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Navigating a Post-Windsor World: The Promise and Limits of Marriage Equality

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NAVIGATING A POST-WINDSOR WORLD: THE PROMISE AND LIMITS OF MARRIAGE EQUALITY

by Nancy J. Knauer

When the 2013 landmark decision in U.S. v. Windsor invalidated part of the Defense of Marriage Act (DOMA), it was hailed as a landmark civil rights victory, but its implementation has been far from seamless. The federal government has not applied a uniform rule for marriage recognition, applying a state-of-domicile rule for some purposes (Social Security) and a broader state-of-celebration rule for others (e.g., federal tax matters). Moreover, Windsor did not directly address the state-level marriage prohibitions that remain in place in the majority of states. As a result, the United States continues to be a patchwork of marriage laws where some states allow marriage, others ban it, and others have created parallel legal categories that grant some or all of the rights of marriage (e.g., civil union, domestic partnership, reciprocal beneficiary).

The post-Windsor complexity and lack of uniformity has left LGBT individuals to navigate an uncertain and rapidly changing legal landscape. With over thirty marriage cases pending in federal courts across the country, and positive decisions from six conservative federal District Courts, it seems that the U.S. may be poised for nationwide marriage equality within the next several years. Although many members of the media have already declared that the struggle for LGBT rights has been won, this article explains why these reports are not only premature, but miss the mark by conflating marriage equality with the larger LGBT rights movement. It details both the promise of marriage equality and its limitations.

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INTRODUCTION

At the age of 84, Edie Windsor, a petite, well-coifed widow, became the unlikely face of the marriage equality movement.¹ Edie had married her long-time partner Thea Spryer in Canada in 2007 after Thea was diagnosed with the life-threatening illness.² The couple first met in 1963 and, by the time they married, they had been “engaged” for over 40 years.³ When Thea died in 2009, Edie was presented with a federal estate tax bill for $363,053 because she did not qualify for the unlimited marital deduction that is designed to provide tax relief for surviving spouses.⁴ Section 3 of the Defense of Marriage Act (DOMA) mandated that for all federal purposes marriage was only between a man and a woman, and the Internal Revenue Service had no choice but to disallow Edie’s claim for the marital deduction.⁵ Edie challenged section 3 of DOMA on the grounds that it violated the Due Process Clause and Equal Protection guarantees of the 5th Amendment, and a majority of the U.S. Supreme Court agreed.⁶ In U.S. v. Windsor, the Court ruled that section 3 “is invalid, for no legitimate purpose overcomes the purpose and effect to disparage and to injure those whom the State, by its marriage laws, sought to protect in personhood and dignity.”⁷

⁶ U.S. v. Windsor, 133 S.Ct. 2675 (2013). See also, Sheryl Gay Stolberg, After Rulings, Same-Sex Couples Grapple With Diverging State Laws, N.Y. TIMES, June 28, 2012 (noting that Edie will be entitled to a refund “with interest”).
⁷ Windsor, 133 S.Ct. at 2012-3013.
On the day the case was argued, Edie appeared triumphant on the steps of the U.S. Supreme Court, flanked by her lawyers. The picture of Edie with her arms outstretched in victory, dressed in her stylish pantsuit and bright pink scarf, has become an iconic and galvanizing image of the LGBT rights movement. Heralded as a landmark opinion, the change brought about by Windsor was immediate and swift, affecting every married same-sex couple in the U.S. who pays taxes or receives federal benefits. The potential scope of the ruling extends beyond the issue of federal recognition and has overshadowed the higher profile companion case of Perry v. Hollingsworth that was argued by the legal dream team of Ted Olson and David Boies. When Edie filed her lawsuit in 2010 only five states recognized same-sex marriage. The number now stands at seventeen states with full marriage equality, and federal district courts in six different states have invalidated state prohibitions on marriage, citing Windsor as precedent.

