LGBT ESTATE PLANNING AND FAMILY LAW POST *OBERGEFELL*: Not So Simple, Not So Quick.

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APPENDIX II

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VIII. MARITAL AND LGBT EQUALITY.

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

Although marriage equality has provided significant rights to married LGBT people, both the history of discrimination against LGBT people and the use of alternative legal structures which LGBT couples and their families used to achieve estate planning and family law goals prior to *Windsor* and *Obergefell* present issues in estate planning and estate administration unique to LGBT clients. More importantly, *Windsor* and *Obergefell* only established marriage equality, but have not precluded attempts to curtail legal equality for LGBT people and their families.

H. Understanding a Client's Marital Status. Since the existence and length of a marriage are critical in determining a client's legal rights and obligations relating to issues such as income and transfer taxes, equitable distribution, spousal support, social security benefits, the rights of a surviving spouse and others, it is essential to discuss and review all prior legal relationships, including without limitation, civil unions, domestic partnerships and pre-*Obergefell* marriage ceremonies. LGBT clients often need assistance in determining the effect of prior marriages, civil unions or domestic partnerships, especially in the case of prior relationships which could, without proper termination, prevent them from marrying in the future. For example, without properly terminating a prior marriage, the validity of a subsequent marriage could be challenged as being void due to bigamy. Prior legal techniques used to protect their partners, family or relationships (e.g., adult adoptions) can also prove to be a barrier to a committed couple desiring to marry unless the adoption is annulled.

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

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

announcement of the rule…" *James B. Beam Distilling Co. v. Georgia*, 501 U.S. 529, 543-44 (1991).

Kay, Richard S., GENERAL LEGAL THEORY: Retroactivity and Prospectivity of Judgments in American Law, 62 Am. J. Comp. L. 37 (2014).

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

J. Pro- and Anti-LGBT Legislation. Following the Supreme Court's pronouncement that the right to marry cannot constitutionally be denied to same-sex couples, the stances of state legislatures are mixed. Some states have advanced the rights of LGBT people through enacting protections against (i) anti-LGBT discrimination in employment and housing (Utah), (ii) bullying for youth in schools (Nevada) (iii) outlawing "conversion therapy" for youth (Illinois and Oregon), (iv) simplified processes for changing gender markers on identity documents (Hawaii and Maryland) and (v) the repeal of bans on adoptions by gay and lesbian couples (Florida). Yet, other states have proposed legislation which will negatively impact LGBT people, including religious freedom restoration acts (RIFRAs) and super RIFRAs (creating private causes of action against private entities and persons and/or reducing the standard from "substantially burdening" to "burdening"), anti-transgender bills (restricting access to gender-segregated facilities or health care coverage), promoting conversion therapy, and nullifying local civil rights protections. http://hrc-assets.s3-website-us-east-1.amazonaws.com//files/assets/resources/2016_Legislative-Doc.pdf

In North Carolina, the General Assembly overrode Governor McCrory's veto of Senate Bill 2 (which allows magistrates to recuse themselves from performing marriages, as well as allowing assistant and deputy registrar of deeds to recuse themselves from issuing marriage licenses, which are against "sincerely held religious objection"). G.S. § 51-5.5 (2015). On December 9, 2015, six plaintiffs filed a lawsuit against the State of North Carolina, challenging the constitutionality of Senate Bill 2. That case is currently pending in the Asheville Division for the Western District of North Carolina District Court. *Ansley, et al. v. State of North Carolina*, Case No.:1:15-cv-274 (W.D.N.C. 2015).
http://www.southernequality.org/wp-content/uploads/2015/12/Ansley-v-North-Carolina-Complaint.pdf.

K. North Carolina House Bill 2. On March 23, 2016, Governor McCrory signed House Bill 2 which (a) prohibits the use of restrooms of a designated sex by persons whose birth certificates reflect a different sex, (b) prohibits local governments from regulating employee wage levels, hours of labor, payment of earned wages, benefits, leave or well-being of minors in the workforce, and (c) prohibits local governments or other political subdivisions of the states from passing any regulation of discriminatory practices in places of public accommodation. The Act also declares it is the public policy of the state:

> to protect and safeguard the right and opportunity of all individuals within the State to enjoy fully and equally the goods, services, facilities, privileges, advantages, and accommodations of places of public accommodation free of discrimination because of race, religion, color, national origin, or biological sex, *provided that designating multiple or single occupancy bathrooms or changing facilities according to biological sex, as defined in G.S. § 143-760(a)(1), (3), and (5), shall not be deemed to constitute discrimination*. *Emphasis added*. http://www.ncleg.net/Sessions/2015E2/Bills/House/PDF/H2v1.pdf

The bill also specifically states that "[t]his Article does not create, and shall not be construed to create or support, a statutory or common law private right of action, and no person may bring any civil action based upon the public policy expressed herein." Instead, all complaints of discrimination shall be investigated by the Human Relations Commission which "Commission shall use its good offices to effect an amicable resolution of the complaints of discrimination."

