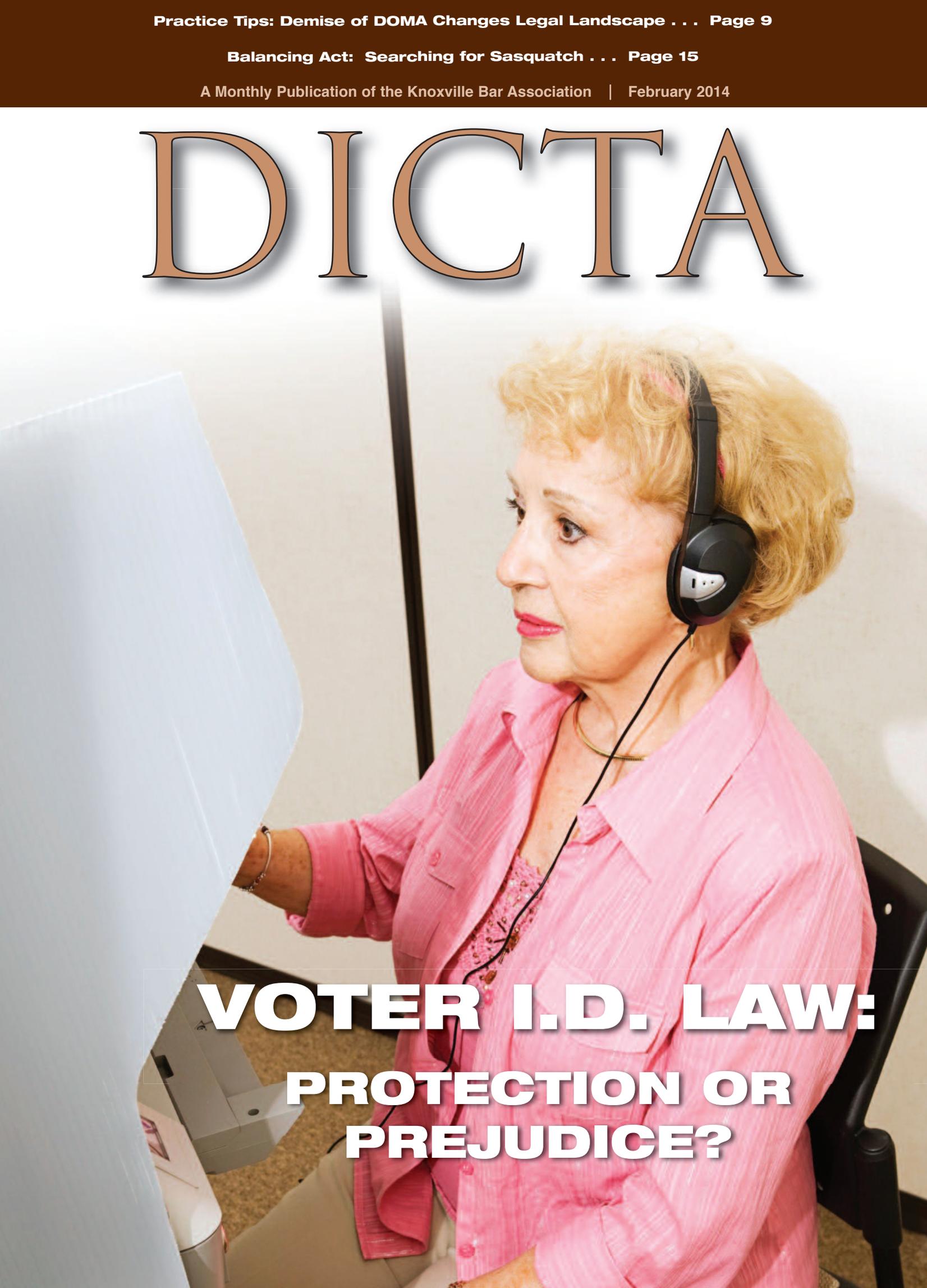


DICTA

A photograph of a woman with short, curly blonde hair, wearing a pink button-down shirt and a black headset with a microphone. She is sitting at a desk, looking at a computer monitor. The background is a plain, light-colored wall.

**VOTER I.D. LAW:
PROTECTION OR
PREJUDICE?**

By: Marshall H. Peterson
Holbrook Peterson Smith PLLC



Demise of DOMA Changes Legal Landscape

*"How small, of all that human hearts endure,
That part which laws or kings can cause or cure."
--Samuel Johnson*

Acknowledging Dr. Johnson's point, but legal developments in 2013 regarding same-sex marriage had a major effect on many clients' hearts and our representation and advice.

A significant change in the legal landscape occurred on June 26, 2013. That day the Supreme Court issued its opinions in *United States v. Windsor*¹, and *Hollingsworth v. Perry*². The *Hollingsworth* opinion restored the right to same-sex marriage in California. The *Windsor* opinion held that section 3 of the federal Defense of Marriage Act (DOMA) is unconstitutional. That section forbade the federal government from recognizing anyone as married unless the affected parties were a man and woman legally married to each other.

The response of the various federal executive branch agencies was prompt. Gay or lesbian couples validly married in a jurisdiction which recognizes same-sex marriages will generally be recognized as married for purposes of federal law. By adopting a "site of celebration" rule, the benefit or burden of federal rights and obligations will apply regardless of where the couple lives at any time following their marriage.

Even though Tennessee voters amended the state constitution in 2006³ to provide that a marriage between one man and one woman is the only recognized marital contract, that restriction only applies to privileges and duties derived from the State; for all those arising from the federal government, this restriction is not valid.

