

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF OHIO  
WESTERN DIVISION

JAMES OBERGEFELL, et al,

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Case No. 13-cv-501  
Judge Timothy S. Black

Plaintiffs,

vs.

THEODORE E. WYMYSLO, et al.

**EXPERT DECLARATION OF  
BERNARD L. MCKAY IN  
SUPPORT OF PLAINTIFFS'  
MOTION FOR DECLARATORY  
JUDGMENT AND PERMANENT  
INJUNCTION**

Defendants.

I, Bernard L. McKay, pursuant to 28 U.S.C. § 1746, declare under the penalty of perjury under the laws of the United States of America that the following are my true and correct opinions:

**I. Summary of Expert Opinions**

1. Married same-sex couples living in states such as Ohio that do not recognize their marital relationship face many estate planning and probate challenges not encountered by married heterosexual couples.

2. While certain estate planning instruments (such as wills, trusts and powers of attorney) may be implemented by married same-sex couples, those documents alone do not provide the full array of benefits and protections afforded to married heterosexual couples.

3. Until laws are applied equally to all married couples, married same-sex couples living in Ohio will need to continue exploring various legal alternatives in which to protect their families and wealth.

## **II. Expert Background and Qualifications**

4. I am a licensed and practicing attorney at law, admitted to the bar in the State of Ohio in 1994 and in the Commonwealth of Kentucky in 1995.

5. I am a Member of the law firm of Frost Brown Todd LLC, 3300 Great American Tower, 301 East Fourth Street, Cincinnati, Ohio 45202, where I have been employed since August 1994 and practice primarily in the areas of estate planning, probate and trust administration. I currently serve as the Chair of the Personal and Succession Planning Practice Group.

6. I am a Fellow in the American College of Trust and Estate Counsel, and currently serve as a member of the Professional Responsibility Committee and the State Laws Committee.

7. I am certified by the Ohio State Bar Association as a specialist in estate planning, trust and probate law.

8. I am a member of the Cincinnati Estate Planning Council.

9. I am a member of the Cincinnati Ohio Bar Association, where I served as Chair of the Estate Planning and Probate Committee in 2004-2005, and previously served as Chair of the Advanced Estate Planning and Probate Institute Committee.

10. I am a member in good standing with the American Bar Association, the Ohio State Bar Association, the Commonwealth of Kentucky Bar Association, the Cincinnati Ohio Bar Association and the Northern Kentucky Bar Association.

11. In addition to several charitable and civic board responsibilities, I currently serve on the Cincinnati Ohio Opera's Planned Giving Advisors Committee, the Cincinnati Ohio Bar Foundation's Planned Giving Committee and the Mercantile Library Planned Giving Advisory Council.

12. My background and experience are hereinabove referenced, and my presentations and publications are provided in detail in my bibliography attached as Exhibit A to this declaration.

13. I have never testified as an expert, either at trial or through declaration, nor have I been deposed as an expert.

14. The statements, conclusions and opinions included in this declaration are based upon my own research and experience.

15. I am being compensated at the rate of \$375 per hour.

**III. Statutory Protections That Apply to All Married Heterosexual Couples Living in Ohio But Are Not Available To Married Same-Sex Couples Living in Ohio**

16. When a married individual domiciled in Ohio dies, his or her surviving spouse is granted numerous property rights as a matter of law. Such rights include, among other things, the right to receive a portion of the deceased spouse's estate assets regardless of the provisions of the deceased spouse's will, the right to receive a family allowance, the right to remain in the mansion house free of charge for a period of time following the spouse's death, as well as the entitlement to receive notification at certain times throughout the deceased spouse's estate administration process. A surviving spouse is also considered in the distribution of damages awarded in a civil action for wrongful death. Such privileges are granted to surviving spouses only; not to domestic partners, individuals who have entered into a civil union or other couples

who are considered unmarried by the State of Ohio. Under Ohio law, when an Ohio domiciliary who was in a valid same-sex marriage dies, the estate administration process unfolds as if the deceased individual had died unmarried.

