

# *the will & the way*

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## *The Chair's Comments*



**Elizabeth K. Arias**

***In 1789, at the age of 83,*** Benjamin Franklin wrote in a letter to Jean-Baptiste Leroy that “our new Constitution is now established, and has an appearance that promises permanency; but in this world nothing can be said to be certain, except death and taxes.” I doubt Franklin realized how prescient his statement

would be. Not only was he correct that neither death nor taxes can be avoided, he was also correct that nothing else in the federal government appears to be certain or permanent.

The estate and gift tax laws applicable to our clients over the last 12 years are a perfect example. The exemption amounts, tax rates, basis rules, ability to “port” exemption, and a myriad of other rules have changed constantly since EGTRRA was enacted in 2001. The uncertainty in the law has made our area of practice extraordinarily interesting, difficult, frustrating and rewarding, all at the same time, as we have sought to advise clients regarding how to plan for the certainty of their own deaths in an environment where the rules constantly change.

I have no idea what the rules will be for 2013. If I had to bet, given the current political climate and the fact that this is an election year, I would feel fairly comfortable taking the position that there is no way that Congress will pass legislation regarding estate and gift taxes this year. If true, this means that we are facing a \$1 million exemption next year and a maximum tax rate of 55 percent – numbers that will cause many of our clients whose estates are currently not subject to tax to be subject to significant liability. Even if Congress does take action this year, it would likely be nothing more than another quick fix – a one or two year extension of the current laws. A patch only serves to delay the discussion which must inevitably occur and prevents our clients from being able to plan with any certainty.

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## **Estate Planning for Gay, Lesbian, Bisexual and Transgender Clients** **Statutory Surrogates, Regulatory Changes, Health Care Powers of Attorney & Related Considerations**

***By Paula A. Kohut***

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

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

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

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## Comments, *continued from page 1*

While I cannot predict the rules applicable to donors and decedents in 2013, I can say with certainty what the rules are in 2012 – we have a \$5 million gift tax and estate tax exemption and a top estate tax rate of 35 percent. North Carolina no longer has a gift tax and no estate tax is due unless there is a federal tax to be paid. This makes 2012 a perfect year for gifting for clients who would like to push assets down a generation or two and who do not need the assets for their own care. Gifting in 2012 does not need to be reserved for only the ultra-wealthy. Clients whose total net worth is between \$1 million and \$5 million may also be excellent candidates. If they have assets that they can afford to part with, making a gift in 2012 assures the clients that their assets will not be subject to tax in the future even if the exemption drops.

Even if a client does not want or need to make gifts in 2012, the client still needs to have good, effective estate planning documents in place. I have heard some practitioners worry about the future of our practice in the “new normal” of higher exemptions and lower rates and they have opined that, as a result, most clients will no longer need tax planning thereby reducing the amount of available work. I do not believe this to be the case. First, the permanency of the current estate and gift tax regime is far from certain. Second, as long as people die, they will still need to plan for the disposition of their assets upon death. Individual family situations and specific asset issues will always generate the need for customized planning. In this respect, 2012 is no different from 2011 or 2001.

The role of the estate planner may change over time, but, as long as there is death and as long as there are taxes, there will always be a need for competent, capable estate planners. The future of our profession looks bright, even as we wonder what new rules 2013 will bring. •

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*facility. We just found out the ill partner passed away. We do not know the location of the body.*

A later post explained that the partner was the designated health care surrogate, but the patient's family had made false allegations to the police and hospice facility regarding the surrogate which resulted in his exclusion. In North Carolina, the 2007 amendments to the informed consent statute (N.C.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. Recent changes in the federal regulations applicable to health care facilities accepting Medicare and Medicaid may also help in similar circumstances. Additionally, changes to 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 preneed 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. The provisions of Chapter 130A are addressed in detail in the article "Dust to Dust," by Michael Anderson, in this issue of the Will and the Way.

While the focus of this article is estate planning 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 deposition 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, there are new 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.

