaves out any married same-sex couples living in a non-recognition jurisdiction. The spouse must be: considered a spouse at the time of applying; must have been spouses at age 65, covered through the spouse's health plan and the spouse must still be working.

Health insurance benefits under an employer's domestic partnership plan do not qualify. The plan must recognize the spouses as such.

Not enrolling in Part B at age 65 may result in delays in enrolling in the future. The spouse may be required to wait for an open enrollment period (usually January 1 to March 30 annually). That may result in a gap in coverage. Consideration needs to be given to when it is best to enroll, even if the other spouse's employer provided health insurance covers the spouse.

3. Part D

As long as the person has creditable prescription drug coverage, there is no requirement to enroll at age 65. There are no penalties assessed for delaying enrollment. To be creditable, the plan must be as good as the basic federal plan. The spouse's employer will notify employees each year if the plan meets those criteria. Once that plan ends, enrollment in Part D must take place within 63 days.

4. Parts B & D Premiums

Premiums for this insurance are based on a married couple's joint income. The threshold is $170,000. The premiums increase at higher income levels. The individual threshold is $85,000.

[31] Social Security Administration, *Program Operations Manual Systems*, §HI 00830.001 *Granting Equitable Relief*

Parts B & D premiums are based on the couple's Modified Adjusted Gross Income (MAGI) that was reported on their federal tax return for the previous 2 years. The MAGI is adjusted gross income plus tax-exempt interest income.

Same-sex married couples can be at a disadvantage because their earlier tax returns may be viewed under the "individual" threshold if they did not file jointly.

It may be possible for married same-sex couples to get a premium adjustment from the SSA. There is a process but, so far, no guidance from the agency on what it will do in cases involving same-sex couples. And, unless there is an overall fix, married same-sex couples living in a non-recognition jurisdiction will be treated differently from those in the marriage equality jurisdictions.

Low-income individuals and couples can seek assistance of up to $4,000 to pay Medicare costs, including premiums, deductibles and prescription co-pays through the Extra Help Program. Individual resources cannot exceed $13,330; income: $17,235. Couples are limited to $23,265 in income and $26,580 in resources. There is also a Medicare Savings Program but it is run through the state Medicaid program. And, same-sex married couples will not qualify in non-recognition jurisdictions.

Workers who applied for Medicare when they turned 65 must pay the premiums **even if they are not receiving SSA retirement benefits.** Failure to pay the premiums will result in the coverage being terminated.

I. Medicaid

Medicaid is the health care program for low-income individuals and families. It is a cooperative program operated by the states and partially funded by the federal government. There are different rules for each state. The benefits are limited and based on income.

Following the Windsor decision, marriage equality states are including same-sex married couples in their Medicaid programs. Some states are also recognizing civil unions and domestic partnerships.

Married same-sex couples living outside that protected sphere are discriminated against. The federal government does permit states to recognize same-sex partners and spouse for Medicaid purposes.

J. Supplemental Security Income (SSI)

The Supplemental Security Income for Aged, Blind and Disabled is a program administered under the auspices of the Social Security Administration (SSA). The program provides a cash benefit to people who are at least 65 and meet financial guidelines or who are disabled. Program participants have very limited income and resources.

It is very difficult for a married couple to qualify for SSI benefits. The financial restrictions are significant. A married couple must apply together if both are over 65 or meet the SSA disability standard. The limit on allowable income and resources is 50% higher for a couple than an individual.

If only one spouse meets the basic criteria for SSI, she may apply as an individual but the other spouse's income and resources will be counted as available to the applicant. However, if the married couple is living separately, they will be treated as individuals.

Like SSA benefits, the Social Security Act[32] controls the definition of "spouse" and "marriage." State law defines a person's marital status. And, the law in the applicant's state of domicile is controlling.

The law[33] provides that even if there is no recognized marital relationship a couple will be recognized as married for SSI purposes if they hold themselves out as "husband and wife."

This may allow married same-sex couples to qualify for SSI if their federal tax returns are submitted "married filing jointly."

2. Portability - THIS IS A BIG DEAL

The American Taxpayer Relief Tax Act of 2012 contained a provision that can be important for married same-sex couples. In January 2014, the IRS released *Revenue Procedure 2014-8* that extends the time for surviving spouses to take advantage of this key estate tax break.