Post-Windsor, the pace of change with respect to marriage equality has been so rapid and the outlook is so bright that some members of the media have declared that the struggle for...
LGBT rights has been won.\textsuperscript{15} Of course, such reports are not only premature, but they conflate marriage equality with the larger LGBT rights movement. Marriage remains highly contested in the U.S.,\textsuperscript{16} and even the federal government has not been able to implement the \textit{Windsor} decision with a uniform rule regarding marriage recognition.\textsuperscript{17} Moreover, marriage equality will only mandate access to the institution of marriage and its attendant rights, obligations, and benefits.\textsuperscript{18} Apart from its normalizing influence, marriage equality will not directly address many other pressing issues facing LGBT individuals, such as bullying in schools,\textsuperscript{19} health disparities,\textsuperscript{20} and anti-LGBT bias or discrimination.\textsuperscript{21} In particular, it will not address the some of the primary concerns expressed by LGBT elders and older adults, including income insecurity, the availability of LGBT-friendly senior housing, the legal fragility of chosen family, and anti-LGBT bias and discrimination that extends far beyond the workplace to senior services, medical care, and housing.\textsuperscript{22}

This article addresses the uncertain post-\textit{Windsor} legal landscape from the perspective of LGBT elders and older adults. The demise of DOMA has enhanced access to federal benefits, but it has also increased the complexity that LGBT individuals and their families face as they begin to plan for retirement and beyond. Additionally, marriage equality – even when it is recognized nation-wide – will not help LGBT elders and older adults tackle many of obstacles they face when trying to navigate the challenges of aging. Fully addressing these challenges will require comprehensive legal reform and social change that includes greater recognition for chosen family, legal protections that span the life course, and broad-based cultural competency awareness with respect to LGBT aging and related issues.\textsuperscript{23} As attitudes on high profile issues


\textsuperscript{16} Thirty-three states continue to prohibit same-sex marriage. \textit{See infra} text accompanying notes 104-124.

\textsuperscript{17} For many purposes, the federal government will recognize all legal same-sex marriage even if the couple lives in a non-recognition state, but for other purposes it follows a strict “state-of-domicile” rule. \textit{See infra} text accompanying notes 165-172.

\textsuperscript{18} The benefits attached to marital status are considerable. For example, on the federal level there are an estimated 1,138 federal statutory provisions under “which marital status is a factor in determining or receiving benefits, rights, and privileges.” Gov. Accountability Office, GAO-04-353R Defense of Marriage Act (2004) available at http://www.gao.gov/new.items/d04353r.pdf (last visited May 9, 2014).


\textsuperscript{21} Emma Margolin, \textit{Studies Show Connection Between Anti-Gay Bias and Death}, MSNBC, Feb. 23, 2014, at http://www.msnbc.com/msnbc/can-homophobia-kill-you (summarizing two research studies showing connection between anti-gay bias and high mortality).

\textsuperscript{22} For a discussion of the unique concerns facing LGBT elders and older adults see \textit{infra} text accompanying notes 27-78.

\textsuperscript{23} For a summary of the potential reforms necessary to address the concerns of LGBT elders and older adults see \textit{infra} text accompanying notes 361-410.
such as marriage equality continue to “evolve,” it is likely that anti-LGBT bias will continue to decrease, but systemic legal and social change may take decades.  

In the meantime, there are concrete planning steps that LGBT elders and older adults can take to improve their chances of aging in dignity and with security, preserve their autonomy, and protect their interests. This article outlines the types of financial, estate, and personal planning options available to address 1) the absence of uniform marriage equality, 2) the legal fragility of chosen family, and 3) the persistence of anti-LGBT bias and discrimination. In particular, this article urges LGBT older adults to develop an integrated elder care plan that addresses a number of issues not typically covered in the traditional estate plan, such as issues related to gender identity, living arrangements, and caregivers.

Part I of this article provides a brief overview of the unique challenges that LGBT individuals face as they age. Part II reviews the current state of marriage equality and the conflicting federal rules governing the recognition of same-sex marriage with respect to federal taxes, social security, and other benefits. Part III discusses the special importance of advance planning for LGBT elders and older adults. Although all older adults should plan for financial security in retirement and develop an estate plan, these steps are essential for LGBT individuals, who often must plan against the strong legal and normative preferences for next of kin.

Recognizing that private planning documents are necessarily an imperfect alternative for meaningful legal and social reform, Part IV explores the types of reform that is necessary to address the challenges faced by LGBT older adults, specifically considering reforms on the federal and state level, as well as market-based strategies. A brief conclusion reflects on the complexity of living (and planning) on the edge of equality.