Some examples of federal rules now applying to same-sex married couples are: income tax filing status⁴, federal transfer tax (estate, gift, generation skipping taxes) rules⁵, social security⁶, veteran's benefits⁷, employment benefits such as health insurance⁸, family medical leave act requirements⁹, retirement benefit requirements for ERISA plans¹⁰, and immigration¹¹.

There are many others, but the point is lawyers need to determine if their client(s) is married under the laws of any jurisdiction, even if domiciled in a state such as Tennessee that does not yet recognize the marriage as valid under state law. There are currently seventeen (17) states¹², the District of Columbia, and many foreign countries where same-sex couples may marry. Utah's prohibition of such marriages was invalidated by a federal court on December 13, 2013, but on January 4, 2014, the United States Supreme Court stayed that ruling pending further appeals.¹³

Tennessee's constitutional ban on same-sex marriage has been challenged.¹⁴ The same is true in states across the country. But regardless of the outcome of those cases, we must be aware of the implications for our clients. Not only will same-sex married couples live in Tennessee, but many national employers¹⁵ offer benefits to same-sex couples whether married or in a registered domestic partnership or civil union partnership.

Just as Dr. Johnson had the first words in this article, his sage advice will provide the last: "Knowledge is of two kinds. We know a subject ourselves, or we know where we can find information on it." It is important for us all to know the law is evolving regarding same-sex couples, and we will be called on to guide decisions in response.

¹ *United States v. Windsor*, No. 12-307, slip op. (U.S. June 26, 2013).

² *Hollingsworth v. Perry*, No. 12-144, slip op. (U.S. June 26, 2013).

³ Tenn. Const. Art. XI, § 18 (2013).

⁴ Rev. Rul. 2013-17, 2013-38 I.R.B. 201 (August 29, 2013).

⁵ See Kay Bell, Estate tax issues of same-sex marriage, Bankrate.com, Aug. 31, 2013, available at: <http://www.bankrate.com/finance/taxes/estate-tax-issues-same-sex-marriage.aspx>.

⁶ Marilyn Bowden, *Social Security Benefits and Same Sex Marriage*, Bankrate.com, available at: <http://www.bankrate.com/finance/retirement/social-security-benefits-same-sex-marriage-1.aspx>.

⁷ Charlie Savage, *V.A. to Provide Spousal Benefits to Gays, Administration Says*, N.Y. Times, Sept. 4, 2013, available at: <http://www.nytimes.com/2013/09/05/us/va-to-provide-spousal-benefits-to-gays-administration-says.html>.

⁸ See David G. Savage, *Benefits Rules Eased on Same-Sex Partners of Federal Employees*, L.A. Times, July 21, 2012, available at: <http://articles.latimes.com/2012/jul/21/nation/la-na-same-sex-benefits-20120721>.

⁹ Sean Higgins, *Labor Dept.: Family Medical Leave Act Extends to Same-Sex Couples*, Washington Examiner, Aug. 13, 2013, available at: <http://washingtonexaminer.com/labor-dept.-family-and-medical-leave-act-extends-to-same-sex-couples/article/2534192>.

¹⁰ See Benjamin Takis, *Same-Sex Marriage and ERISA in the Windsor Era*, Bloomberg Law, 2013, available at: <http://about.bloomberglaw.com/practitioner-contributions/same-sex-marriage-and-erisa-in-the-windsor-era/>.

¹¹ Dep't of State, U.S. Visas for Same-Sex Spouses: FAQs for Post-Defense of Marriage Act, available at: http://travel.state.gov/visa/frvi/frvi_6036.html.

¹² States where same-sex marriage is currently legal include: California, Connecticut, Iowa, Massachusetts, New Jersey, Delaware, Hawaii, Illinois, Minnesota, New Hampshire, New York, Rhode Island, Vermont, Maine, Maryland, New Mexico, and Washington. See *States, Freedom to Marry*, available at: <http://www.freedomtomarry.org/states/>.

¹³ U.S. Supreme Court Order No. 13A687, Jan. 6, 2014, (staying the permanent injunction issued by the United States District Court for the District of Utah) available at: http://www.supremecourt.gov/orders/courtorders/010614zr_2co3.pdf. See also Jacob Gershman, *Why the Supreme Court Put the Utah Gay Marriage Ruling on Hold*, Law Blog, Wall Street Journal, Jan. 6, 2014, available at: <http://blogs.wsj.com/law/2014/01/06/why-the-supreme-court-put-utah-gay-marriage-on-hold/>.

¹⁴ Complaint, *Tanco, et. al. v. Haslam, et. al.*, M.D. Tenn. (Oct. 21, 2013), available at: <http://www.nclrights.org/wp-content/uploads/2013/10/TNComplaint.pdf>. See Brian Hass, *4 Same Sex Couple Sue Tennessee Over Gay Marriage*, USA Today, Oct. 21, 2013, available at: <http://www.usatoday.com/story/news/nation/2013/10/21/gay-marriage-tennessee-lawsuit/3145541/>.

¹⁵ Examples of nationwide businesses that are of particular importance to Tennessee that now offer benefits to same sex couples include Walmart and FedEx. The trend of offering such benefits continues to grow; see Blake Ellis, *Record Number of U.S. Firms Offering Same-Sex Benefits*, CNN Money, Dec. 9, 2013, available at: <http://money.cnn.com/2013/12/09/pf/lgbt-corporate-equality/index.html>.