Widows and widowers are allowed to carry over the deceased spouse's estate tax exemption and add it to their own. This means a surviving spouse will have an unified tax exemption of that is double the individual exemption amount. In 2015, the unified tax exemption is $5.43 million and is indexed to increase annually.

There are specific requirements that must be met. The executor must file an estate tax return within nine months of the death--even if no estate tax is owed. The six-month extension provision is allowed.

Many attorneys and executors failed to make this election primarily because they thought there was no chance the surviving spouse would ever need the extra exemption.

This can be of significant benefit to surviving same-sex spouses. The portability election is not available to a non-citizen decedent spouse unless provided for by treaty. The U.S. has 15 estate tax treaties and seven of them contain language addressing a decedent's unified credit. These issues are complicated. When in doubt, enlist the services of an experienced tax planner.

4. Recouping taxes paid on employer provided health insurance

When employers offered Domestic Partnership benefits for same-sex employees and their partners, the value of those benefits was taxable to the employee. The employee should be able to recoup those payments and should contact their employer to determine the best way to accomplish the task.

Many employers and employees may overlook this situation but the amounts in question can be significant. Consulting with a knowledgeable CPA or other tax professional will be helpful.

[32] 42 U.S.C. §1382c(d)
[33] 42 U.S.C. §1382c(d)(2)

K. Military Spouses

The United States military no longer bans lesbian and gay people from serving. The military recognizes same-sex marriage based on the state of celebration.

Service members stationed in foreign countries must obtain approval from the military before marrying a foreign national. If the member fails to do so, she must obtain "recognition of marriage" from the military. Without this approval or recognition, the spouse is not entitled to any benefits.
The Secretary of Defense issued a Memorandum on Feb. 1, 2013, *Extending Benefits to Same-Sex Domestic Partners of Military Members*[34] addressing benefits for the partners of lesbian, gay and bisexual military personnel. Some benefits, such as health care and housing allowances, remain prohibited because of DOMA. This Memorandum predates the *Windsor* decision but serves as an example of the types of benefits available to military personnel and their spouses.

Available benefits include: hospital visitation privileges, group life insurance beneficiary, casualty notification, TSP beneficiary designation, travel and transportation allowance, commissary privileges, exchange privileges, family center programs, child care and legal assistance.

A service member registers for benefits through the Defense Enrollment Eligibility Reporting System (DEERS). To add a spouse the service member must present a valid marriage certificate. The prospective dependent must bring two forms of identification, such as a driver's license, passport or birth certificate. A complete list can be viewed at Defense Manpower Data Center (DMDC) website.[35]

Service members must report changes to their dependent status within 30 days. This now includes same-sex marriages.

Military spouses are eligible for a variety of benefits. These include: spousal identification card, TRICARE medical insurance coverage, dependent housing allowance and access to military installations and facilities. The latter includes commissaries and exchanges as well as Family Center programs.

The Servicemembers Civil Relief Act (SCRA) also protects military spouses. This federal statute, first enacted during World War I, provides protection from civil actions against military personnel called to active duty.

L. Veteran's Spousal Benefits

There are two categories of military veterans: qualified non-retired veterans and retirees.

Retirees are individuals who served at least 20 years in the military and formally retired from service. These veterans receive military retired pay from the Department of Defense (DoD) and may receive benefits from the Department of Veterans Affairs (VA).

[34] http://www.defense.gov/news/same-sexbenefitsmemo.pdf (last viewed June 2014)
[35] www.dmdc.osd.mil (last viewed June 2014)

The VA is bound by statutory language[36] declaring that a marriage is valid "…according to the law of the place where the parties resided at the time of the marriage or the law of the place where the parties resided when the right to benefits accrued." This is similar to the definition in the Social Security Act. It defines "spouse" as a "person of the opposite sex who is a wife or husband." There is similar restrictive language defining a "surviving spouse."

Changes to this language will need to come from either Congress or the courts. It is unlikely that Congress will agree to change this provision even with bills pending in both chambers. It is more likely that a lawsuit will prompt a court decision ordering equal treatment for all spouses.
The VA's Office of General Counsel issued an opinion stating the VA will recognize same-sex marriages based on the state of residence if either spouse at the time of the marriage or when the spouse or veteran became eligible for benefits. This conforms to the requirements of Sec. 103(c).