On March 28, 2016, three individual plaintiffs, the American Civil Liberties Union of North Carolina and Equality North Carolina filed a lawsuit in the United States District Court for the Middle District of North Carolina seeking an order declaring House Bill 2 to be unconstitutional under the Equal Protection and Due Process Clauses of the Fourteenth Amendment to the United States Constitution, illegal discrimination "on the basis of sex" under Title IX of the United States Code (public education) and to be a violation of the individual plaintiffs' right to privacy. *Carcano, et al. v. McCrory, et al.*, No.:1:16-cv-236 (M.D.N.C. 2016). http://duringwww.acluofnc.org/files/Lawsuits/Carcano_v__McCrory_Complaint.pdf.

On April 19, 2016, the Fourth Circuit Court of Appeals reversed and remanded the United States District Court for the Eastern District of Virginia's dismissal of a transgender student's claims under Title IX of the United States Code arising from the School Board's policy of limiting access to bathroom based upon "biological sex" as opposed the student's gender identity for failure to state a claim upon which relief can be granted, as well as the denial of a preliminary injunction. G.G. v Gloucester County School Board, 2016 U.S. App. LEXIS 7026 (4th Cir. 2016). http://www.ca4.uscourts.gov/Opinions/Published/152056.P.pdf

L. Employment, Housing and Public Accommodations. On July 16, 2015, the Equal Employment Opportunity Commission released its decision reversing an agency ruling which had dismissed the complainant's claim that he was not selected for a managerial position due to his sexual orientation and that such act constituted sex discrimination under Title VII of the Civil Rights Act of 1964. *Baldwin v. Anthony Foxx, Sec'y, Dep't of Transp.*, EEOC Appeal No. 0120133080, 2015 EEOPUB LEXIS 1905, 2015 WL 4397641, at *10, (EEOC July 16, 2015). There are circuit court of appeals decisions holding that Title VII does not apply to sexual orientation. *Bibby v. Phila. Coca Cola Bottling Co.*, 260 F.3d 257 (3d Cir. Pa. 2001); *Dawson v. Bumble & Bumble*, 398 F.3d 211 (2d Cir. N.Y. 2005). However, as noted by the EEOC in the *Baldwin* decision, the federal courts have begun recognizing that "sexual orientation discrimination and harassment 'are often, if not always, motivated by a desire to enforce heterosexually defined gender norms [and thereby constitute unlawful sex discrimination under Title VII].'" *Baldwin*, 2015 WL 4397641, at *22, *quoting*, *Centola v. Potter*, 183 F. Supp. 2d

403, 410 (D. Mass. 2002). *See also, Terveer v. Billington*, 34 F. Supp. 3d 100, 116 (D.D.C. 2014) (Plaintiff's complaint sufficiently stated a claim for sex and religious discrimination under Title VII based upon allegations that his supervisor created a hostile work environment and took adverse action against Plaintiff after learning that Plaintiff was gay). For the time being, there is a split of authority on whether discrimination based upon sexual orientation constitutes sex discrimination under Title VII of the Civil Rights Act of 1964.

IX. FEDERAL AND STATE TAX RECOGNITION OF MARRIAGES, AND LEGAL NON-MARITAL RELATIONSHIPS.

E. Federal Tax Recognition of Same-sex Marriages. With respect to federal taxes, the principles announced in IRS Rev. Rul. 2013-17, as supplemented by Notice 2013-61 and amplified by Notice 2014-1, should apply: All married taxpayers must file either jointly or married filing separately for tax years beginning 2013. A taxpayer or employer may claim a refund for taxes improperly paid due to non-recognition of a marriage prior to *Windsor* within the applicable statute of limitation – the latter of three years from the due date for filing the return or two years after payment of the tax.

On October 23, 2015, Proposed Regulations were issued defining the terms relating to Marital Status.

> Proposed Reg. § 301.7701-18. **Definitions; spouse, husband and wife, husband, wife, marriage.**
>
> (a) *In general*. For federal tax purposes, the terms *spouse*, *husband*, and *wife* mean an individual lawfully married to another individual. The term *husband and wife* means two individuals lawfully married to each other.
>
> (b) *Persons who are married for federal tax purposes*. A marriage of two individuals is recognized for federal tax purposes if the marriage would be recognized by any state, possession, or territory of the United States.
>
> (c) *Persons who are not married for federal tax purposes*. The terms *spouse*, *husband*, and *wife* do not include individuals who have entered into a registered domestic partnership, civil union, or other similar relationship not denominated as a marriage under the law of a state, possession, or territory of the United States. The term *husband and wife* does not include couples who have entered into such a relationship, and the term *marriage* does not include such relationships.