I. LGBT ISSUES AND AGING

The brief that Edie Windsor filed with the Supreme Court details some of her experiences in pre-Stonewall America when homosexuality was both pathologized and criminalized, and gender variance was strictly policed. This history has had a profound impact on many members of her generation — those LGBT individuals who came of age before the advent of the Gay Liberation movement in the 1970s. The members of the pre-Stonewall generation are

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24 President Obama famously explained that his thinking on same-sex marriage had been “evolving” over time. Jo Becker, How the President Got to ‘I Do’ on Same-Sex Marriage, N.Y. TIMES, Apr. 16, 2014.

25 For the elements of an integrated elder care plan see infra text accompanying notes 306-360.

26 The general default rules for probate and decision-making purposes will prioritize next of kin, leaving unmarried partners and chosen families in the status of mere legal strangers. See infra text accompanying notes 291-297 (discussing default rules favoring next of kin).

27 The brief notes that “Ms. Windsor’s own life experiences compellingly reflect the history of lesbians and gay men in our nation over the past decades[,]” Brief of Respondent in Response Of Writ Of Certiorari Before Judgment at 9, U.S. v. Windsor, No. 12-307 (S.Ct. Oct. 10, 2012). The term “pre-Stonewall” refers to the Stonewall riots that began on June 27, 1969 when police raided a gay bar, the Stonewell Inn, in Greenwich Village. See generally MARTIN DUBERMAN, STONEWALL (1993) (discussing history of Stonewall through the lives of six individuals). The disturbances continued sporadically for several days. Id. at 203-09. The date of the riots is routinely used to mark the beginning of the contemporary gay rights movements, although historians differ as to the importance of the event. See ANNAMARIE JAGOSE, QUEER THEORY: AN INTRODUCTION 30 (1996) (“Stonewall functions in a symbolic register as a convenient if somewhat spurious marker of an important cultural shift away from assimilationist policies and quietist tactics, a significant if mythological date for the origin of the gay liberation movement.”)

28 See generally id. at 30-43 (discussing history of Gay Liberation from the 1969 Stonewall riots until the mid-1970s).
more likely to be estranged from their families of origin,\textsuperscript{29} and they are less likely to have had children.\textsuperscript{30} They are more likely to be single and to live alone.\textsuperscript{31} As long-time survivors of homophobia and transphobia, they experience high levels of financial insecurity,\textsuperscript{32} as well as health disparities.\textsuperscript{33} They are also much more likely than younger LGBT individuals to be closeted in at least some aspect of their lives.\textsuperscript{34} Indeed, they are “the last generation who had to spend their adolescence and young adult years in hiding.”\textsuperscript{35}

Although Edie shares a common history with her age cohort, it is important to resist viewing Edie as the symbol of LGBT aging, just as it is important to resist conflating marriage equality with the larger LGBT right movement. Edie Windsor, a runner up for the 2013 “Time person of the year,”\textsuperscript{36} is simply not representative of the pre-Stonewall generation as a whole. Many members of that generation are facing the challenging of aging under very different circumstances.

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\begin{footnotesize}
\textsuperscript{29} Judith C. Barker, \textit{Lesbian Aging: An Agenda for Social Research}, in \textit{GAY AND LESBIAN AGING: RESEARCH AND FUTURE DIRECTIONS} 60-61 (Gilbert Herdt & Brian de Vries eds., 2004). Estrangement from next of kin can be understood as a natural consequence of the pre-Stonewall views on homosexuality.

\textsuperscript{30} Brian de Vries & John A. Blando, \textit{The Study of Gay and Lesbian Aging: Lessons for Social Gerontology}, in \textit{GAY AND LESBIAN AGING: RESEARCH AND FUTURE DIRECTIONS}, supra note 29, at 3, 7 (describing how gay men and lesbians are less likely to have children). For the pre-Stonewall generation, children were most likely the product of prior heterosexual relationships, rather than intentionally conceived within same-sex relationships. See generally Daniel Winuwe Rivers, \textit{Radical Relations: Lesbian Mothers, Gay Fathers, \& Their Children in the United States since World War II} (2013). Even gay and lesbian elders who do have children from prior heterosexual relationships may be estranged from them and therefore not able to call on them for support as the age.