The irony is some military retirees receive benefits from the DoD and the VA. The DoD will recognize their marriages but the VA cannot.

The VA will use its discretionary authority[37] to designate individuals eligible for burial in national cemeteries. This will be reviewed on a case-by-case basis. Evidence of a "committed relationships" between a Veteran and the otherwise ineligible person will be considered. This is a more inclusive standard and will allow married same-sex couples to be buried together without §103(c) limitations.

Payment of funeral/burial costs to a Veteran's "eligible surviving spouse" will include payment to "the survivor of a legal union." This results from a rule designed to streamline delivery of benefits.

The VA will recognize the retiree's same-sex marriage and surviving spouses are eligible for benefits provided the couple lives in a marriage equality jurisdiction. These benefits include:

- Passing on GI Bill benefits
- Veterans Health Administration Healthcare (CHAMPVA)
- Dependency and Indemnity Compensation
- Dependent's Educational Assistance Program
- VA Guaranteed Home Loan Program
- Burial Benefits

Married same-sex couples living in a non-recognition jurisdiction will not be eligible for these same benefits.

Someone will file a lawsuit on behalf of a military retiree or a veteran's surviving spouse and they will be successful. It is only a matter of time.

M. Survivor Benefit Plans (SBP)

The Department of Defense (DoD) announced in September 2013 that it would use a "state of celebration" standard to determine the validity of a same-sex marriage. That policy is effective June 26, 2013.

[36] Title 38 §103(c)
[37] 38 U.S.C. §2402(a)(6)

Claims filed before that date are invalid because DOMA was in effect. No SBP premiums would be owed and no annuity payments will be paid for deaths that predate the *Windsor* decision.

This raises the issue of whether the *Windsor* decision is retroactive. Generally, when the U.S. Supreme Court declares a law unconstitutional it relates back to the date of enactment. However, there continues to be questions about whether the decision is retroactive.

The DoD has stated spouses have one year from the date of the *Windsor* decision to make an election. The final filing date is June 25, 2014. [This also happens to be the anniversary of Custer's last stand!]

After June 26, 2013, full spousal coverage will be entered and members are responsible for paying premiums, including those owed from that date.

If a same-sex spouse has insurable interest coverage--this was the only way to cover these spouses before *Windsor*, the member may elect spousal coverage. The deadline is June 15, 2014.

The Defense Finance and Accounting Service (DFAS)[38] is responsible for processing these claims, elections and forms.

CONCLUSION

The complete effect of *United States v. Windsor* on benefits--federal and private--has not yet been determined. This is a moving target. Once the U.S. Supreme Court decides whether individual states can ban same-sex marriage and refuse to recognize those marriages, things should settle down.

My prediction? The U.S. Supreme Court will order all states to recognize same-sex marriages and strike down state laws and constitutional provisions prohibiting such recognition. I expect that SCOTUS will rule on the issue by June 2016.

But resolving the marriage issue is not the end of the story. There are thousands of statutes across the states that must be revised. The ongoing battles will involve: parenting, inheritance rights, intestate succession, taxes, Social Security rights, federal and state benefits, Medicaid benefits. And, the list goes on. Marriage is one part of the equation. The need for qualified, experienced and creative lawyers to represent LGBT clients will continue. In many ways, the fun is just beginning.

RESOURCES:

The Lesbian and Gay Law Notes published monthly by Professor Arthur Leonard at New York Law School[39] (current issues only available to bar members)
Professor Patricia Cain of Santa Clara Law School writes the *Same-Sex Tax Blog*[40]
Nancy Polikoff writes the *Beyond Straight and Gay Marriage* blog[41]

[38] www.dfas.mil
[39] http://www.nyls.edu/justice-action-center/publications/lesbiangay_law_notes/
[40] http://law.scu.edu/category/same-sex-tax/

National Center for Lesbian Rights[42]
Lambda Legal[43]
Gay and Lesbian Advocates and Defenders (GLAD)[44]

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[41] http://beyondstraightandgaymarriage.blogspot.com
[42] http://www.nclrights.org
[43] http://www.lambdalegal.org
[44] http://www.glad.org