SAME SEX ESTATE AND ELDER LAW PLANNING IN VIRGINIA AFTER WINDSOR

by

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I. Introduction

Same sex couples are in a struggle for equality. They want to be able to love whoever they want, live wherever they choose, and have their relationships validated in the same manner as heterosexual couples. They want to be able to marry in any state and have their marriages recognized uniformly throughout the United States for all purposes. Same sex individuals are seeking full and equal protection under the law in all respects. They and their supporters are carrying this fight to statehouses and federal courts around the country. Traditionalists are adamant in their opposition.

Our nation is widely divided on this key issue, with some states recognizing such relationships and others banning them[1]. Even within each state there are widely diverging views. Virginia still has a ban on same sex-marriages which it is enforcing, but litigation is in process which may reach the U.S. Supreme Court and result in the overturn of that ban. Speaking about whether same-sex couples have a fundamental right to marry and enjoy the same rights and obligations as opposite sex couples, Attorney General Mark Herring has recognized that this is "one of the most important civil rights issues of our time" and has voiced support for freedom to marry. Virginia Governor Terry McAullife similarly supports eliminating the ban on same-sex marriage. The Virginia legislature is sharply divided on this issue.

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[1] As of January 2014, 17 states and the District of Columbia have legalized same sex-marriages, although the law in Illinois will not become effective until June 1, 2014: California, Connecticut, Delaware, District of Columbia, Hawaii, Illinois, Iowa, Maine, Maryland, Massachusetts, Minnesota, New Hampshire, New Jersey, New Mexico, New York, Rhode Island, Vermont, and Washington. Oregon recognizes same-sex marriages performed out of state. Utah and Missouri recognize them only for state tax purposes, and Ohio recognizes them only for death certificate purposes. Other states prohibit them by statute and/or constitution. A few states recognize civil unions or domestic partnerships. Much of the legalization of same-sex marriage has come through legislative or court processes. In 2012, Maine, Maryland, and Washington State became the first states to legalize same-sex marriages by means of the popular vote of state voters.

II. Historical Perspective

To better understand the issue and its history, it is helpful to look at how the Defense of Marriage Act (DOMA) came about in 1996 and how it was impacted by the decision in the Supreme Court case of U.S. v. Windsor , 570 U.S. __ (2013) in June 2013.

A movement to legalize same-sex marriage came to prominence in the 1970s and developed slowly. Historically, 1996 was an important year in the fight over marriage equality. A constitutional fight over the ban on same-sex marriage was taking place in Hawaii. At that time, a majority of Americans were opposed to same-sex marriage[2]. This spurred the U.S. Congress to enact the Defense of Marriage Act (DOMA) on September 21, 1996. On that date, there was not a single state which recognized same sex marriages. There was, however, a perceived danger that Hawaii would grant recognition, jeopardizing the enforcement of the ban on same-sex marriage in other states. A bill entitled the Defense of Marriage Act (DOMA) was quickly shepherded through Congress and signed by the President. Not only did DOMA when it was enacted provide, in Section 3, that marriage could only mean the union of one man and one woman, Section 2 of DOMA went so far as to provide that no state could be required to give recognition to a same sex-marriage performed in another state, or any attendant rights stemming from such a marriage, even if valid under the laws of the place of celebration.

Eight years later, in 2004, Massachusetts became the first state in America to allow the performance of same-sex marriages, which developed as a result of a federal court ruling. A great deal of national debate and litigation took place in the ensuing years, with strong voices and deep emotion on each side of the issue. Mini-DOMAS and anti-gay-marriage statutes were enacted in a number of states, including Virginia, while in other states, same-sex marriages were legitimized or civil unions or domestic partnerships were recognized and given many of the same privileges as marriages. In 1997, Virginia passed a statute (§ 20-45.2) declaring same sex marriages performed in other states and the contractual rights arising therefrom "void". In 2004, Virginia extended this rule to civil marriages and partnership

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[2] According to polls, at the time a majority of Americans were opposed to the recognition of gay marriage but by the time of Windsor , in fact since 2011, a majority have favored allowing same-sex marriage.

contracts (§ 20-45.3). In 2006, in a still further step, the Virginia Constitution was amended to restrict the definition of marriage to one man and one woman and to prohibit recognition of any rights stemming from a same-sex relationship. Clerks of Court throughout the Commonwealth were prohibited from issuing marriage licenses to same sex-couples. § 20-28 made it a misdemeanor for anyone to perform a marriage ceremony without a lawful marriage license having been issued.