Transgender elders may have similar experiences with respect to children from pre-transition marriages.

\textsuperscript{31} Brian de Vries & John A. Blando, supra note 30 (describing how gay men and lesbians are more likely to be single). Anthony R. D’Augelli & Arnold H. Grossman, \textit{Disclosure of Sexual Orientation, Victimization, \& Mental Health Among Lesbian, Gay, \& Bisexual Older Adults}, 16 J. INTERPERSONAL VIOLENCE 1011 (2001) (reporting results of large national study where sixty-three percent of respondents lived alone). See also SAGE, \textit{Social Isolation}, at \url{http://www.sageusa.org/issues/isolation.cfm} (last visited May 9, 2014) (noting that “LGBT elders are more likely to live alone and with thinner support networks”).


\textsuperscript{34} In one large study of older gay men and lesbians, only thirty-eight percent reported that they were out to more than three quarters of their acquaintances. FUNDERs FOR LESBIAN \& GAY ISSUES, \textit{AGING IN EQUITY: LGBT ELDERS IN AMERICA} 10 (2004) [hereinafter AGING IN EQUITY], available at \url{http://www.lgbtfunders.org/files/AgingInEquity.pdf}. The study also showed that seventy-five percent of LGBT elders are not completely open about their sexual orientation with health care providers. \textit{Id.}

\textsuperscript{35} Ski Hunter, \textit{Midlife and Older LGBT Adults: Knowledge \& Affirmative Practices for the Social Services} 14 (2005). To put these dates in perspective, the LGBT elders who turn sixty-five in 2014 were twenty years old in 1969, the year of the Stonewall riots. They were twenty-four when homosexuality was declassified as a mental illness by the American Psychiatric Association in 1973. See generally RONALD BAYER, \textit{HOMOSEXUALITY AND AMERICAN PSYCHIATRY: THE POLITICS OF DIAGNOSIS} (1987) (describing history of controversy relating to declassification of homosexuality and its deletion from the \textit{Diagnostic and Statistical Manual III}). The classification of homosexuality as a severe sociopathic personality disorder was used to justify a wide range of legal and social disabilities.

\textsuperscript{36} Edie Windsor is Time’s Third Runner Up for Person of the Year, at \url{http://timemagazine.tumblr.com/post/69696494975/edith-windsor-is-times-third-runner-up-for-person} (last visited May 9, 2014).
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circumstances – estranged from family, disconnected from the larger LGBT community, and ignored by senior service providers.\textsuperscript{37}

Over the last several years, there has been increased interest in issues related to LGBT older, adults and LGBT aging. National advocacy organizations now address LGBT aging issues\textsuperscript{38} as do mainstream aging and senior organizations.\textsuperscript{39} The federal government has recognized LGBT seniors as an especially vulnerable population in administrative guidance interpreting the Older Americans Act (OAA).\textsuperscript{40} State governments have also begun to take notice. California has passed anti-discrimination protections specifically aimed at LGBT seniors,\textsuperscript{41} and Massachusetts has convened a Commission on LGBT Aging.\textsuperscript{42} Notwithstanding this new level of awareness, considerable disparities remain.

Many LGBT elders and older adults are at a severe disadvantage as they age with respect to caregiving. In the U.S. over eighty percent of all caregiving is provided on an “informal” or unpaid basis, and the vast majority of that care is performed by younger relatives.\textsuperscript{43} However, LGBT elders and older adults are often estranged from their next of kin, given the negative views of pre-Stonewall America.\textsuperscript{44} They are also more likely to be single and less likely to have children.\textsuperscript{45} Instead, they rely on what anthropologists refer to as “chosen family” for support.\textsuperscript{46}