17. When an individual domiciled in Ohio dies, their death certificate reflects their marital status and, if married, the identity of their spouse. Death certificates have evidentiary value in both the private and public sector. Financial institutions universally advise surviving spouses to obtain multiple certified copies of death certificates upon the death of their loved ones.<sup>1</sup> The Vanguard Group advises surviving spouses that “you generally won’t be able to do anything regarding your spouse’s assets without certified copies of the death certificate.”<sup>2</sup> In the public sector, a death certificate is required for a surviving spouse to claim an interest worth up to \$40,000 in one or two of the decedent’s separately titled vehicles. Ohio Rev. Code § 4505.18.<sup>3</sup> Under this statute, the decedent’s interest passes outside of the estate; so if the surviving spouse is entitled to less than the full estate, receiving the vehicles outside the estate may increase the overall inheritance of the surviving spouse. Granted, in both the preceding examples, the death certificate may not serve as the sole evidence of marriage (for the title transfer, surviving spouses must also sign an affidavit swearing they are the surviving spouse), and may serve more as evidence of death, but the death certificate is one form of supporting evidence of marriage.

18. This declaration outlines certain statutory rights granted to the surviving spouse of an Ohio decedent and the estate planning issues often taken into consideration by married same-sex

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<sup>1</sup> *E.g.*, Fifth Third Bank - Death of a Spouse, <https://www.53.com/site/personal-banking/planning-center/lc-death-of-a-spouse.html> (last visited Sept. 18, 2013).

<sup>2</sup> The Vanguard Group Inc., Surviving spouse checklist (2010), [https://retirementplans.vanguard.com/segment/pdfs/SS\\_Checklist.pdf](https://retirementplans.vanguard.com/segment/pdfs/SS_Checklist.pdf).

<sup>3</sup> *See also* Ohio Bureau of Motor Vehicles, Vehicle Titling – Frequently Asked Questions, [http://bmv.ohio.gov/faq\\_vehicle\\_titling.stm](http://bmv.ohio.gov/faq_vehicle_titling.stm) (last visited Sept. 18, 2013); and Hamilton County Clerk of Courts, Auto Title – Frequently Asked Questions, [http://www.courtclerk.org/auto\\_title\\_faq.asp](http://www.courtclerk.org/auto_title_faq.asp) (last visited Sept. 18, 2013).

couples living in the State of Ohio who recognize that such legal protections are not extended to their marital relationship.

#### **IV. Probate Administration**

19. Chapter 2106 of the Ohio Revised Code is entitled “Rights of Surviving Spouses.” As a matter of Ohio law, by virtue of being the surviving spouse of a decedent, (s)he possesses numerous property rights in the decedent’s estate and is entitled to be notified on certain occasions throughout the estate administration proceedings.

20. For example, ORC §2106.01(A) provides that after the initial appointment of an administrator or executor of a decedent’s estate, the probate court shall issue a citation to the surviving spouse to elect whether to exercise the surviving spouse’s rights under Chapter 2106 of the Revised Code, including, after the probate of a will, the right to elect to take under the will or under §2105.06 of the Revised Code.

21. Chapter 2106.01(C) provides that if the surviving spouse elects to take under §2105.06 of the Revised Code, the surviving spouse shall take not to exceed one-half of the net estate, unless two or more of the decedent’s children or their lineal descendants survive, in which case the surviving spouse shall take not to exceed one-third of the net estate.

22. Ohio Revised Code §2106.03 provides that the surviving spouse may file a complaint in the probate court, making all persons interested in the will defendants, that requests a construction of the will in favor of the surviving spouse and for the court to render a judgment to that effect.

23. Ohio Revised Code §2106.10(A) provides that a surviving spouse may elect to receive, as part of the surviving spouse’s share of an intestate estate under §2105.06 of the Revised Code and the allowance of support under §2106.13 of the Revised Code, the entire

interest of the decedent spouse in the mansion house. Revised Code §2106.10(F) provides that the mansion house includes the decedent's title in the parcel of land on which the house is situated and, at the option of the surviving spouse, the decedent's title and the household goods contained within the house and the lots or farmland adjacent to the house and used in conjunction with it as the house of the decedent.

