



# COMMONWEALTH of VIRGINIA

Office of the Attorney General

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The Honorable Robert G. Marshall  
Member, House of Delegates  
Post Office Box 406  
Richmond, Virginia 23218

Dear Delegate Marshall:

I am responding to your request for an official advisory opinion in accordance with § 2.2-505 of the *Code of Virginia*.

## Issue Presented

You inquire whether a Governor, by executive order, can require or direct the Finance Department or the Department of Taxation to allow same-sex couples to receive joint marital status for purposes of filing Virginia income tax returns.

## Response

It is my opinion that a Governor may not direct or require any agency of state government to allow same-sex couples to receive joint marital status for Virginia income tax returns. Such a directive would represent an attempt to exercise legislative powers in violation of the constitutionally mandated separation of powers and would also violate the express terms of Article I, § 15-A of the Virginia Constitution.

## Applicable Law and Discussion

Article V, § 1 of the Constitution of Virginia establishes that “[t]he chief executive power of the Commonwealth shall be vested in a Governor.” The Supreme Court of Virginia has noted that “[u]nder our system of government, the governor has and can rightly exercise no power except such as may be bestowed upon him by the constitution and the laws.”<sup>1</sup> No constitutional or statutory provisions explicitly grant to the Governor the authority to issue executive orders. Governors historically have issued executive orders based upon the authority inherent in the constitutional duty of a Governor to “take care that the laws be faithfully executed.”<sup>2</sup> Prior opinions of the Attorney General recognize that the Constitution grants to the Governor a general reservoir of powers as chief executive of the Commonwealth.<sup>3</sup> Thus, the authority of the Governor to issue executive orders is well established in the law and history of the Commonwealth.

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<sup>1</sup> Lewis v. Whittle, 77 Va. 415, 420 (1883).

<sup>2</sup> VA. CONST. art. V, § 7.

<sup>3</sup> See 1983-84 Op. Va. Att’y Gen. 180; 1945-46 Op. Va. Att’y Gen. 144.

The scope of such authority, however, is limited.<sup>4</sup> A Governor may not use an executive order (or any other means) to exercise legislative power, which is vested solely in the General Assembly.<sup>5</sup> Furthermore, a governor may not issue executive orders or take other action that is contrary to express provisions of the Virginia Constitution.<sup>6</sup> Thus, if an executive order amounts to an exercise of legislative power or violates a provision of the Virginia Constitution, the Governor is without power to issue it and the order necessarily is void.

Applying this background to your specific inquiry, it becomes clear that a Governor may not direct or require a state agency to allow a change in filing status to permit same sex couples to receive joint marital status for Virginia income tax returns for two reasons. First, it would represent an impermissible attempt by the Governor to exercise legislative power belonging to the General Assembly. Second, such a directive would violate the express terms of Article I, § 15-A of the Virginia Constitution.

At the outset, it must be recognized that the power of taxation is a legislative power. The Virginia Supreme Court has

long recognized the principle that the power of a government to tax its people and their property is essential to government's very existence. This power to tax, which is inherent in every sovereign state government, is a legislative power that the Constitution vests in the General Assembly.<sup>[7]</sup>

Regarding income taxation, the General Assembly has exercised its legislative power by enacting Chapter 3 of Title 58.1 of the *Code of Virginia*.<sup>8</sup> In Chapter 3, the General Assembly, through the words it has chosen, has made clear that joint returns are available only to traditional married couples. For example, § 58.1-324 of the *Code of Virginia* uses the gender-specific terms "husband" and "wife," making clear an intention to have the provision apply to couples composed of one man (the husband) and one woman (the wife). Furthermore, even when the relevant provisions of Chapter 3 contain the gender neutral "individual

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<sup>4</sup> See generally 2006 Op. Va. Att'y Gen. 36.

<sup>5</sup> See VA. CONST. art. I, § 5; art. III, § 1; art. IV, § 1. See also 2012 Op. Va. Att'y Gen. 119 n.44 (listing instances in which this principle has been applied).

<sup>6</sup> *Lewis*, 77 Va. at 420.

<sup>7</sup> *Marshall v. N. Va. Transp. Auth.*, 275 Va. 419, 427, 657 S.E.2d 71, 75 (2008) (internal citations omitted). Because taxation is a legislative power, it may only be exercised by the General Assembly. See VA. CONST. art. IV, § 1 ("The legislative power of the Commonwealth shall be vested in a General Assembly . . .").

