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MEMORANDUM

TO: Clients

FROM: Wade Ash Woods Hill & Farley, P.C.

RE: Same Sex Marriage and Civil Unions

The past few years have seen extraordinary changes on many fronts with respect to the definition of marriage, civil unions, the federal Defense of Marriage Act, the acceptance and legal validity of same sex marriages, and the revised uniform Pre-Marital and Marital Agreement Act. The purpose of this memorandum is to give our clients an overview of some of the issues with regard to same sex marriage and civil unions that might affect their estate plans.

Same Sex Marriage in General. As of June 26, 2015, same sex marriage is legal in all fifty states and certain territories of the United States (Guam was the first U.S. territory to recognize same sex marriage; however, the legal status of same sex marriage in American Samoa is unclear because its residents are not U.S. citizens by birth). Multiple sovereign tribal nations located in the United States also recognize same sex marriages.

History of Same Sex Marriage. The history of the legalization of same sex marriage in the United States is dramatic and convoluted. While the right to same sex marriage began to be litigated in the early 1970s, the issue came to the fore in contemporary history in 1993 when the Hawaii Supreme Court issued its decision in *Baehr v. Miike*, with an ultimate finding upon remand that Hawaii's ban on same sex marriages was unconstitutional. This finding was followed up in 1998 with an amendment to the Hawaii State Constitution which banned same sex marriage.

In 1996, the United States Congress passed the federal Defense of Marriage Act ("DOMA"), which defined marriage as being "only a legal union between one man and one woman as husband and wife", and which further defined the term "spouse" as referring "only to a person of the opposite sex who is a husband or a wife". Interestingly, DOMA was a direct response to the *Baehr* case, which was pending at the time DOMA was introduced. DOMA's proponents were particularly concerned that Hawaii's unique precedent could have substantial, wide-ranging, and complicated impacts on traditional notions of marriage and family and on federal laws related to rights and benefits theretofore only available to married couples of the opposite sex.

DOMA remained valid law until June 26, 2013, when the United States Supreme Court decided the case of *Windsor v. U.S.*, 133 S. Ct. 2675 (2013) and struck down DOMA as unconstitutional for federal law purposes. The *Windsor* decision made certain federal tax laws (such as filing joint income tax returns and claims for the estate tax marital deduction), available to surviving spouses of same sex marriages entered into in a jurisdiction where such marriages were recognized, even if those spouses were living in a jurisdiction which did not recognize same sex marriage at the time. It also made health care, retirement, and Medicare benefits available to spouses in a legally valid same sex marriage.

Legal challenges to bans on same sex marriage continued, and multiple lawsuits were filed seeking to overturn those bans in various jurisdictions. On October 6, 2014, the U.S. Supreme Court decided not to review several appellate court decisions finding various state DOMA laws invalid, including an appellate decision from the Tenth Circuit Court of Appeals which found that Utah's state DOMA law was invalid. This appellate decision was binding precedent on Colorado, making the date of the U.S. Supreme Court's decision the effective date upon which same sex marriage was legally recognized in Colorado.

Finally, on June 26, 2015, the U.S. Supreme Court issued its decision in the case of *Obergefell v. Hodges*, 135 S.Ct. 2584 (2015), finding that the Due Process Clause of the Fourteenth Amendment to the United States Constitution requires all states to grant and recognize same sex marriages. The Court further recognized a fundamental right to marry for all individuals wishing to enter into a marriage, whether of the same or the opposite sex. This landmark decision made same sex marriage the law of the land, and removed any distinctions between married couples of the same sex and the

opposite sex.

Countries Recognizing Same Sex Marriage: Argentina, Belgium, Brazil, Canada, Denmark (including Greenland), France, Iceland, Ireland, Luxembourg, Mexico, the Netherlands (this was the first country to extend marriage to same sex couples, in 2001), New Zealand (not including territories other than the Ross Dependency in Antarctica), Norway, Portugal, South Africa, Spain, Sweden, the United Kingdom, and Uruguay.

Civil Unions in General. Pursuant to C.R.S. § 14-15-101 *et seq.*, eligible couples, whether of the opposite or the same sex, may enter into civil unions in Colorado. Neither of the parties to the civil union may be party to another civil union, or be legally married to another person. Civil unions give couples many of the same rights and responsibilities as spouses in a marriage without having to enter into a marriage, and have been used in the past by same sex couples seeking those rights as an alternative to marriage. Civil unions, however, do not include all of the rights included in a marriage, such as access to federal benefits. Now that same sex marriage is legal in Colorado and the rest of the 50 states, however, civil unions will likely become even less popular with both types of couples.

Mechanics of Entering Into a Same Sex Marriage. Entering into a same sex marriage in Colorado works exactly the same way as entering into an opposite sex marriage, including common law marriage available under Colorado law.

Rights Available to Spouses in a Same Sex Marriage. After the *Obergefell* decision, spouses in a valid same sex marriage have the same state and federal rights, and access to benefits, as spouses in an opposite sex marriage.