The Background and Explanation of Provisions of the Proposed Regulations noted that civil unions, registered domestic partnerships or similar relationships which are not recognized by a state as a marriage will not be treated as a marriage for federal tax purposes, noting that imposing marital status for federal tax purposes "could undermine the expectations certain couples have regarding the scope of their relationship." Proposed Reg. § 301.7701-18.

F. North Carolina Tax Recognition of Same-sex Marriages. In response to the October 10, 2014 decision in *General Synod of the United Church of Christ v. Resinger*, 12 F. Supp. 3d 790 (W.D.N.C. 2014) (holding "that North Carolina's laws prohibiting same-sex marriage are unconstitutional as a matter of law"), the North Carolina Department of Revenue issued Directive PD-14-3 (withdrawing Directive PD-13-1 issued on October 18, 2013 which previously advised that North Carolina did not recognize marriage of same-sex couples legally married under the laws of any state). PD-14-3 provides that original returns filed by persons married under any state law as of December 31, 2014 must use the same filing status as claimed on their federal tax return with the exception that if one spouse is a nonresident and one spouse that is a resident of North Carolina or has North Carolina income, the spouse may elect to file married filing separately. For tax years prior to 2014, original returns must use the same filing status as claimed on the federal tax return and married persons may, but are not required to file amended returns for prior years claiming married filing jointly or married filing separately status. North Carolina's statute of limitations for tax refunds mirrors the Internal Revenue Code – claims for refunds must be filed within the latter of three years of the due date of the return or two years after the payment of the tax. G.S. § 105-241.6.

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

Overviews of relationship recognition can be found at:

- ***Marriage, Domestic Partnerships, and Civil Unions: An overview of relationship recognition for same-sex couples Within the United States:*** http://www.nclrights.org/legal-help-resources/resource/marriage-domestic-partnerships-and-civil-unions-an-overview-of-relationship-recognition-for-same-sex-couples-within-the-united-states/ (hereinafter "NCLR, *Marriage, Domestic Partnerships and Civil Unions*")

- **POMS GN 00210.003 Dates States and U.S. Territories Permitted Same-Sex Marriages:** https://secure.ssa.gov/poms.nsf/lnx/0200210003

- **POMS GN 00210.006 Same-Sex Marriages and Non-Marital Legal Relationships Established in Foreign Jurisdictions:** https://secure.ssa.gov/poms.nsf/lnx/0200210006

D. Statutory Conversions of Civil Unions and Domestic Partnerships. Some states which enacted marriage equality by statute after the enactment of civil unions or domestic partnerships provide for (a) automatic conversion of civil unions and domestic partnerships to marriage (Connecticut, Delaware, New Hampshire and Washington) or (b) conversion of a domestic partnership upon marriage (District of Columbia, Illinois, Rhode Island and Vermont). See, NCLR, *Marriage, Domestic Partnerships and Civil Unions, supra*.

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

D. Social Security. On February 5, 2016, the Social Security Administration began publishing its updated POMS (Program Operations Manual System) regarding Same-Sex Marriage Claims. https://secure.ssa.gov/poms.nsf/lnx/0200210000. While a detailed discussion of social security benefits is beyond the scope of this article, the new POMS set forth the following guidelines:

- **GN 00210.002A Determining Marital Status for Title II and Medicare Benefits.** For claims filed on or after June 26, 2015 and for claims pending at any level of review on or after June 26, 2015, same-sex marriages will be recognized as of the date of the marriage, including any periods during which the spouses were domiciled in a state which did not "recognize" the marriage**.** https://secure.ssa.gov/poms.nsf/lnx/0200210002. Like other spousal rights, the length of a marriage is often determinative of eligibility for benefits.

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

  Similarly, to collect spousal retirements and disability benefits, the marriage must have been at least twelve (12) months in duration, or, in the case of a divorced spouse, married for ten (10) years or more before a divorce was granted.
  RS 00202.001.B Spouse. https://secure.ssa.gov/apps10/poms.nsf/lnx/030020200
  RS 00202.005 Divorced Spouse. https://secure.ssa.gov/apps10/poms.nsf/lnx/0300202005

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

Many practitioners advised their clients to file an appeal of any adverse ruling after the *Windsor* decision on June 26, 2013, and the Social Security Administration was holding most appeals pending clarification of the law. The new **POMS GN 00210.002A.2** also provides that a new claim may be filed in any case in which a claim was previously filed and closed (from which the time to appeal has expired and cannot be extended).