24. Ohio Revised Code §2106.13(A) provides that if a person dies leaving a surviving spouse and no minor children or leaving a surviving spouse and minor children, the surviving spouse, minor children, or both shall be entitled to receive in money or property the sum of \$40,000 as an allowance for support. If the surviving spouse selected two automobiles under Revised Code §2106.18, the allowance for support proscribed by this Section shall be reduced by the automobile having the lower value of the two automobiles so selected. Section 2106.13(B) provides that if the person died leaving a surviving spouse and no minor children, the probate court shall order the distribution of 100% of the family allowance to be paid to the surviving spouse. If the person died leaving a surviving spouse and minor children, and if all of the minor children are the children of the surviving spouse, again the probate court shall order the distribution of 100% of the family allowance to the surviving spouse. Alternatively, if the person died leaving a surviving spouse and minor children, and if not all the minor children are children of the surviving spouse, the family allowance shall be distributed in equitable shares as fixed by the Probate Court, to the surviving spouse and the minor children who are not the children of the surviving spouse.

25. Ohio Revised Code §2106.15 provides that a surviving spouse may remain in the mansion house free of charge for one year, except that such real property may be sold within that time for the payment of debts of the decedent. If the real property is so sold, the surviving

spouse shall be compensated from the estate to the extent of the fair rental value for the unexpired term.

26. Ohio Revised Code §2106.16 provides that a surviving spouse, even though acting as executor or administrator, may purchase certain property left by the decedent if such property was not specifically devised or bequeathed under the provisions of the decedent's will.

27. Ohio Revised Code §2106.18 provides that upon the death of a married resident who owned at least one automobile at the time of death, the interest of the deceased spouse in up to two automobiles that are not transferred to the surviving spouse due to joint ownership with the right of survivorship and are not transferred to a transfer-on-death beneficiary and that are not otherwise specifically disposed of by the testamentary disposition may be selected by the surviving spouse. This statute further provides that this interest shall immediately pass to the surviving spouse upon the transfer of the title and the sum total of the values of the automobiles selected by surviving spouse shall not exceed \$40,000.

28. Ohio Revised Code §2106.19 provides that upon the death of a married resident who owned at least one watercraft, one outboard motor, or one of each at the time of death, the interest of the deceased spouse in one watercraft, one outboard motor, or one of each that is not otherwise specifically disposed of by testamentary disposition and that is selected by the surviving spouse immediately shall pass to the surviving spouse.

29. Ohio Revised Code §2106.20 provides that a surviving spouse is entitled to a reimbursement from the estate of the decedent for funeral and burial expenses, if paid by the surviving spouse, to the extent that the rights of other creditors of the estate will not be prejudiced by the reimbursement.

30. In addition to the rights afforded to surviving spouses under Chapter 2106 of the Ohio Revised Code, other protections exist for surviving spouses. For example, when a married Ohio domiciliary dies without a will other laws apply as to the administration of the deceased spouse's estate as well as the distribution of the deceased spouse's property. More specifically, Ohio Revised Code §2105.06 provides that when a person dies intestate having title or right to any personal property, or to any real property or inheritance, in this state, the personal property shall be distributed and the real property or inheritance shall descend and pass in parcenary, in the following course:

(a) if there is a spouse and one or more children of the decedent or their lineal descendants surviving, and all of the decedent's children who survive or have lineal descendants surviving also are children of the surviving spouse, then the whole to the surviving spouse;

(b) if there is a surviving spouse and one child of the decedent or the child's lineal descendants surviving and the surviving spouse is not the natural or adoptive parent of the decedent's child, the first \$20,000 plus one-half of the balance of the intestate estate to the spouse and the remainder to the child or the child's lineal descendants, per stirpes;

(c) if there is a spouse and more than one child or their lineal descendants surviving, the first \$60,000 if the spouse is the natural or adoptive parent of one, but not all, of the children, or the first \$20,000 if the spouse is the natural or adoptive parent of none of the children, plus one-third of the balance of the intestate estate to the spouse and remainder to the children equally, or to the lineal descendants of any deceased child, per stirpes; and

(d) if there are no children or their lineal descendants, then the whole estate to the surviving spouse.



31. Ohio Revised Code §2113.06 provides that the administration of an estate of an intestate shall be granted to the persons mentioned in the following order: to the surviving spouse of the deceased, if resident of the state; afterwards, to one of the next of kin of the deceased, resident of the state.