<sup>8</sup> VA. CODE ANN. § 58.1-301(A) (2013) provides that "[a]ny term used in this chapter shall have the same meaning as when used in a comparable context in the laws of the United States relating to federal income taxes, unless a different meaning is clearly required." As discussed more fully below, the precise terms chosen by the General Assembly and the existence of Article I, § 15-A of the Virginia Constitution make clear that same-sex couples are not authorized to file joint returns in Virginia regardless of the position taken by the federal government. Accordingly, to the extent the federal government allows Virginia same sex couples to file joint federal tax returns, "a different meaning is clearly required . . ." for Virginia income tax purposes. The United States Supreme Court's decision in *United States v. Windsor*, 133 S. Ct. 2675 (2013) does not alter the analysis. The holding in *Windsor* is limited to the federal government's definition of "marriage" and "spouse." The holding applies only to "those lawful marriages" entered into in a state that, through its marriage laws, "sought to protect in personhood and dignity" same-sex unions. *Windsor*, 133 S. Ct. at 2696. Indeed, the Court made clear that § 2 of the federal Defense of Marriage Act, which allows states to refuse to recognize same-sex marriages performed under the laws of other states, was not at issue, and thus it remains valid law. *Windsor*, 133 S. Ct. at 2682.

and spouse,”<sup>9</sup> such language must be interpreted consistent with the provisions of Article I, § 15-A of the Virginia Constitution, which limits marriage to one man and one woman.

Because the power of taxation is legislative and because the General Assembly has spoken directly on the topic, there is no avenue for a Governor to countermand existing law to require or direct a state agency to allow same-sex couples to receive joint marital status for Virginia income tax returns.<sup>10</sup> Any attempt by a Governor to do so would represent an unconstitutional attempt to exercise legislative power in violation of the separation of powers.<sup>11</sup>

Irrespective of the limitations imposed by the separation of powers provisions, the Virginia Constitution nonetheless otherwise prevents a Governor from requiring or directing a state agency to allow same sex couple to receive joint marital status for Virginia income tax returns. A Governor, whose powers flow from the Virginia Constitution, has no ability to violate the provisions of the same Virginia Constitution.<sup>12</sup> Article I, § 15-A of the Virginia Constitution provides that

only a union between one man and one woman may be a marriage valid in or recognized by this Commonwealth and its political subdivisions. This Commonwealth and its political subdivisions shall not create or recognize a legal status for relationships of unmarried individuals that intends to approximate the design, qualities, significance, or effects of marriage. Nor shall this Commonwealth or its political subdivisions create or recognize another union, partnership, or other legal status to which is assigned the rights, benefits, obligations, qualities, or effects of marriage.

Thus, because joint filing is limited to married couples, a Governor cannot, consistent with the Virginia Constitution, expand the class of people who may file jointly to same sex couples because doing so would have the Commonwealth “approximate the design, qualities, significance, or effects of marriage . . .” for persons who are not recognizable as married under Virginia law. Accordingly, Article I, § 15-A of the Virginia Constitution serves as an additional bar to a Governor requiring or directing a state agency to allow same-sex couples to receive joint marital status for Virginia income tax returns.

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<sup>9</sup> See, e.g., VA. CODE ANN. § 58.1-321(B) (2013). I note that § 58.1-321 was amended after Article I, § 15-A of the Virginia Constitution became effective. Accordingly, to comply with the Virginia Constitution, the use of the term “spouse” must be understood to refer only to a marriage between one man and one woman.

<sup>10</sup> Although the Department of Taxation does have authority “to develop procedures or guidelines for implementation of the provisions” of certain portions of Chapter 3 of Title 58.1, any procedure or guideline that would allow joint filings by same-sex couples would be subverting the statutory scheme as opposed to implementing it and would therefore be void.

<sup>11</sup> The separation of powers is a bedrock principle of Virginia government. It is so significant that it appears in two separate provisions of the current Virginia Constitution. See VA. CONST. art. I, § 5 (“That the legislative, executive, and judicial departments of the Commonwealth should be separate and distinct . . .”) and VA. CONST. art. III, § 1 (“The legislative, executive, and judicial departments shall be separate and distinct, so that none exercise the powers properly belonging to the others, nor any person exercise the power of more than one of them at the same time . . .”). The concept of separation of powers in Virginia government first appears as § 5 of the Virginia Declaration of Rights of 1776. It has continued in every Virginia Constitution since then. See VA. CONST. of 1830 art. I, § 5 & art. II; VA. CONST. of 1851 art. I, § 5 & art. II; VA. CONST. of 1864 art. I, § 5 & art. II; VA. CONST. of 1870 art. I, § 7 & art. II; and VA. CONST. of 1902 §§ 5 & 39.

<sup>12</sup> See VA. CONST. art. II, § 7; VA. CODE ANN. § 49-1 (2013) (providing that all elected officers are to take an oath or affirmation swearing or affirming to “support the Constitution of the United States, and the Constitution of the Commonwealth of Virginia . . .”).

**Conclusion**

Accordingly, it is my opinion that a Governor may not direct or require any agency of state government to allow same-sex couples to receive joint marital status for Virginia income tax returns. Such a directive would represent an attempt to exercise legislative powers in violation of the constitutionally mandated separation of powers and would also violate the express terms of Article I, § 15-A of the Virginia Constitution.

With kindest regards, I am

Very truly yours,

A handwritten signature in black ink, appearing to read "Ken C II". The signature is stylized and written in a cursive-like font.

Kenneth T. Cuccinelli, II  
Attorney General