FAULKNER LAW
THOMAS GOODE JONES SCHOOL OF LAW

Adam J. MacLeod
Professor of Law
amacleod@faulkner.edu

March 21, 2019

David Fowler, Esq.
Family Action Council of Tennessee

Dear Mr. Fowler,

I am a law professor and legal scholar. In addition to my permanent appointment as Professor of Law at Faulkner University, Jones School of Law, I have successfully completed research fellowships at Princeton University and George Mason University. I have published books, scholarly articles, essays, and book reviews concerning the fundamental rights and duties of the common law, including those declared and secured in the Constitution of the United States and the Tennessee Constitution.

You have asked me to examine a proposed bill titled, Marital Contract at Common Law Recording Act (MCCLRA), and to discuss the legal and jurisprudential issues that it raises. I have read a draft of the bill that you provided to me on March 9, 2019 and have formed the following opinion based upon my knowledge of common law and fundamental rights jurisprudence.

The MCCLRA makes an accurate declaration that natural marriage is not a creature of positive law but instead precedes both the state and the positive law of civil marriage. The common law follows Roman and ecclesiastical law in considering the rights and duties of a natural marriage to be inherent within the relationship itself. The common law acknowledges marriage to be a unique source of natural rights and obligations, which precedes the formation of states and the official power to posit law. In particular, common law treats a marriage between a man and woman as a unique civil contract, of special interest to lawyers because of its radical capacity to bring new human life into being. The vested obligations that husband and wife incur toward each other, and the natural duties that both have toward their natural-born children, exist independently of positive law. They are part of what William Blackstone and other common-law jurists refer to as the "superior" law or "fundamental" law, which officials merely declare and do not create.

The Constitution of the United States does not deprive the states of their power to declare and make more secure natural rights and duties. To the contrary, the First through Ninth and Fourteenth Amendments expressly contemplate that the state and national governments will continue to give legal recognition to the rights and duties that the people enjoy as a matter of fundamental law. So, when the Supreme Court of the United

States decided in *Obergefell v. Hodges* that states must extend the status of *civil* marriage—a status generated by a state's positive laws—to same-sex couples, the Court expressly bracketed and set aside as irrelevant its jurisprudence concerning those fundamental rights and duties that are found in the common law, what the majority called "history and tradition." The Court further insisted that it was not disparaging the views of those who understand marriage to be an inherently man-woman union, as the common law has always taught from time immemorial. Therefore, the holding and reasoning of *Obergefell* do not bear upon the provisions of this bill that declare marriage in its natural, common-law contours and allow for recording of marriages.

The MCCLRA's proposal to employ official recording of marriage contracts is sound. The use of a recording system to assist people in assuring the validity of marriages is an innovation. But its analog, the public recording of instruments concerning title in real property, has a long and well-documented history of success. Marriages differ from estates of ownership in land, of course. But owners of land move away from the locus of the land they own, just as marriages can move away from their original states of domicile, and human mobility throughout American history has not proven an insuperable obstacle to achieving high levels of real property title assurance using recording systems.

I offer no opinion on the implications of MCCLRA for Tennessee's public laws or the public laws of other states, especially those laws that concern benefits and privileges incident to marriage under any state's positive laws. Nor do I opine on the constitutionality of any particular provisions of the MCCLRA. But the declarations of the bill concerning natural marriage and natural parentage and the means chosen to achieve the bill's purpose are both sound and consistent with the immemorial usages of the common law, as declared and secured by the Constitution of the United States.

Very truly yours,

Adam J. MacLeod