32. Chapter 2113 of the Ohio Revised Code further deals with the appointment, powers and duties of executors and administrators. Ohio Revised Code §2113.05 provides that when a will is approved and allowed, the probate court shall issue letters testamentary to the executor named in the will, if the executor is suitable, competent, accepts the appointment and gives bond if that is required. If no executor is named in a will or if the executor named in a will dies, fails to accept the appointment, resigns or is otherwise disqualified, letters of administration with the will annexed shall be granted to a suitable person or persons, named as devisees or legatees in the will, who would have been entitled to administer the estate if the decedent had died intestate, unless the will indicates an intention that the person or persons shall not be granted letters of administration.

33. Ohio Revised Code §2113.07 provides that before being appointed executor or administrator, every person shall make and file an application that shall contain the names of the surviving spouse and all the next of kin of the deceased known to the applicant and that the application may be accompanied by a waiver signed by the persons who have priority to administer the estate, and, in the absence of a waiver, those persons shall be served notice for the purpose of ascertaining whether they desire to take or renounce administration.

34. Ohio Revised Code §2109.07 provides that a bond required of an administrator shall not be required in either of the following cases: (1) it shall not be required of a surviving spouse to administer the deceased spouse's estate if the surviving spouse is entitled to the entire net

proceeds of the estate and (2) it shall not be required of an administrator to administer an estate if there is no will, if the administrator is the next of kin, and if the administrator is entitled to the entire net proceeds of the estate.

35. Ohio Revised Code §2115.04 provides that not less than five days previous thereto, a written notice stating the time and place of making the inventory required by §2115.02 of the Revised Code must be served by the executor or administrator on the surviving spouse, but such notice may be waived in writing by such surviving spouse.

36. Ohio Revised Code §2119.01 provides that when a person owning property in this state has disappeared and has not been heard from, after diligent inquiry and for at least three months, under circumstances that afford reasonable ground to believe that the person is dead, cannot return or refuses to return to the person's home, and the person's estate requires attention, supervision, and care, or is needed for the maintenance of the person's dependents, the probate court, on application of the spouse or one of the next of kin, may appoint a trustee to take possession and charge of the property of the person, other than the property with respect to which the person has made provision by written instrument designating an agent or attorney in fact.

37. Chapter 2125 of the Ohio Revised Code is entitled "Action for Wrongful Death." Ohio Revised Code §2125.02 provides, in part, that a civil action for wrongful death shall be brought in the name of personal representative of the decedent for the exclusive benefit of the surviving spouse, the children and the parents of the decedent, all of whom are rebuttably presumed to have suffered damages by reason of the wrongful death, and for the exclusive benefit of the other next of kin of the decedent. Compensatory damages may be awarded in a civil action for wrongful death that may include damages for the loss of the society of the

decedent, including loss of companionship, consortium, care, assistance, attention, protection, advice, guidance, counsel, instruction, training and education, suffered by the surviving spouse, dependent children, parents or next of kin of the decedent including the mental anguish incurred by said individuals.

#### **V. Federal Income and Estate Taxes**

38. On August 29, 2013, the Internal Revenue Service clarified its position by issuing Revenue Ruling 2013-17 which provides that same-sex couples legally married in jurisdictions that recognize their marriages will be treated as married for federal tax purposes, including income, gift and estate taxes. This means that all federal tax provisions where marriage is a factor (filing status, claiming personal and dependency exemptions, taking the standard deduction, employee benefits, contributing to an IRA, claiming the earned income tax credit or child tax credit) apply to married same-sex couples. The ruling, effective September 16, 2013, applies regardless of whether the couple lives in a jurisdiction that recognizes same-sex marriage or a jurisdiction that does not recognize same-sex marriage. And while any same-sex marriage legally entered into in one of the 50 states, the District of Columbia, a U.S. territory or a foreign country will be covered by the ruling, it does not apply to registered domestic partnerships, civil unions or similar formal relationships recognized under state law.

39. Not all federal government agencies have taken a similar position. The Family and Medical Leave Act (FMLA) is a federal law that entitles eligible employees of covered employers to take unpaid, job-protected leave for specific family and medical reasons, with continuation of group health insurance coverage under the same terms and conditions as if the employee had not taken leave. The Wage and Hour Division of the U.S. Department of Labor

has issued guidance indicating that for purposes of FMLA, a spouse means a husband or wife as defined or recognized under state law for purposes of marriage in the state where the employee resides, including common law marriage and same-sex marriage. Consequently, married same-sex couples residing in Ohio do not qualify for protection under FMLA.