E. Supplemental Security Income (SSI). On February 12, 2016, the Social Security Administration announced the following rules for recognition of same-sex marriages for SSI purposes:

- **POMS GN 00210.800 Supplemental Security Income (SSI) Same-Sex Marriages, Same-Sex Couples, and SSI Deeming from a Same-Sex Ineligible Spouse, the Social Security Administration.** We recognize marriages between individuals of the same-sex for SSI purposes in all states. As set out in this subsection, we will also consider certain individuals in same-sex relationships other than ceremonial marriages to be holding out as married, in keeping with existing SSI policy for opposite-sex marriages. Same-sex individuals are married for SSI purposes if they are:

    - legally married according to the laws of the state of their permanent home **(Note: all states must permit and recognize same-sex marriages)**;
    - entitled to Title II benefits as a same-sex couple; or
    - living together in the same household and holding themselves out to the community as married. **POMS SI 00501.152,** above. [Note: It is important to note that given the gender-neutral recognition of marital status under *Obergefell* and the new POMS, same-sex couples holding themselves out as married will be considered a couple for SSI eligibility.]

  https://secure.ssa.gov/apps10/poms.nsf/lnx/0200210800

On March 16, 2016, **POMS EM-16013** provided that all SSI Post-Eligibility actions (SSI PE actions) for same-sex couples, including SSI PE action that would result in overpayment of benefits, are to be processed. However, instead of requiring an affirmative request for waiver of overpayments, a waiver will be presumed if the overpayment is due to recognition of a same-sex marriage. This Emergency Message applies to SSI PE actions beginning March 15, 2016 through March 15, 2018.
POMS EM-16013. https://secure.ssa.gov/apps10/reference.nsf/links/03142016014911PM

F. Medicare and Transgender Health Care. On May 31, 2014, the Department of Health and Human Services Departmental Appeals Board ruled that the National Coverage Determination (NCD) requiring denial of all claims for gender reassignment surgery under Medicare was no longer valid under the Board's reasonableness standard. Transgender persons with Medicare coverage may now obtain coverage for gender reassignment surgery. While the NCD may not be used to summarily deny coverage, Medicare coverage of gender reassignment may be denied for "other reasons permitted by law." NCD 140.3, Transsexual Surgery, A-13-87, Decision No. 2576 (2014).

XI. SPOUSAL RIGHTS

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

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

E. U.S. Department of Labor. On September 18, 2013, the Department of Labor announced in Technical Release 2013-04 that the definitions of "spouse" and "marriage" under ERISA and regulations thereunder "will be read to refer to individuals who are lawfully married to one another under any state law, including individuals married to a person of the same-sex who were legally married in a state that recognizes such marriages, but who are domiciled in a state that does not recognize such marriages." http://www.dol.gov/ebsa/newsroom/tr13-04.html.

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

F. Transgender Spouses. Prior to *Obergefell*, there was some uncertainty regarding whether a marriage with a transgender person could be challenged as an invalid same-sex marriage. In New Jersey and Minnesota, the courts recognized the post-transition gender of transgender spouses and denied challenges to the validity of such marriages as same-sex marriages. *M.T. v. J.T.*, 140 N.J. Super. 77 (App. Div. 1976) (affirming the trial court's award of spousal support to transgender spouse); *Radke v. Misc. Drivers & Helpers Union*, 867 F. Supp. 2d 1023 (D. Minn. 2012) (holding employee benefit plan could not deny spousal coverage to transgender spouse). In contrast, Kansas and Texas refused to recognize the post-transition gender of transgender spouses. *In re Estate of Gardiner*, 273 Kan. 191 (2002) (transgender spouse's denied intestate share of the decedent's estate); *Littleton v. Prange*, 9 S.W.3d 223 (Tex. App. 1999), cert. denied, 531 U.S. 872 (2000) (transgender spouse denied standing to pursue wrongful death claim). *Obergefell*, in holding that there is a constitutional right to marry without regard to gender, has eliminated this prior uncertainty. It is important to note that a gender transition by a spouse after marriage does not affect the validity of the marriage.

Despite the lack of any bar to marriage by transgender people, it is recommended that a transgender person who has transitioned disclose his or her transgender status to a prospective spouse. http://www.nclrights.org/wp-content/uploads/2014/01/Transgender-Family-Law-National.pdf

G. Tenants by the Entireties. Effective January 1, 1983, G.S. § 39-13.6 expressly changed the common law incidents of tenancy by the entireties to provide for equal rights of both the husband and wife to the control, use, possession, rents, income and profits of such real property. However, G.S. § 39-13.6 refers to "husband and wife", not married persons or spouses. While it will be ideal for the General Assembly to eliminate this and other inconsistencies in our statutes, *Obergefell* expressly stated that it is unconstitutional for states to deny "the benefits of marriage"

based upon the sex of the spouses. *Obergefell*, 135 S. Ct. 2584. Since the benefits of tenancy by the entireties are only available to married couples, there is no basis for a court or legislature to use antiquated language in the statute to deny same-sex married couples the benefits of tenancy by the entireties with respect to any real estate they acquire during the marriage. Prior to *Obergefell*, deeds to same-sex married couples as tenants by the entireties often included a savings clause (stating that if the tenancy by the entireties was not recognized it would be a joint tenancy with right of survivorship). Some practitioners have cautioned that such savings clauses could be used to argue for disregarding the creditor protections and are unnecessary post-*Obergefell.*