Despite these similarities, estate planning for LGBT clients has become more complex with (i) the emergence of recognition states (those states recognizing same sex marriage, civil unions or both), (ii) the overlay of the Defense of Marriage Act (DOMA) (which provides no state shall be required to recognize the validity of a same sex relationship that is treated as a marriage in another state, that "marriage" for federal purposes is defined only as a union between one man and one woman and "spouse" refers only to a person of the opposite sex who is also a husband or a wife), (iii) mini-DOMA acts (state laws

prohibiting same sex marriage), (iv) challenges to both DOMA and mini-DOMAs and (v) state constitutional prohibitions against same sex marriages (in some cases, other domestic partnerships or unions as well).

This article is the first in a planned series of articles. This article will: (A) review North Carolina and federal law on the ability of patients and their representatives, designees and support persons to control visitation rights and health care decisions in absence of the appointment of statutory health care agents, (B) discuss considerations in drafting powers of attorney, health care powers of attorney and advanced directives for LGBT and unmarried clients, (C) discuss health care authorizations for minor children in families other than opposite sex marriages, and (D) provide a summary of federal and state law effecting estate planning for LGBT clients.

## ***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.

### ***North Carolina Statutory Provisions Regarding Health Care Decisions***

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

1. Guardian of the person or general guardian, but health care power takes precedence unless clerk suspends the health care agent's authority.
2. Health care agent.
3. An attorney in fact to the extent authority is so granted, subject to the authority of a health care agent appointed under chapter 32A. N.C.G.S. § 32A-2. [Note: N.C.G.S. 32A-2(9) does give such authority if a statutory short form power of attorney is so initialed.]
4. The patient's spouse.
5. A majority of available parents and adult children.

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6. A majority of adult siblings.

7. 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.

8. The attending physician with confirmation by a second physician.

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

The 2007 amendments to N.C.G.S. Section 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).

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

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

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

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

## ***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: [http://www.cms.gov/manuals/Downloads/som107ap\\_a\\_hospitals.pdf](http://www.cms.gov/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).

**Hospitals – Conditions of Medicare Participation.** Effective Jan. 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. Section 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 Rules on Who Can Make Medical Decisions for You, National Center for Lesbian Rights, Sept. 9, 2011. [http://www.nclrights.org/site/DocServer/FAQs\\_New\\_Hospital\\_Visitation\\_Rules\\_9.09.11.pdf](http://www.nclrights.org/site/DocServer/FAQs_New_Hospital_Visitation_Rules_9.09.11.pdf)

The Interpretive Guidelines amplify and explain the regulations. The Interpretive Guidelines can be found at: [http://www.cms.gov/manuals/Downloads/som107ap\\_a\\_hospitals.pdf](http://www.cms.gov/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.

**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).

**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, providers of personal care), hospices and religious non-medical 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.

### ***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/standards\\_information/standards.aspx](http://www.jointcommission.org/standards_information/standards.aspx). On Nov. 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.

### ***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 a the ability of a non-family member to make health care decisions in the event of the principal's incapacity. Even a short form power of attorney can be effective in appointing a non-family member as one's health care agent with priority over other family members. The priority given health care agents under N.C.G.S. Section 90-21.13 (which by definition applies to a broad array of health care providers as defined in N.C.G.S. Section 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 may wish to consider the following when drafting:

**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. However, as noted below, any such provision should be thoughtfully drafted.

As experienced by Janice Langbehn as recently as 2009, it was a health care provider, not her lesbian 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. Section 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

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scope of providers subject to 42 C.F.R. Section 489.102 is very broad.

**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 provision need to be revised to be 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 below, any such provision should be thoughtfully drafted. Of course, transfer tax issues need to be considered.

**HIPAA Authorization Forms.** Given the potential for family members interfering with the desires of an unmarried client and LGBT clients in particular, HIPAA authorization forms will provide one more document establishing the client's desires, in addition to assuring access to necessary health care information.