History of Civil Unions. Same sex legal rights in Colorado have gone through some interesting twists and turns. In 1975, the Boulder County Clerk issued marriage licenses for several same sex couples, but those were later invalidated. In the 1980s, Aspen, Boulder and Denver passed domestic partner ordinances. In 1992, Amendment Two was passed by the state that prohibited rights being granted to same sex couples, which was overturned by the U.S. Supreme Court in May 1996. In the 1990s, several bills failed that would have either banned same sex marriages (vetoed by the governor) or granted inheritance rights to committed partners. In 2006, two ballot initiatives were on the ballot: Referendum I that would have granted domestic partnership benefits and responsibilities (which failed), and Amendment 43 (“mini-DOMA”) that defined marriage as between one man and one woman (which passed, and was codified as Article II, Section 31 of the Constitution of the State of Colorado). In 2007, the legislature passed the Sexual Orientation Employment Discrimination Act and the Second Parent Adoption Act. In 2009, the legislature passed the Designated Beneficiary Act, and after civil union legislation failed to pass in 2011 and 2012, a bill was passed and civil unions were signed into law in 2013. Finally, in 2014, a bill was passed permitting the filing of joint Colorado state income tax returns for both partners in a civil union and same sex married couples. The bill, codified as C.R.S. § 14-15-117, requires that such partners/couples use the same filing status for Colorado tax returns as used on their federal tax returns.

States Recognizing Civil Unions. Only four states recognize civil unions: Colorado, Hawaii, Illinois, and New Jersey.

States Recognizing Domestic Partnerships: California, the District of Columbia, Maine, Nevada, Oregon, Washington, and Wisconsin allow for domestic partnerships, while Hawaii allows for a similar relationship known as “reciprocal beneficiary relationships”.

Mechanics of Entering into a Civil Union: Any two unmarried adults (age 18 or older) who are not related to each other, and who are not otherwise in another civil union or legal marriage, may enter into a civil union. A license must be obtained from the clerk and recorder of the county in which one of the partners resides. Authorized persons may preside over the ceremony, and a certificate of civil union is then issued which is filed with the clerk and recorder. The Office of Vital Statistics keeps a record of civil unions, as they do for marriages. If a couple has entered into a valid civil union or domestic partnership in a different jurisdiction, they will be deemed to be partners in a civil union with respect to Colorado law.

Colorado Rights Available to Partners in a Civil Union: This is not a complete list, but the rights include: the right to inherit from each other; receive exempt property and a family allowance (currently \$32,000 for each allowance) in the estate of a deceased partner; elective share rights for a surviving partner; presumption of joint tenancy ownership of tangible personal property on the death of a partner; file joint Colorado income tax returns; right to bring a wrongful death action; receive workers’ compensation benefits; priority for appointment as conservator, guardian and personal representative; presumptions as to parentage of children born to the union; PERA rights; group benefits for state employees; rights to visit the partner in hospitals; rights to visit the partner in correctional facilities; healthcare proxy decision-makers; family leave benefits; same priority as spouses for directions as to disposition of last remains; homestead exemption; immunity from compelled testimony; inclusion in the list of family members who have an insurable interest; right to obtain orders concerning division of property, child support, child custody and visitation, and awarding of maintenance on the dissolution of a civil union; and the same rights to adopt as step-parents. In fact, the entire body of domestic relations law applies to civil unions in the same manner as marriages.

*Rights **Not** Available to Partners in a Civil Union:* Because partners in a civil union are not married, there are a number of rights that are still not available to them simply because a civil union is not a legal marriage. It should be noted that the *Windsor* decision does not affect civil unions in Colorado for this reason as well. Many *federal* rights are not available to partners in a civil union, including Social Security benefits payable to a surviving partner, COBRA benefits after a divorce or the death of a partner for health insurance, the tax effects of transfers between partners (such transfers will be subject to the federal gift tax because there will be no marital deduction), a deduction for payments of maintenance awarded in the dissolution of a civil union, QDRO protection from taxation of a division of a retirement account in a dissolution, protection from capital gains or gift tax on transfers of property between partners on dissolution of a civil union, and the marital deduction from the federal estate tax for gifts passing to a surviving spouse at death.

Also, on the state level, some rights are not entirely clear. For example, Colorado's Uniform Parentage Act has not been updated to the newer uniform act that addresses artificial reproductive techniques commonly used for same-sex couples, and speaks in terms of paternity, maternity, and marital status. Some practitioners recommend that same sex couples still apply for a court order determining parental status, especially if other states may be involved in the future. The Colorado Department of Vital Statistics has not yet clarified whether it will permit both partners to be listed on the birth certificate of a child born to partners in a civil union.

With respect to qualification for Medicaid, partners in a civil union must apply for federally-funded Medicaid programs separately. For state-funded Medicaid programs, applicants in a civil union may apply together as one household. The Colorado Department of Health Care Policy and Financing has not yet issued guidance as to whether the assets owned by a partner in a civil union will be counted in the same manner as the assets of a "community spouse" for purposes of determining the eligibility of the incapacitated spouse for Medicaid. Personnel at the agency have indicated that they are leaning towards treating the civil union partners in the same manner as spouses. The community spouse asset limit in 2015 was \$119,200.

In the context of a dissolution of the civil union, it is not clear whether court orders affecting child custody, division of property, or child support and maintenance orders will be enforceable in states that do not recognize civil unions. It also may not be clear when the civil union has commenced, for schedules determining maintenance or the elective share after the death of a partner. For example, if a couple has been together for many years in Colorado, and now enters into a civil union, does it start on the date of the formation of the civil union, or when the relationship commenced? For married couples in a divorce, the court will not look at the prior relationship years (but they could have married and chose not to).

Entering into a civil union will revoke a Designated Beneficiary Agreement, but does not affect the validity of prior Domestic Partnership Agreements or Cohabitation Agreements. The terms of such agreements should be reviewed to determine what the effect a civil union may have on them. We recommend that such agreements be amended to specifically state how the parties' property rights are affected by entering into a civil union, if the agreement did not contemplate that such a union might be available. Partners in a civil union (or couples contemplating entering into a civil union) can enter into the same kind of Marital Agreements as married couples.