XII. FAMILY LAW FOR LGBT CLIENTS.

A. Termination of Adult Adoptions. Adult adoptions have long been used by same-sex couples to obtain legal rights that they were deprived or excluded from by virtue of their sexual orientation. While the adult adoption process was considered an option for gay and lesbian couples, an adult adoption can now be a barrier to marriage. *Obergefell*'s legalization of same-sex marriage nationwide means that partner adult adoptions need to be annulled or vacated before such couples have the ability to marry. While many judges are granting these petitions, some requests have been denied due to the finality of adoption decrees (which in most cases is an essential principle of law). http://www.post-gazette.com/local/north/2015/10/09/Fox-Chapel-gay-couple-had-to-legalize-their-status-through-adoption-now-it-keeps-them-from-getting-married/stories/201510110112.

B. Annulment or Divorce. Prior to October 2014, same-sex couples who were legally married in another state could not get divorced in North Carolina. This resulted in many same-sex couples separating and doing nothing since they believed that their marriage was not valid or recognized and they did not have the ability to obtain a divorce anyway. Although some same-sex couples were able to get divorces in other jurisdictions, many did not understand that it was necessary or were unable to afford or unwilling to incur the legal expense to formally divorce. Some obtained annulments. With recognition of all same-sex marriages in North Carolina, many couples though separated for long periods of time, are legally married whether they want recognition of that marriage or not. Any person previously married must be divorced before they marry another person. Similarly, couples who entered into civil unions in states that have automatically converted those unions into marriages must divorce if they wish to remarry or prevent the spouse from claiming elective share and spousal support rights in the other spouse's estate. Some clients may have entered into more than one marriage or non-marital legal relationship believing them not to be recognized. In such cases, all prior relationships and the termination of such relationships need to be confirmed.

C. Prenuptial and Postnuptial Agreements. Like elective share rights, the marital estate for purposes of equitable distribution depends upon the length of the marriage. In contested cases, the length of a marriage may depend upon prior marriage celebrations or civil unions or domestic partnerships which were celebrated pre-*Obergefell*. Couples who have only recently married, but have been in a long-term relationship may want to define both property rights and support obligations in prenuptial and postnuptial agreements. Such agreements can preemptively address issues such as distribution of assets and support based upon the parties' expectations

given the length of the relationship regardless of the length of legal recognition, thereby minimizing the risk of litigation.

D. Birth Certificates and a Rebuttal Presumption of Parenthood. In North Carolina, when a child is born to a legally married couple, that child is considered to be the child of the married parties. The statutes related to the presumption of parentage based on marriage are gender specific referring to "mother" and "father." G.S. § 130A-101. Nonetheless, North Carolina Department of Health and Human Services has agreed to apply the presumption in cases of married lesbians using an anonymous sperm donor and an artificial reproductive technology (ART) clinician thereby including both parents on the birth certificate. However, this presumption is not being applied to married gay men or married lesbians who birth children using other methods, such as surrogacy, therefore both parents will not be recognized on the birth certificate.

It is very important to note that the presumption that is created by a parent being recognized on a birth certificate is nothing more than that – a rebuttable presumption. G.S. § 8-50.1 provides that in any proceeding in any court in which the question of parentage arises, regardless of any presumption, the Court shall order that the parent in question and the child submit to a blood test to establish parentage. Including both same-sex parents on a birth certificate of a child born during the marriage often creates a false sense of security, despite the risk that the non-biological parent's relationship could be challenged in future litigation. In other states where same-sex couples have attempted to rely on the presumption of parenthood, the courts have consistently held that birth certificates only confer a rebuttal presumption, not legal parenthood. *Debra H. v. Janice R.*, 14 N.Y.3d 576, 593 (N.Y. 2010); *Matter of Marilene S. v. David H.*, 63 A.D.3d 949, 950 (N.Y. App Div. 2d Dep't 2009). For this reason, same-sex couples are strongly encouraged to use the stepparent adoptions to establish a parental relationship between the child and both the biological and non-biological parent.