40. **Income Taxes.** In the most recent United States Government Accountability Report, the federal government identified 1,138 federal statutory provisions in which marital status was at least a factor in determining the rights and privileges of individuals. Of course, marital status is a key factor in determining how individuals file their federal and state individual income tax returns. When the United States Supreme Court held that Section 3 of the Defense of Marriage Act was unconstitutional, questions immediately arose regarding how the Internal Revenue Service would permit married gay and lesbian couples to file their individual income tax returns.

41. Under *Windsor*, the federal government cannot refuse to acknowledge a valid same-sex marriage.<sup>4</sup> Same-sex couples, then, living in a state that celebrates and recognizes same-sex marriages could proceed somewhat confidently in planning to file federal income tax returns as married, whether jointly or separately. What was unclear from the opinion, however, was whether the federal government must accept as married same-sex couples who were issued a marriage license in a same-sex marriage state but resided in a state that does not recognize out-of-state same-sex marriages and either statutorily or constitutionally prohibits such marriages in their own state. The issuance by the IRS of Revenue Ruling 2013-17 resolved the issue. As such, all federal tax provisions where marriage is a factor (filing status, claiming personal and dependency exemptions, taking the standard deduction, employee benefits, contributing to an

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<sup>4</sup> See *United States v. Windsor*, 570 U.S. \_\_\_\_ (2013) (slip opinion) at 20 (“DOMA seeks to injure the very class New York seeks to protect. By doing so it violates basic due process and equal protection principles applicable to the Federal Government.”)

IRA, claiming the earned income tax credit or child tax credit) apply to married same-sex couples, regardless of their state of residency.

42. While federal income tax filing issues for same-sex married couples are being resolved, state income tax filings for same-sex married couples are confusing. Many states require filers to mirror their federal filing status. For example, under Ohio law, “‘Adjusted gross income’ or ‘Ohio adjusted gross income’ means federal adjusted gross income....”<sup>5</sup> Since the Internal Revenue Service has issued guidance that it will consider same-sex couples as married for federal income tax filing purposes, it appears filers who celebrated their marriages in a same-sex marriage state but now reside in a non-same-sex marriage state may need to compute their taxable income as single for state filing purposes.

43. Another confusing factor for same-sex married couples is how to file their Ohio individual income tax returns. Ohio statute provides that if a husband and wife file a joint federal income tax return for a taxable year, they shall file a joint return in Ohio for said taxable year and that the tax liability is joint and several. Since Ohio does not recognize same-sex marriages, it is unclear how married same-sex couples who file their federal income tax returns jointly can comply with Ohio law.

44. **Estate Taxes.** In 2013, the unified credit and transfer tax exemption amount from federal estate taxes is \$5,250,000. This exemption amount determines the value of assets that can pass free of federal estate tax at one’s death (if not used during life).

45. Internal Revenue Code Section 2056 provides for a marital deduction for assets passing to a surviving spouse. Married gay and lesbian couples are now afforded the opportunity to take advantage of the marital deduction for federal estate tax purposes, which previously had

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<sup>5</sup> See Ohio Revised Code § 5747.01(A). For comparable statutes in other states that prohibit same-sex marriage see: Indiana Code § 6-3-1-3.5(a); Kentucky Revised Statutes § 14.010(9); Nebraska Revenue Statute § 77-2714.01(a); Virginia Code § 58.1-324(b) and 58.1-341(A)(1).

not been the case. The availability of the marital deduction can have a significant economic impact, if the couple's combined taxable estates exceed the federal exemption amount.

46. Prior to *Windsor* and Revenue Ruling 2013-17, the inability to utilize the marital deduction could have resulted in a monumental federal estate tax liability at the first spouse's death. As an illustration, if at the first spouse's death his/her taxable estate was \$6,250,000 and those assets were bequeathed to the surviving spouse, the federal estate tax liability potentially would have been approximately \$400,000 without the benefit of the unlimited marital deduction.