**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. Reference is made to the article, Dust to Dust, in this newsletter for the priority of such directives.

**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 and in the article Dust to Dust in this newsletter, such a form, if used in North Carolina, should be attested by two witnesses. Please note that the use of such a form should be handled on a case by case basis and thoughtfully drafted.

**References to Domestic Partners or Similar Terms.** Some commenters have suggested North Carolina's Amendment One use of the term "legal domestic union" may provide arguments against enforcing rights of domestic partners, despite the provision stating that private contracts are unaffected. *See*, hyperlink below.\* Counsel for LGBT clients should consider the benefits and risks of references to domestic partners, partnerships and similar terms in estate planning documents and advanced directives. If there is no benefit to using such terms, would it be better to reflect a client's preferred agents and exclude any family members who could interfere under the statutory

default provisions without explanations that could be used for arguments against enforcing such provisions? Professional judgment applied to the specific facts of each case is required. <http://www.law.unc.edu/documents/faculty/marriageamendment/dlureportnov8.pdf>

### ***Minor Children and Health Care Authorizations***

**Second Parent Adoptions Are Unavailable in North Carolina.** A common adoption procedure for gay and lesbian couples in many states is a second parent adoption. In a second parent adoption the non-biological parent adopts the child of the biological parent without terminating the rights of the biological parent. In *Jarrell v. Boseman*, 364 N.C. 537, 704 S. E. 2d 494 (2010), the North Carolina Supreme Court held that Chapter 48 of the North Carolina General Statutes does not permit second parent adoptions and that Ms. Boseman's adoption of her partner's biological child was void. Although Ms. Jarrell, the biological parent, did win on the issue of the legality of the adoption, Ms. Boseman, the non-biological parent was entitled to visitation rights.

**Health Care Authorizations for Minors and Nominations of Guardians.** Health care authorizations, as provided in Article 4 of Chapter 32A of the North Carolina General Statutes, permit a parent of a minor child to delegate decisions regarding the parent's minor children to another adult when the parent is unavailable. An authorization is not affected by the subsequent incapacity or mental incompetence of the custodial parent making the authorization. N.C.G.S. § 32A-32(d). In light of the decision in *Jarrell v. Boseman*, such authorizations are an essential document for LGBT couples with children. The authorization terminates upon the earlier of a specified date, revocation by the custodial parent, termination of such custodial parent's custody rights or upon the minor attaining eighteen years of age. N.C.G.S. § 32A-32(a). 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. N.C.G.S. § 32A-32(c). The statutory form is set forth at N.C.G.S. Section 32A-34.

### ***Federal and State Laws Effecting LGBT Estate Planning***

**Relevance of Federal and State Law Unique to LGBT Estate Planning.** LGBT clients may be under the false impression that a marriage, civil union or domestic partnership recognized in another state or country will be honored in North Carolina and such clients may not realize that without proper health care powers of attorney and related documents a partner, support person or non-biological

parent may not be permitted to act. Instead, current federal and state law, particularly DOMA, mini-DOMAs and the law of non-recognition states such as North Carolina, make estate planning for LGBT clients complex and uncertain. Summaries of current challenges to DOMA, North Carolina law and other state law relating to same-sex marriage, civil unions and domestic partnerships, all of which effect LGBT estate planning, are set forth below.

These laws are not only relevant with respect to advanced directives, but with respect to other estate planning considerations in representing LGBT clients as well. For example, the validity of a marriage in the domiciliary state is determinative of not only of the estate tax marital deduction but also survivorship benefits such as Social Security and both private health care and Medicare coverage. As noted below, at least one taxpayer residing in a recognition state brought suit for an estate tax refund based upon the marital deduction as she and her late wife were married and living in New York on the date of death. LGBT clients residing in recognition states are filing protective claims for survivorship benefits. A lawyer advising a same sex couple (whether in a marriage, civil union or domestic partnership) contemplating a move to North Carolina, a non-recognition state, from a recognition state may want to consider the effect of establishing residency in North Carolina upon a claim for the estate or gift tax marital deduction, survivorship benefits and health insurance issues. If a couple moves from a recognition state, community property rules may apply. In addition to the estate planning considerations for unmarried individuals, familiarity with relevant statutory, case and regulatory laws which impact LGBT clients and awareness of advocacy groups which can provide assistance to both the practitioner and clients are essentials.