E. Stepparent Adoptions. Stepparent adoption statutes allow the spouse of a legal or genetic parent to adopt the child of their spouse in certain circumstances. G.S. § 48-4-101. To qualify for a stepparent adoption (i) the petitioner must be legally married to the child's biological parent for at least six (6) months immediately preceding the filing of the petition, (ii) the parental spouse must have legal custody of the child, (iii) the other parent must consent to the adoption, unless their rights have been terminated or another exception applies, and (iv) the home you share must have been the residence of the child for six (6) months prior to the petition.

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

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

G. Unmarried Parents and Second Parent Adoptions. Historically, when unmarried same-sex couples had a child together, a common means to establish legal parentage for the non-biological parent was through "second parent" adoption. A second parent adoption allows an unmarried co-parent to adopt a child without terminating or affecting the legal relationship of the child and the existing biological or legal parent. While similar to step parent adoption, second parent adoptions do not require the co-parent to be married to the legal parent. However, in some jurisdictions, including North Carolina, second parent adoptions are not available. *Boseman v. Jarrell*, 704 S.E.2d 494 (2010) (holding that the law governing adoptions in North Carolina is wholly statutory and therefore courts lack subject matter jurisdiction to issue second parent adoptions and such judgments are void *ab initio*). Second parent adoptions remain available to unmarried same-sex couples in other jurisdictions (residency requirements vary by state).

XIII. ADOPTIONS FOR LGBT FAMILIES.

E. Chapter 48 – Adoption. North Carolina adoption statutes are gender neutral and differentiate between married vs. unmarried couples, not opposite sex or same-sex couples. Married couples must adopt jointly unless a waiver for cause is granted by the Court, regardless of the gender of the individuals. An unmarried couple may not adopt jointly, regardless of the gender of the individuals or sexual orientation.

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

1. **Direct placement adoption**. This type of adoption contemplates substitution of families where biological parents sever their rights in favor of adoptive parents. Most often this is a situation where birth parents chose who will adopt their child without the involvement of public or government agencies.
2. **Agency placement adoptions**. Public or government adoption agencies acquire legal and physical custody of a minor and adoption occurs by means of relinquishment or termination of parental rights. Most often this is a situation where a child has become a ward of the state due to abuse, neglect or abandonment by the birth parents.
3. **Stepparent Adoption**. The spouse of a legal or genetic parent may adopt a child if statutory requirements of G.S. § 48-2-310 and §§ 48-4-101-103 are met.

G. Stepparent Adoptions Process.

1. Petition for Adoption of minor child by stepparent (DSS-5162) (G.S. §§ 48-2-301 – 306 and 48-4-101)
    a. Parent who is the spouse of the stepparent must consent to the adoption but does not join in the adoption. The child must have lived with the stepparent at least six months prior to the filing of the petition.
    b. Attach certified copies of the minor child birth certificate and marriage license of the Stepparent and parent. (G.S. § 48-2-305)
2. Consent to Adoption by parent who is petitioner's spouse (DSS-5189) (G.S. § 48-4-103(a))
3. Consent to Adoption by parent who is not petitioner's spouse (DSS-5190) (G.S. § 48-4-103(b)) OR Certified copy of any Court Order terminating the rights of a parent or guardian of adoptee.
4. Denial of Paternity (DSS-5118)
    a. Only an unwed father may deny paternity (G.S. § 48-3-603(a)(5))
5. Consent of Minor Child 12 years old or older to adopt (DSS-5169)
    a. unless dispensed with in writing under G.S. § 48-3-603(b)(1)
6. Proof of Service of Notice by Petition (no form) (G.S. § 48-2-401; 407)
7. Order for Report on Proposed Adoption (DSS-1807) (G.S. §§ 48-2-501; 48-2-403)
8. Report on Proposed Adoption (DSS-1808) (G.S. §§ 48-2-502; 503)
9. Affidavit accounting for any payments or disbursements made in connection with adoption (DSS-5191) (G.S. §§ 48-2-602; 48-2-603(9); 48-10-103)
10. Final Decree of Adoption (DSS-1814)
11. Report to Vital Records (DSS-5170). Adoptive parent's name will go on the birth certificate unless both parents currently listed and the child over the age 12 request that the original birth certificate not be changed.

H. Adult Adoptions. An Adult is defined as an individual who is 18 years of age, or if under the age 18, is either married or has been emancipated under applicable State law. The process to complete an adult adoption as provided by the Department of Health and Human Services is as follows:

1. Petition for Adult Adoption (DSS-5163) G.S. § 48-5-101
   Attachments to petition:
    a. Consent to adoption by adult adoptee (DSS-5164)
    b. Consent to adoption by spouse of petitioner (when adult's stepparent is petitioner) unless waived for cause (DSS-5165).
    c. Consent to Adoption (if applicable) must be completed by the guardian of an incompetent adult adoptee. (G.S. § 48-5-103) An investigation and report to the court must be filed by a court appointed GAL other than guardian in the case.
2. Proof of Service of Notice by Petitioner to appropriate persons in G.S. § 48-2-401(d), including any <u>adult</u> children of prospective adoptive parent and any parent, spouse or adult child of adoptee listed in the petition. Notice may be waived in writing by the person entitled to receive it. For cause, the requirement that the adoptee's parent

notice may be waived. G.S. § 48-2-405. Any person receiving notice may only appear and present evidence as to whether the adoption is in the best interest of the adoptee. Their consent is not required. G.S. § 48-2-405.