\begin{footnotes}
\item[38] For example, the Human Rights Campaign, the largest LGBT advocacy organization, includes “health & aging” as one of its primary “issues.” Human Rights Campaign, Health & Aging, at http://www.hrc.org/issues/health-and-aging (last visited May 9, 2014).
\item[40] In 2012, the Administration on Aging (AoA) issued administrative guidance clarifying that LGBT elders could be targeted as a population of “greatest social need” for purposes of the OAA. Administration on Aging, Frequently Asked Questions: Targeting, at http://www.aoa.gov/AoARoot/AoA_Programs/OAA/resources/Faqs.aspx#English (last visited May 9, 2014) (recognizing “isolation due to sexual orientation or gender identity may restrict a person’s ability to perform normal daily tasks or live independently”).
\item[44] See supra note 29 (discussing likelihood of estrangement).
\item[45] See supra note 30 (discussing lack of partners and children).
\item[46] See generally KATH WESTON, FAMILIES WE CHOOSE (1997). See also Douglas C. Kimmel, Issues to Consider in Studies of Midlife and Older Sexual Minorities, in GAY AND LESBIAN AGING, supra note 30, at 267 (“family of choice”); see also de Vries & Blando, supra note 30, at 8-11 (alternate family structure based on camaraderie and caring); Jacqueline S. Weinstock, Lesbian Friendships at and Beyond Midlife: Patterns and Possibilities for the 21st Century, in GAY AND LESBIAN AGING, supra note 30, at 177-210 (“friends like family”).
\end{footnotes}
These families of choice have two primary shortcomings: they are legally very fragile, and they are often single-generational.\textsuperscript{47} The single generational nature of chosen family means that a friendship group will age in unison, thereby creating reciprocal and overlapping caregiving responsibilities.\textsuperscript{48}

Without natural caregivers, LGBT elders and older adults may be more likely to require assisted living arrangements or home health care.\textsuperscript{49} However, LGBT elders also report deep concern that they will experience anti-LGBT bias on the part of service providers and extreme trepidation regarding any sort of congregate living facilities.\textsuperscript{50} For these reasons, LGBT elders are often determined to “age in place.”\textsuperscript{51} They will resist assisted living or long-term care options, but also under utilize supportive services that are designed to help elders live independently in the community.\textsuperscript{52} As a result, LGBT elders and older adults are at an enhanced risk of self neglect and social isolation.\textsuperscript{53}

LGBT elders who are required to enter senior living facilities report a strong pressure to be closeted – a feeling that is shared by LGBT older adults.\textsuperscript{54} As one aging LGBT Baby Boomer explained, “as strong as I am today . . . when I am in front of the gate of the nursing home, the closet door is going to slam shut behind me.”\textsuperscript{55} The resort to the closet is not surprising given the history of the pre-Stonewall generation who are very familiar with the use of the closet as an

\textsuperscript{47} See Andrew J. Hostetler, \textit{Old, Gay, and Alone? The Ecology of Well-Being Among Middle-Aged and Older Single Gay Men, in GAY AND LESBIAN AGING, supra note 30, at 143, 159-61} (noting that intergenerational relationships are not common in the gay and lesbian community).

\textsuperscript{48} In one study, ninety percent of LGBT elders reported that their primary support group consisted of close friends. Arnold H. Grossman, Anthony R. D’Augelli, & Scott L. Hershberger, \textit{Social Support Networks of Lesbian, Gay, and Bisexual Adults 60 Years of Age and Older}, 55 \textit{J. Gerontology: Psychol. Sci.} 174 (2000). This same study found that friendship groups provided seventy-two percent of the social support, sixty-four percent of the emotional support, fifty-four percent of the practical support, and thirteen percent of the financial support for LGBT elders.

\textsuperscript{49} The majority of individuals who are “aging in place” rely solely on informal (i.e., unpaid) caregiving. \textit{CAREGIVING, supra note 43, at 28.}

\textsuperscript{50} See Jane Gross, \textit{Aging and Gay, and Facing Prejudice in Twilight, N.Y. TIMES, Oct. 9, 2007, at A1} (noting that LGBT elders “live in fear of the day when they are dependent on strangers for the most personal care”).

\textsuperscript{51} LGBT elders, like the majority of Americans, also desire to “age in place,” and this preference is reinforced by intense fear that they will experience discrimination and anti-LGBT bias in mainstream senior housing options. Nancy Orel, \textit{Community Needs Assessment: Documenting the Need for Affirmative Services for LGB Older Adults, in LESBIAN, GAY, BISEXUAL, AND TRANSGENDER AGING: RESEARCH AND CLINICAL PERSPECTIVES} 233 (Douglas Kimmel, Tara Rose & Steven David eds., 2006).