By June of 2013, sweeping changes had occurred in how the U.S. public and a number of states viewed the institution of marriage and individual liberties. By then even traditional marriage had changed to the point that statistics were showing that fewer people were marrying, a high percentage of marriages were ending in divorce, and more children were being born and raised out of wedlock. The fabric of American families was changing. Gay individuals were identifying themselves openly, presenting themselves as couples, and gaining acceptance. Various states had legitimized same-sex marriages and recognized them for all purposes in their jurisdictions. Other states still found them illegal and prohibited their recognition.

In a highly controversial decision, on June 26, 2013, the United States Supreme Court ruled in the Case of U.S. v. Windsor that Section 3 of the Defense of Marriage Act (DOMA), prohibiting recognition of same-sex marriages, is unconstitutional. The case was far-reaching in its impact, requiring legal same-sex marriages to be recognized for all federal purposes. However, while it opened the door to marriage equality in federal matters, it left many state-specific issues in its wake.

III. <u>The Decision in U.S. v. Windsor,</u>

Turning to the facts in Windsor, it is noted that Edith Windsor and Thea Speyer were lawfully married in Ontario, Canada, in 2007. At the time of Thea Speyer's death in 2009, the couple was living in New York. Her will left everything to Edith Windsor, who paid $363,053 in federal estate taxes because DOMA prohibited her from claiming the federal estate tax exemption on account of its limited definition of a "spouse" and "marriage". Edith Windsor challenged the DOMA definition of marriage, filing suit in federal court for a refund which IRS would not grant her. The Department of Justice (DOJ) declined to

defend DOMA in that suit. The case traveled thorough the United States District Court and the Court of Appeals and finally reached the United States Supreme Court. In a sharply divided (5-4) decision, on June 26, 2013, the Supreme Court declared Section 3 of DOMA to be unconstitutional, thereby entitling Edith Windsor to the same refund that would have been available had she been in a heterosexual marriage, and thereby extending federal benefits to married same-sex couples in states where same-sex marriages are recognized.

IV. Implementation by the Federal Government[3]

The Executive Branch of the Federal Government acted with great speed to support and implement the decision. There were four ways, however, in which the implementation became complicated. First of all, although Windsor prohibited the federal government from discriminating against lawfully married same-sex marriages for purposes of federal benefits and rights, Windsor did not make a finding that there was a fundamental constitutional right to marry which the states could not abridge, since this was not the issue in the Windsor case. Secondly, because Windsor only addressed Section 3 of the Defense of Marriage Act and did not address Section 2, Windsor did not settle the question of whether Section 2 of DOMA is unconstitutional in its granting permission to one state to ignore a marriage validly performed in another state. Thirdly, a number of federal programs, such as Social Security, are created by statutes that look to the place of residence rather than the place of celebration of the marriage in defining the right to federal benefits, which may require Congressional or court action to change this for couples living in non-recognition states, further complicating implementation of changes. Lastly, the question of whether benefits will be received retroactively, particularly as to retirement benefits, has not been fully settled. Moreover, for the various federal agencies, the task of examining and changing procedures, developing new forms, and notifying the public is an enormous and time-consuming job.

President Obama and the Administration wasted no time in

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[3] With permission of the ACLU, a series of LGBR facts sheets on the topic of "after DOMA , What It Means For You" addressing what the Supreme Court Ruling in Windsor on DOMA means for various federal programs is attached hereto.

seeking to implement changes. Immediately following Windsor, the President hailed this ruling and directed the U.S. Attorney General to determine the impact of the Windsor decision on all federal benefit programs. He directed federal departments to ensure that the decision and its implications for federal benefits for same-sex legally married couples were implemented "swiftly and smoothly". It is clear that advance preparation had already been taking place as the agencies moved swiftly[4]. There have been a series of announcements, most of which are available and readily located on the internet, that were made by various agencies and departments as they determined, and redetermined, how Windsor would affect their programs and operations.