3. Accounting Affidavit (DSS-5191) G.S. §§ 48-2-602; 48-10-103.
   An accounting of any payments or disbursements made or agreed to be made by a petitioner in connection with the adoption. This accounting must include the amount of each payment or disbursement and name and address of each recipient. This accounting must be filed at least 10 days before the entry of final decree.
4. Final Decree of Adoption (DSS-5166) G.S. § 48-2-605
   The prospective adoptive parent and the adoptee shall both appear in person unless the court waives this requirement, for cause, in which case an appearance for either or both may be made by an attorney authorized in writing to make an appearance.
   At least 30 days shall have elapsed from the filing of the adoption petition unless waived by the clerk, but notice of the petition must have been served on all required persons or waived prior to the hearing.
   At the hearing the Clerk must find that the adoption is entered into freely and without duress or undue influence and that each party understands the consequences of the adoption.
5. Report to Vital Records (DSS-5167) G.S. § 48-9-102(d)
   All records filed in connection with an adoption, including a copy of the petition, a copy of the final decree, and the originals of all other documents to be sent to DHHS within 10 days after the decree is entered or within 10 days of the final disposition of an appeal under G.S. § 48-2-607(b). After indexing by the DHHS Division of Social Services, the name change report is transmitted to NC Vital Records, if the adoptee was born in North Carolina, or to the Vital Records equivalent in the state where the adoptee was born.

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

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

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

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

Does anyone have knowledge or experience about the best way to seek enforcement of provision in will giving same-sex partner the power to make funeral arrangements? This is in Florida but would appreciate hearing from anyone who has dealt with this situation. The parents kept

partner from visiting in hospice facility. We just found out the ill partner passed away. We do not know the location of the body.

A later post explained that the partner was the designated health care surrogate, but the patient's family had made false allegations to the police and hospice facility regarding the surrogate which resulted in his exclusion. In North Carolina, the 2007 amendments to the informed consent statute (G.S. § 90-21.13) and the adoption of a Patient Bills of Rights provide for greater certainty of a person's right to self-determination and visitation rights of non-family members. The 2011 changes in the federal regulations applicable to health care facilities accepting Medicare and Medicaid also help in similar circumstances. Finally, Chapter 130A of the North Carolina General Statutes provide some clarity on burial rights and authority to dispose of one's remains. Assuming the same facts as the post but in North Carolina, the decedent's funeral arrangements could have been set forth in a pre-need funeral contract (or authorization for cremation), a health care power of attorney, direction in a will or a written, attested statement, witnessed by two adults. G.S. § 130A-420(a). See, Anderson, *Dust to Dust*, the Will and the Way, (Estate Planning and Fiduciary Law Section, NCBA, 2012).

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

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

1. North Carolina Statutory Provisions Regarding Health Care Decisions.

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

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

ii. Health care agent.

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

iv. The patient's spouse.

v. A majority of available parents and adult children.

vi. A majority of adult siblings.

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

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

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

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

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

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

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

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

2. Section 1557 of the Affordable Care Act. Section 1557 of the Affordable Care Act prohibits discrimination against individuals on the basis of race, color, national origin, sex, age, disability, gender identity, and sexual stereotypes. Patient Protection and Affordable Care Act § 1557, codified at 42 U.S.C. § 18116 (2012); Letter from Leon Rodriguez, Dir. of Office for Civil Rights, Dep't. of Health & Human Servs. to Maya Rupert, Fed. Pol'y Dir., Nat'l Ctr. for Lesbian Rights (Jul. 12, 2012) (OCR Transaction No. 12-000800).

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

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

a. Hospitals – Conditions of Medicare Participation. Effective January 18, 2011, the conditions for participation in Medicare with respect to hospitals were revised to: (a) provide patients with the right to designate surrogates for health care decisions and in the event of incapacity recognize support persons as a patient's representative, 42 C.F.R. § 482.13(b)(3),(4); and (b) provide patients with the right to control who has visitation rights and, in the event of incapacity, the health care institution must allow visitation rights to support persons regardless of the lack of a health care power of attorney or other formal documentation. These new regulations were in response to a hospital's refusal to permit a patient's lesbian partner of 18 years, Janice Langbehn, and their minor children from visiting with the patient for over eight hours after a hospital admission for a brain aneurism. By the time the partner and children were able to see the patient, she was unconscious and died the next morning. http://www.nytimes.com/2009/05/19/health/19well.html. In that case, it was the health care

providers and not next of kin that prevented the patient's family from being with her during her last hours of life.