**Status of Challenges to DOMA.** There are a number of challenges to the Defense of Marriage Act (DOMA) pending in the federal courts. Given the 1,138 privileges, rights and benefits provided by the federal government based upon marital status, it can only be expected that challenges will continue. See, <http://www.gao.gov/new.items/d04353r.pdf>. Like the changing landscape in transfer tax law, an estate planner advising LGBT clients needs to keep abreast of these changes whether the clients are in a recognition or non-recognition state.

**United States Attorney General's Statement on Litigation Involving the Defense of Marriage Act 2/23/11.** Attorney General Eric Holder and the President concluded that DOMA fails to meet the heightened scrutiny standard of review appropriate for classification based upon sexual orientation and therefore is unconstitutional. Therefore, the Department of Justice has ceased defending Section 3 of DOMA (defining marriage), but the memorandum notes that federal agencies will still enforce DOMA. As a result, the US House of Representatives has hired its own counsel and intervened in Gill and other cases challenging the validity of DOMA. Statement of the Attorney General on Litigation Involving the Defense of Marriage Act (2/23/11) is available at: <http://www.justice.gov/opa/pr/2011/February/11-ag-22.html>.

## ***Cases Involving Challenges to DOMA***

**Health Care Benefits. Golinski v. United States Office of Personnel Management**, 2012 U.S. Dist. LEXIS 22071 (N.D. Cal. 2/22/12): Plaintiff, a staff attorney in the United States Court of Appeals for the Ninth Circuit, was granted summary judgment against the U.S. Office of Personnel Management (OPM) finding DOMA unconstitutional and granting a permanent injunction against enforcement of DOMA to deny Ms. Golinski's partner of twenty (20) years (domestic partner of over 15 years and spouse since 2008) from family coverage under the OPM's group coverage.

**Marital Status. Perry v. Brown**, 2012 U.S. App. Lexis 2328 (9th Cir. 2012): On February 7, 2012, the Ninth Circuit Court of Appeals affirmed the district court's holding that California's amendment to its constitution, Proposition 8, was unconstitutional. The decision is narrowly drawn to address the specific facts in California in which the right to same sex marriage existed under state law at the time the constitutional amendment was passed to take that right away.

**Employee Benefits. Dragovich v. United States Department of Treasury**, 2012 U.S. Dist. LEXIS 9197 (N.D. Cal. 1/26/12): The federal defendant's motion to dismiss were denied as the plaintiffs adequately stated claims for relief alleging that DOMA's definition of marriage deprived plaintiffs of their right as California public employees and their same sex spouses under the equal protection clauses of the Fifth and Fourteenth Amendments.

**Estate Tax Marital Deduction. Windsor v. United States**, 797 F. Supp. 2d 320 (S.D.N.Y. 2011): In 2007, Edith Windsor and Thea Spyer married in New York after a 40 year engagement. In 2009, Thea Spyer died. Edith Windsor, as the executor and surviving spouse of Thea Clara Spyer, filed a claim for a \$363,053 refund of federal estate tax which was assessed based on the ground that DOMA restricts the definition of "spouse" to "a person of the opposite sex." The United States Attorney General and President gave notice to the plaintiff that the United States of America would not defend the constitutionality of applying DOMA to deny plaintiff's claim and the Bipartisan Legal Advisory Group of the U.S. House of Representatives (BLAG) intervened. A decision on the merits has not been reported to date.