47. Now, not only do same-sex married couples receive equal treatment of the unlimited marital deduction, they also may benefit from other tax laws surrounding the portability of the unused federal estate tax exemption of a deceased spouse. For example, if at the first spouse's death his/her taxable estate for federal estate tax purposes was \$3,250,000, the \$2,000,000 of unused exemption can now be transferred to the surviving spouse. This would result in the surviving same-sex spouse having an increased federal estate tax exemption of \$7,250,000. Again, prior to *Windsor* and Revenue Ruling 2013-17, this tax benefit would not have been available to married same-sex couples.

48. Historically, another trap for the gay or lesbian married couple was the taxation of jointly owned property. Jointly owned property is taxed quite differently depending on whether the joint owners are married. The general rule in Internal Revenue Code Section 2040 provides that the entire value of jointly owned property where the joint owners are not married is included in the gross estate of the first owner to die, except to the extent that the survivor can show that he or she contributed consideration toward the acquisition of the property. Conversely, if the joint owners are married, the general rule is that only one-half of the value of the jointly held property is included in the gross estate of the first owner to die regardless of who supplied the

consideration. As a result, if the jointly owned property between a married heterosexual couple is held as “joint tenants with rights of survivorship,” the one half interest in the property included in the decedent’s estate will receive the benefit of the marital deduction and pass to the surviving spouse free of federal estate tax. Prior to *Windsor* and Revenue Ruling 2013-17, for gay and lesbian married couples, to prevent the inclusion of the entire value of jointly owned property in the taxable estate of the first spouse to die (for which no marital deduction was available), they were required to document how much consideration each party contributed toward the acquisition of the property for future use in determining the extent such property would be taxed at the death of the first spouse to die.

49. Note the aforementioned paragraphs relate only to the federal estate tax system. If the married same-sex couple lives in a state that does not recognize their marital relationship, such as the Commonwealth of Kentucky, a significant estate or inheritance tax can be assessed regardless of the marital deduction being available at the federal level. Prior to the repeal of the state estate tax statutes for individuals who died on or after January 1, 2013, the same was true for married same-sex couples living in the State of Ohio.

## **VI. Estate Planning Considerations**

50. Ohio law provides many protections and safeguards to a surviving spouse at the death of his/her spouse. In light of Ohio’s non-recognition of valid same-sex marriages granted in other jurisdictions, individuals in same-sex marriages must take into consideration when preparing their estate plan the issues hereinafter reviewed.

51. **Wills.** The drafting of any last will and testament must be done with the utmost care. Nominating an executor or personal representative is an important task. Without a last will and

testament, a probate court will appoint a legal representative for the estate, who typically is a person defined under Ohio law as next-of-kin of the decedent. In Ohio, the surviving spouse in a same-sex marriage is excluded from the definition of next-of-kin.

52. A decedent's next-of-kin also are entitled to notice of the probate of the decedent's will. In Ohio, since the surviving spouse in a same-sex marriage is not considered next-of-kin, it is likely that the decedent's parents or siblings would be entitled to the notice and not the same-sex spouse.

53. Also under Ohio law, a decedent's next-of-kin have standing to contest the decedent's will, which can cause a tremendous amount of anxiety to a gay or lesbian married individual who fears that his/her family members may contest the validity of his/her last will and testament that benefits the same-sex surviving spouse.

54. It is important for married same-sex couples to keep in mind that a last will and testament, like most of the estate planning instruments referenced herein, may not be automatically revoked if the same-sex couple terminates their relationship, as is typically the case in a divorce of a heterosexual marriage.

55. These are just a few of the issues confronting married same-sex couples when contemplating the preparation of a last will and testament.

56. **Trusts.** A living trust (commonly referred to as "revocable trust agreement" or "*inter vivos* trust") can be funded during one's life. If so, the trust-owned assets can easily be managed for the grantor's benefit in the event of incapacitation and said assets should avoid the probate administration process at such person's death, which can be an attractive alternative to the married same-sex couple for the aforementioned reasons. Instead of being governed by the provisions of a last will and testament, the trust assets would be administered by the trustee in



accordance with the terms of the trust agreement. While the trustee can avail himself/herself of the jurisdiction of the probate court if need be, typically a living trust allows the trustee to manage and dispose of the trust assets without court intervention.