> Most notably, the new rules:
>
> • Require that when a patient is competent to choose a surrogate decision-maker, hospitals must honor that request, even if the person had previously designated someone else.
>
> • Require that when a patient is incapacitated, hospitals must recognize that patient's self-identified family members, regardless of whether they are related by blood or legally recognized. The rules specifically include same-sex partners and de facto parent-child relationships.
>
> • Prohibit a hospital from requiring proof of a relationship in order to respect that relationship.
>
> • Require that when a patient is incapacitated and more than one person claims to be the patient's representative, hospitals must resolve the dispute by considering who the patient would be most likely to choose. The hospital must consider factors including the existence of a marriage, domestic partnership, or civil union, a shared household, or any special factors that show that a person has a special familiarity with the patient and the patient's wishes.

Frequently Asked Questions Regarding New Federal Hospital Visitation Rules on Who Can Make Medical Decisions for You, National Center for Lesbian Rights, September 9, 2011. http://www.nclrights.org/wp-content/uploads/2014/01/FAQ-New-Fed-Hospital-Visitation-Rules.pdf

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

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

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

b. Skilled Nursing Facilities – Conditions of Participation. Nursing facilities receiving Medicare or Medicaid must provide residents with the right of self-determination, the right to immediate access to the resident's immediate family members and others as designated

by the resident (and subject to the resident's right to withdraw consent). 42 C.R.F. § 483.10(j). Additionally, the facility must honor the resident's appointment of a surrogate and to the extent permitted by state law and to the maximum extent practicable the facility must respect this request. Interpretive Guidelines § 483(a)(3) and (4).

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

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

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

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

1. Health Care Powers of Attorney. As noted in the Listserv post above, LGBT clients may have family members who would be antagonistic towards a client's partner or wish to impose unacceptable personal or health care decisions in the event of incapacity. Similarly, family members of transgender clients may refuse to accept the client's new gender or continue to refer to them in the birth gender. In such cases, the client may need assistance in protecting against families using the client's incapacity to assert their own beliefs and desires. If such conflicts are known, it may be prudent to specifically exclude any such individual in the health care power of attorney, itself, including the provisions nominating the health care agent as guardian of the person. A sample provision is set forth in Appendix II.

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

2. Powers of Attorney. Powers of attorney are often drafted with gifting powers and powers to use assets to support the principal's spouse, issue and dependents. These provisions need to be revised to address the specific facts of each case. For example, unmarried couples may want their attorney-in-fact to have the ability to use the principal's assets to support their partner in the event the principal is incapacitated. Like the health care power of attorney, if there are provisions nominating the attorney-in-fact as a guardian of the estate, in appropriate cases it may be helpful to specifically exclude family members from the nomination providing a clear guide to the principal's intent in any contested proceeding. Again, as noted above, any such provision should be thoughtfully drafted. Of course, transfer tax issues need to be considered as well. A sample provision is set forth in Appendix II.

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

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

5. Appointment of Support Person and Legal Representative: Based upon the accreditation standards and conditions of participation in Medicare and Medicaid discussed above, at least one author has suggested that a client execute a Designation of Agent for Health Care Visitation, Receipt of Personal Property, and Disposition of Remains and Making Funeral Arrangements. Joan Burda, *Estate Planning for Gay Lesbian and Transgender Clients: A Lawyer's Guide* (2008). In light of the provisions of Chapter 130A as noted above, such a form, if used in North Carolina, should be attested by two witnesses. A sample provision is set forth in Appendix II.

C. Health Care Authorizations for Minors and Nominations of Guardians. Health care authorizations, as provided in Article 4 of Chapter 32A, permit a parent of a minor child to delegate decisions regarding the parent's minor children to another adult when the parent is unavailable. An authorization is not affected by the subsequent incapacity or mental incompetence of the custodial parent making the authorization. G.S. § 32A-32(d). In absence of a stepparent or second parent adoption, such authorizations are an essential document for LGBT couples (both married and unmarried) with children. The authorization terminates upon the

earlier of a specified date, revocation by the custodial parent, termination of such custodial parent's custody rights or upon the minor attaining eighteen years of age. G.S. § 32A-32(a). In the event of a conflict between an agent and a parent (custodial or non-custodial), the authorization of the agent terminates and the provisions of Article 1 of Chapter 90 and applicable common law apply as if no authorization had been signed. G.S. § 32A-32(c). The statutory form is set forth at G.S. § 32A-34 and in Appendix II.

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