**Employee Health Care Benefits. Gill v. Office of Personnel Management**, 699 F. Supp. 2d 374 (D. Mass.) (2010): The United States District Court for the District of Massachusetts granted plaintiff's summary judgment on their claims that DOMA's definition of "marriage" and "spouse" resulted in the denial of federal marriage based health benefits, social security benefits and the ability to file joint tax returns with their spouses which denial violated the equal protection principles embodied in the Due Process Clause of the Fifth Amendment.

**County Clerk's Refusal to Recognize Massachusetts Marriage. Wilson v. Ake**, 354 F. Supp. 2d 1298 (M.D. Fla. 2005): Defendants'

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motions to dismiss Plaintiffs claims that a county clerk's refusal to recognize a Massachusetts marriage pursuant to DOMA violated the Full Faith and Credit Clause, the Due Process Clause, the Equal Protection Clause, the Privileges and Immunities Clause, and the Commerce Clause of the United States Constitution were granted.

## ***State Law***

**Survey of Current State Law.** A recent survey of state law on Marriage, Domestic Partnerships and Civil Unions by the National Center for Lesbian Rights is available at the following link:

[http://www.ncrights.org/site/DocServer/Relationship\\_Recognition.pdf?docID=881](http://www.ncrights.org/site/DocServer/Relationship_Recognition.pdf?docID=881)

There is also a helpful summary of Relationship State Laws Summary: [http://www.ncrights.org/site/DocServer/Relationship\\_Recognition\\_State\\_Laws\\_Summary.pdf?docID=6841](http://www.ncrights.org/site/DocServer/Relationship_Recognition_State_Laws_Summary.pdf?docID=6841)

**Current and Contemplated North Carolina Law.** In 1996, the North Carolina General Assembly passed its own version of DOMA. North Carolina General Statutes Section 51-1.2 states that:

*Marriages, whether by common law, contract or performed outside of North Carolina between individuals of the same gender are not valid in North Carolina.*

North Carolina does not recognize civil unions or registered domestic partnerships for any couples, same sex or opposite sex.

Additionally, Senate Bill 514 which was enacted during the 2011 Long Session of the General Assembly places a State Constitutional Amendment – Amendment One - on the ballot for the primaries on May 8, 2012 which, if approved by the voters, will read:

*Marriage between one man and one woman is the only legal union that shall be valid or recognized in this State. This section does not prohibit a private party from entering into contracts with another private party; nor does this section prohibit courts from adjudicating the rights of private parties pursuant to such contracts.*

Note: The ballot itself will state:

“ [ ] FOR [ ] AGAINST

Constitutional amendment to provide that marriage between one man and one woman is the only domestic legal union that shall be valid or recognized in this State.” •

***Paula A. Kohut*** is the sole member of Kohut, PLLC in Wilmington, North Carolina.



## **LIVE and WEBCAST PROGRAM**

Thurs., April 19

CLE Credit: 6.5 Hours

Registration: 7:45–8:20 a.m.  
Program: 8:20 a.m.–4:15 p.m.

## **Advanced Estate Planning Survey Course**

NC Bar Center • 8000 Weston Parkway • Cary

Planned by the NCBA Estate Planning & Fiduciary Law Section

This course is designed as a survey course for individuals who practice routinely in the area of estate planning and who have several years of prior experience in estate planning. The course includes a series of lectures by experienced estate planning practitioners who have expertise in specific areas, including advising clients on and implementing sophisticated gift tax planning strategies, modifying irrevocable trusts, drafting dynasty trusts and charitable trusts and integrating life insurance into an effective estate plan.

This program is designed on an advanced level, but also serves as an excellent opportunity for those who practice at an intermediate level to gain a more in-depth understanding of advanced planning techniques and advising clients regarding the same.

Register online: [www.ncbar.org/CLE/programs/914AEP.aspx](http://www.ncbar.org/CLE/programs/914AEP.aspx)  
Or call (919) 677-8745 or (800) 228-3402 (ask for CLE)

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