V. Reaction of the Commonwealth of Virginia

- **Ken Cuccinelli, then Virginia's Attorney General, has opined that state law and a state constitutional amendment prohibit the recognition of same-sex marriages.**
- **As a result, the Virginia Department of Taxation has ruled that even though our tax laws track the federal tax laws, the state cannot treat same-sex marriages in the same fashion as the Federal government does, and same-sex couples will have to file as married for federal tax purposes but as single for Virginia State tax purposes. Virginia Department of Taxation Tax Bulletin 13-13.**
- **Despite the Attorney General's ruling, civil rights groups have been trying to persuade the new governor to allow, by executive order, lawfully married same-sex couples to file joint Virginia tax returns. Such an executive order was made by the governor of Missouri in his state but the difference in wording of the laws in Virginia and Missouri may make it difficult for Governor Terry McAullife to issue a similar order because our constitutional ban is more**

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[4] **In January 2004, after enactment of the Defense of Marriage Act (DOMA),the U.S. General Accounting Office (GOA) had written to the Majority Leader of the U.S. Senate explaining that the GOA had identified over 1,000 federal statutory provisions in which marital status was a factor, so there already was a significant body of knowledge as to what statutes and agencies the Windsor decision would be likely to impact.**

detailed and specific in its prohibitions regarding unions which are not between one man and one woman. So, this will likely have to be resolved by the courts.

VI. Ongoing Litigation and Legislation

Throughout the country litigation and legislation addressing issues of same-sex relationships has been ongoing, and these important issues are receiving daily media coverage.

Because Virginia still prohibits same-sex marriage and declines to recognize rights and obligations stemming from such relationships, the Commonwealth is one of the states faced with lawsuits seeking to void the ban on gay marriage.

Virginia's ban has been challenged in Federal court in the case of Bostic v. Rainey by two same sex couples, one from Norfolk and one from Chesterfield. Virginia's new Attorney General, Mark Herring, has refused to defend the ban in court, opining that it violates the U.S. Constitution. At the same time he explained that the Circuit Court Clerks will not issue marriage licenses to same sex couples until the law is overturned. Following a hearing on the matter, United States District Court Judge Arenda L. Wright Allen[5] issued a lengthy opinion finding the prohibition on same-sex marriage unconstitutional, as a violation of the Fourteenth Amendment. She issued a stay of the decision until it could be heard on appeal. It is expected to make its way to the United States Supreme Court.

In her forty-one (41) page opinion, Judge Wright Allen cited various ways in which Virginia's refusal to recognize the Chesterfield couple's validly performed California marriage, in circumstances where a heterosexual couple would not have had the same problem, had affected the family, including:

a. One partner's inability to have access to or information for hours about her pregnant partner who was in the emergency room unable to speak [Sec.54.1-2986 (2014)]

b. The couple's expense of having to go to court to obtain joint custody because Virginia would not permit second parent adoption.

c. One spouse's inability to adopt the couple's child because in

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[5] Interestingly, Judge Wright Allen was unanimously confirmed as a federal judge three years ago (96-0) by the U.S. Senate, including many staunch conservative members.

Virginia second parent adoption is not permitted to unwed parents and Virginia considers same sex partners to be "unwed" [63.2-1201, 63.2-1202 (2014)]

d. The couple's inability to obtain a Virginia marriage license or birth certificate for their daughter listing them both as parents [20-45.2; 32.1-161 (2014)]

e. Their difficulty with the passport renewal process because the process requested the consent of both parents.

f. One spouse's inability to obtain health insurance under her partner's employer-sponsored health insurance for a period of time, necessitating her return to work sooner than desired after giving birth to the couple's child, and when finally being able to obtain such insurance being taxed on the imputed value of it.

g. One spouse's ineligibility for family medical leave for the birth of the couple's daughter and also for the death of one of their parents [29 USC Sec.7612 (2014)]

h. The rights of the spouses to be recognized as spouses for purposes of inheritance and estate taxes.

I. The right to have agreements concerning the custody, care or financial support of the couple's daughter enforced or to have the benefit of provisions in the law permitting dissolution of a marriage.

Judge Wright Allen concluded that same-sex couples "face legal and practical challenges that do not burden other married couples in Virginia" and that the right to marry is a core civil rights issue involving a fundamental right. She wrote, "[A]lthough steeped in a rich, tradition-based legacy, Virginia's Marriage Laws are an exercise of governmental power. For those who choose to marry, and for their children, Virginia's laws [sic] ensures that marriage provides profound legal, financial, and social benefits, and exacts serious legal, financial, and social obligations." In striking down the law as unconstitutional, she wrote, "[T]he government's involvement in defining marriage, and in attaching benefits that accompany the institution, must withstand constitutional scrutiny. Laws that fail that scrutiny must fall despite the depth and legitimacy of the laws' religious heritage."