57. Obviously, choosing a trustee to serve at the trust creator's death or incapacitation is of utmost importance. In addition, the creator of the trust can establish certain trusts to be created at his or her death. For example, directing that the trustee continue to hold the trust assets for the benefit of the surviving same-sex spouse so that the assets can be made available for the benefit of the surviving spouse, but not subject said assets to estate taxation at the surviving spouse's later death. Another option to consider is drafting the trust for the benefit of a same-sex spouse in a manner that allows the trust to qualify for the marital deduction. This was a particularly important drafting approach during the period prior to *Windsor* and Revenue Ruling 2013-17, since it was not clear when, or if, the marital deduction would be made available to married same-sex couples for federal estate tax purposes. This still could be an issue, however, for married same-sex couples who are domiciled in a state that does not recognize their marriage for state estate and inheritance tax purposes.

58. **Durable Financial Powers of Attorney.** While not necessary at times for married heterosexual couples, same-sex married couples should execute durable financial powers of attorney. These documents allow for another individual (commonly referred to as an "attorney-in-fact") to act on one's behalf should he or she become incapacitated. A properly drafted durable financial power of attorney can authorize the spouse to access bank accounts to pay the incapacitated spouse's bills, mortgage payments, etc., and to allow the attorney-in-fact to manage the incapacitated spouse's financial affairs. Provisions may also be included to specifically

authorize the attorney-in-fact to make gifts of the principal's property to the principal's spouse and/or other family members for tax planning purposes.

59. If one becomes incapacitated and unable to manage his or her financial affairs and does not have a valid durable financial power of attorney in place, a guardianship court proceeding may be instituted whereby a judge would appoint an individual to serve as legal guardian for the incapacitated individual. Ohio Revised Code §2111.04 provides that no guardian shall be appointed until at least seven days after the probate court has caused written notice, setting first the time and place of the hearing, upon the next-of-kin of the person for whom appointment is sought. Because same-sex marriage is not recognized in Ohio, an alleged incompetent's same-sex spouse would not be entitled to notice of the proceeding since she/he would not be considered next-of-kin. Such a circumstance could be devastating to gay and lesbian couples, if a court refuses to appoint the same-sex spouse as guardian and instead appoints an individual who is next-of-kin and who may not look lovingly upon the homosexual relationship.

60. **Medical Directives.** With respect to healthcare matters, same-sex married couples must execute healthcare proxies (commonly referred to as "durable powers of attorney for healthcare" or "medical directives") which authorize another individual to make medical decisions for an individual when he or she is unable to do so. Such authorizations are typically very broad and allow another person to make all types of medical decisions on behalf of the incapacitated person, such as consenting to surgery, authorizing transportation to another healthcare facility, and accessing medical records. Most importantly, however, naming the same-sex spouse as the healthcare surrogate is the way to assure a same-sex spouse that they will

not be denied visitation rights or a voice in making decisions concerning their spouse's health care matters, since Ohio law does not recognize the individual as spouse or a family member.

61. Similar to a durable financial power of attorney, should one become incapacitated without executing a healthcare proxy, a court proceeding may be initiated in order for a court to appoint a guardian who would make medical decisions on behalf of the incapacitated patient. Notice of these court proceedings are typically only given to next-of-kin which, under Ohio law, would not include a same-sex spouse. Again, in this instance, a court would determine who it feels is best suited to make such decisions on the incapacitated person's behalf—who may or may not be the same-sex spouse.

62. A living will directive or living will declaration is a document expressing an individual's desires concerning how he or she wishes to be treated from a medical perspective in certain circumstances. Typically a living will directive or declaration is only operative if the patient is in a terminal condition, a permanently unconscious state, or some other seriously grave condition. Such a directive or declaration sets forth a person's desire to discontinue healthcare treatment in certain circumstances, including the administration of artificially supplied nutrition and hydration, and allow the patient to die naturally. Same-sex married couples typically execute both a healthcare proxy and a living will directive and deliver a photocopy of these documents to their healthcare providers. Also, same-sex married couples are advised to have a candid discussion with their medical providers to make certain their physicians and other medical providers are aware of the nature of the same-sex marital relationship.

63. **Disposition of Remains.** Upon death, Ohio statute provides that a deceased person's surviving spouse shall have priority over all others and have the right of disposition of the

deceased person's remains, unless the deceased person executed a written declaration prior to death.