A second Virginia case seeking to strike down the ban on same-sex marriages is pending in federal court before Judge Michael F.

Urbanski. Harris v. Rainey was filed in August 2013 by several couples living in Staunton and Winchester. Judge Urbanski certified the case as a class action in January 2014. In the most recent development as of February 20, 2014, he has taken the case under advisement as a result of the ruling in Bostic v. Rainey and is considering whether to stay the case or let it proceed while the earlier decided case of Harris v. Rainey proceeds through the appeal process.

VII. Implications for Virginia Practitioners

Whether people choose to marry and whether a couple is recognized as married can make an enormous difference in their rights, benefits, and obligations. Moreover, just because a marriage is recognized as valid in one state does not mean it will be recognized as valid in another state under the current law. Moreover, recognition of a couple for one federal program does not mean that they will be recognized as married for another federal program. Federal laws vary concerning what law the agency or department looks to in determining the validity of a marriage for a particular benefit. Some programs look to the law of the state of residence while others look to the law of the state in which the marriage was performed to determine whether a couple is considered married for purposes of a particular benefit.

Since Virginia is a non-recognition state with regard to same-sex marriages at this time, but is facing challenges to this position, there is uncertainty about what benefits are or will become available for same-sex couples in Virginia. In planning for same-sex couples residing in the Commonwealth, it is important to consider both the possibility of recognition and the possibility of non-recognition of a couple's relationship in the future, and to consider which benefits are impacted by Virginia's non-recognition of same-sex relationships.

Listed below are some of the ways that federal laws are being applied to same-sex married couples as of the most recent developments at the time of the writing of this article.

1. Federal Rights, Benefits, and Obligations: Legally married couples residing in states which recognize their marriages will be entitled to all rights, benefits, and obligations that federal law provides, just as opposite-sex couples are. However, couples legally

married in one state but living in a state such as Virginia that does not recognize their marriages will have access only to some federal rights and benefits and obligations but not others, depending on whether the specific federal law involved in the matter looks to the state of residence or the state of celebration to define the right to the particular benefit or obligation.

2. Federal tax returns: IRS will permit joint federal tax returns to be filed by married same-sex couples (Revenue Ruling 2013-17), but the Virginia Department of Taxation will not. Lawfully married same-sex couples will be treated as married for all Federal tax purposes, regardless of their state of residence.

3. Federal taxes on transfers between spouses: Married same sex-couples can make unlimited transfers to each other during life or upon death without having to pay any federal gift or estate taxes (as long as the recipient is a U.S. Citizen)

4. Portability: The surviving spouse in a married same-sex couple can take advantage of "portability" for federal gift and estate tax purposes. It, therefore, is important to advise the Executor to file an estate tax return when the first spouse in a same-sex couple dies even if no estate tax is owned, in order to preserve the right of portability.

5. Gift-splitting: Married same-sex couples can gift-split for federal gift tax purposes by giving the annual gift tax exclusion amount of $14,000 (in 2013) each or by jointly giving $28,000 simply from one of their own individual accounts or from a joint account.

6. Taxation of spouse's employer-provided health insurance: Same-sex spouses no longer will have income imputed to them or be required to pay federal income and employment taxes on benefits they derive under their spouse's employer health insurance benefit plans (but plans are not required to offer spousal benefits). It is interesting to note that some employer-sponsored plans currently offer "domestic partner" health insurance to unmarried heterosexual couples, as well as same sex-couples who are in a committed relationship, living together, and financially interdependent; for such unmarried couples, income is still imputed and the benefit is still taxable.

7. Social Security: Place of residence makes a difference for Social Security benefits. The ability to collect social security spousal

and survivor benefits on the record of the wage-earning spouse currently depends on state of residence of the wage earner, who must live in a state that recognizes the marriage, although the agency is encouraging anyone who thinks they should be entitled to benefits to apply to preserve retroactivity in case the interpretation of the law is changed.

8. Medicare - Place of residence does not matter for Medicare. Medicare will recognize legally performed same-sex marriages even if the couple now lives in a state which does not recognize their marriage. The Department of Health and Human Services has announced that beneficiaries in private Medicare plans will have access to equal coverage when it comes to care in a nursing home where their spouses live.

9. Medicaid - Place of residence can still make a difference for Medicaid. Medicaid is a combination federal and state program. Same-sex couples living in states that recognize their marriages will be treated the same as heterosexual couples, but those living in non-recognition states will probably not be treated as married for Medicaid purposes. It is a state option. This can be beneficial or detrimental to a particular couple depending on their circumstances.

10. SSI - Place of residence does not make a difference. SSI in assessing marital status utilizes the principle of "holding out"; accordingly even if they are not recognized as married in the state where they reside, a couple holding themselves out as married can be treated as married for SSI purposes.

11. Divorce, Alimony, Property Division: These matters depend on state law. Same-sex couples who are divorcing may now make deductible alimony payments and tax-free property transfers and retirement plan divisions that were not tax-advantaged for same sex couples before Windsor. However, if they live in a state such as Virginia which does not recognize their marriage, they will not be able to obtain a divorce there and may have to move to a state that does recognize their marriage (and comply with its residency laws) to dissolve their marriage. As for residency rules, Washington, D.C. and Vermont have a special rule that if the couple was married there, they may divorce there even if they no longer reside there.

12. Adoption: Virginia does not allow second parent adoption for an unmarried couple and will not recognize a same-sex marriage for adoption purposes. Efforts in the General Assembly to change this have not been successful.

13. Military benefits: Military benefits do not turn on place of residence. Same-sex married couples are entitled to receive full military benefits.

14. Veteran's Spousal Benefits: This is more problematic. The administration will no longer enforce statutory language in Title 38 that prevented same-sex couples from receiving Veteran's spousal benefits. However, there are still issues as to marriage recognition, because the statutes on Veteran's benefits look to the law of the place where the parties resided at the time of the marriage or the law of the place where the parties resided when the right to benefits accrued. It may take a Congressional or court action to change this to a grant of recognition based on the place of celebration.

15. Civilian Federal Employee and Retiree Benefits: The Office of Personnel Management (OPM) is providing benefits to same-sex federal employees and retirees who have legally married and their children regardless of the state of residence. Retirees have been given the right for a period of time to elect changes to their benefits for a same sex spouse.

16. ERISA benefits for private pension plans: employee benefits plans are extensively regulated by federal law. Even employers in non-recognition states will be required by federal law to recognize same-sex marriages for many employee benefit purposes if the plan is subject to ERISA. Some governmental and church plans are exempted from ERISA.

15. Immigration: Place of residence is not controlling. The U.S. Citizenship and Immigration Services policy uses the place of celebration standard for immigration purposes. Legally married same-sex couples can file petitions for citizenship on behalf of their spouses.

16. Bankruptcy: Bankruptcy proceedings are governed by Federal Bankruptcy laws and take place in federal courts. However, the Bankruptcy Code looks in part to state law which complicates

bankruptcy matters in non-recognition states.

17. Educational loans: Place of residence is not controlling. All same sex marriages are recognized for purposes of educational purposes. Applicants with same-sex parents or same-sex spouses will be required to list them on the applications.

VIII. Conclusion

Married same-sex couples living in states which recognize their marriages now have rights, benefits, and responsibilities that are identical in all respects to those of all other married couples. Same-sex couples living in Virginia and in other jurisdictions which do not permit recognition of their relationships are facing greater uncertainties in these changing times. Moreover, there may be changes that have already taken place of which they may not be aware or whose implications they do not fully understand.

The issue of whether same-sex marriages will be recognized is a cutting edge issue in our country, and Virginia is a battle ground state in the fight for marriage equality. The Windsor decision already has had a major impact on federal rights and obligations. As additional cases on this issue wend their way to the United States Supreme Court, same-sex couples will be considering important decisions about their lives and their plans. For individuals, the decisions they make about whether and when to marry, where to live, and how to set up their financial affairs can have significant implications. Attorneys engaged in estate and elder law planning In Virginia will play a key role in helping persons in the LGBT community understand the state of the law that applies to them and make informed decisions about their lives based on their values, goals and objectives and the law as it currently exists and is evolving. It is crucial for estate planning and elder law attorneys to monitor closely the changes that are occurring.

Some of the seniors in the LGBT community face many more challenges than their younger colleagues in that due to the times in which they came of age, many seniors are alienated from their families of origin, have not formed long term enduring relationships, and are living alone. They can be more at risk when it comes to housing, medical care, home health care, and long term care in facilities. They

may be unaware of the potential benefits available to them. Marriage may not be an option for many of them, and they may have difficulty understanding the complexity of their situations. This is an area where elder law attorneys have the opportunity to render important pro bono services to very vulnerable seniors as well as they services that they render to their more affluent clients.