64. Whereas a widowed person in an opposite sex marriage would routinely be permitted to dispose of their spouse's remains when they die as a matter of law, same-sex married people in Ohio do not have such a right unless the deceased person completed a document typically captioned "Appointment of Representative for Disposition of Bodily Remains, Funeral Arrangements, and Burial or Cremation Goods and Services" prior to death. If said document is prepared in conformity with Ohio law and appoints the same-sex spouse as the representative, said same-sex surviving spouse would then have the legal authority to dispose of their deceased spouse's remains.

65. **Domestic Partnership Agreements.** While laws of every state grant various rights and privileges to heterosexual married couples in the event the relationship terminates by divorce or dissolution, Ohio does not provide such protections to same-sex married couples. In Ohio, to my knowledge no court to date has accepted jurisdiction to hear a petition for dissolution or a complaint for divorce brought by a same-sex married couple now living in Ohio. Therefore same-sex married couples must draft additional documents to address what will happen in the event the parties wish to terminate their relationship. Domestic partnership agreements are a vehicle where a same-sex married couple can establish certain legally enforceable rights between each other. Such an agreement can set forth the financial responsibilities of each partner and describe with particularity the rights of each party to the couple's property, especially if such property is jointly owned. A domestic partnership agreement typically outlines the division of property in the event the relationship terminates by any means other than death.

66. **Employee Benefits.** Certain large employers, even those operating in states that prohibit same-sex marriage, are adding the full range of benefits for gay and lesbian employees and their significant others.<sup>6</sup> Many private employers, however, continue to limit their employment benefits to the spouse and dependants of a heterosexual married employee, sometimes relying on state law refusals to recognize same-sex marriages.

67. While most assets can be transferred to a living trust in order to avoid probate administration at death, certain assets are not eligible to be owned by a trust. For instance, the owner of an IRA account cannot transfer title of the account to his or her living trust. However, the IRA owner can avoid probate administration of the IRA account proceeds remaining at the owner's death by completing a beneficiary designation form. Obviously, if the retirement account owner is considered married, his or her same-sex spouse would have greater rights to the account and more flexibility in regard to the options concerning the distribution of the funds (for income tax planning purposes). Designating a trust as the primary beneficiary of retirement accounts could result in such assets being distributed over a shorter time period than otherwise might be available if such retirement account assets were payable directly to a same-sex spouse.

## **VII. Conclusion**

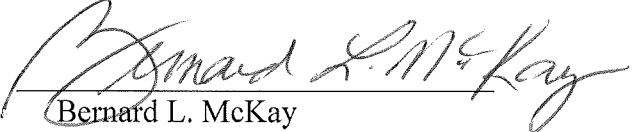
68. Admittedly, estate planning and probate challenges for married same-sex couples have been alleviated somewhat in light of *Windsor* and Revenue Ruling 2013-17, but many obstacles still remain for married same-sex couples living in states that do not recognize their

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<sup>6</sup> According to the Human Rights Campaign's 2013 Corporate Equality Index, approximately 62% of all Fortune 500 companies offer domestic partner health benefits. *See* Human Rights Campaign Foundation, Corporate Equality Index 2013, p. 9. Available at: <http://www.hrc.org/corporate-equality-index/>. Additionally, in January 2013, prior to the Supreme Court's ruling in *Windsor*, aerospace giant Boeing agreed to offer survivor pension benefits to the spouses of deceased employees. *See also* Trudy Ring, "Boeing Reverses Course, Will Offer Gay Spouses Survivor Benefits" (Jan. 18, 2013, 3:30 PM), <http://www.advocate.com/business/2013/01/18/boeing-reverses-course-will-offer-gay-spouses-survivor-benefits>.

marital relationship. While certain estate planning instruments (such as wills, trusts and powers of attorney) are typically advantageous for married same-sex couples to implement, those documents alone do not provide the full array of benefits and protections afforded to traditional married heterosexual couples. Until said laws are applied equally to all married couples, married same-sex couples living in Ohio will need to continue exploring various legal alternatives in which to protect their families and wealth.

Signed under the penalty of perjury under the laws of the State of Ohio this 11th day of October, 2013.

  
Bernard L. McKay

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