\textsuperscript{52} For example, according to a study conducted by the U.S. Department of Health and Human Services (HHS), LGBT elders are only twenty percent as likely as their non-LGBT peers to take advantage of federally funded aging services, as well as other entitlements such as housing assistance and food stamps. Elizabeth Kling & Douglas Kimmel, \textit{SAGE: New York City’s Pioneer Organization for LGBT Elders, in LESBIAN, GAY, BISEXUAL, AND TRANSGENDER AGING: RESEARCH AND CLINICAL PERSPECTIVES} 266 (Douglas Kimmel, Tara Rose & Steven David eds., 2006).

\textsuperscript{53} Social isolation is a term of art. It refers to a situation where an individual has no one to call for help or assistance. Jaime M. Grant, et al., \textit{Nat’l Gay And Lesbian Task Force Policy Inst., Outing Age 2010: Public Policy Issues Affecting Lesbian, Gay, Bisexual And Transgender Elders 91-92} (2010), available at \url{http://www.thetaskforce.org/downloads/reports/reports/outingage_final.pdf} (explaining that isolation occurs when a person cannot access needed social and medical support services).

\textsuperscript{54} According to a 2006 Metlife survey of 1000 LGBT individuals age 40 to 61, a high percentage reported a deep concern that they would be discriminated against as they age on account of their sexual orientation. Metlife, \textit{Out and Aging: the Metlife Study of Lesbian and Gay Baby Boomers} (2006) (on file with the author).

\textsuperscript{55} See Gross, \textit{supra} note 50 (quoting LGBT older adult).
adaptive strategy. In addition to the dignitary harm of having to keep an essential part of yourself hidden, it is clear that the closet has adverse health consequences. *The New York Times* quoted, Dr. Melinda Lantz, chief of geriatric psychiatry at Beth Israel Medical Center in New York, who explained, “[t]here is something special about having to hide this part of your identity at a time when your entire identity is threatened.” Dr. Lantz notes that closeted seniors face “a faster pathway to depression, failure to thrive and even premature death.”

For transgender elders, the closet is not always an option because reasons, many transgender individuals who transition with medical assistance do not elect “bottom surgery.” And, many pre-Stonewall transgender individuals transitioned without medical intervention. As a result, a transgender elder’s physical characteristics may not conform to his or her gender identity and performance, making the elder vulnerable to the prejudice and hostility of personal health aides. Transgender elders may also have difficulty navigating sex segregated senior facilities. Transgender elders in long-term care facilities have been forced to wear the “wrong” clothes and to room with members of the opposite sex because the facility refused to honor the elder’s gender identity. There have also been reports of service providers refusing to wash or provide personal care assistance for transgender residents.

In addition to the concerns over housing and encountering anti-LGBT bias, LGBT elders report high levels of financial insecurity and high levels of health disparities. For example, partnered same-sex elder couples lag behind their different-sex peers on all economic indicators. Elder partnered female same-sex elder couples are more than twice as likely to live below the poverty line. In addition, seniors in same-sex partnered households report higher levels of disability with respect to every category of disability queried on the Census. LGBT elders can also have a difficult relationship with the medical profession, given their experience of living through a time when homosexuality was classified as a severe mental illness and grounds

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56 For example, a 2004 report on LGBT elders explained that “‘passing’ as heterosexual has been a lifelong survival strategy.” *AGING IN EQUITY*, supra note 34.  
57 See *Gross*, supra note 50 (quoting Dr. Lantz).  
58 Id.  
59 See John Eligon, *Suits Dispute City’s Rule on Recording Sex Changes*, *N.Y. TIMES*, MAR. 22, 2011 (reporting 80 percent of transgender women and 95 percent of transgender men have not genital conforming surgery).  
63 Id.  
65 Id. To some extent, this financial insecurity represents the inevitable effect of a lifetime of discrimination, but is it also aggravated by affirmative legal barriers that prohibit the recognition of same-sex relationships, as well as the reluctance of LGBT elders to utilize available services due to their fear of encountering anti-LGBT bias.  
66 Id.
for being institutionalized.\textsuperscript{68} Surveys indicate a widespread distrust of the medical profession among LGBT elders and a lack of confidence that they will receive treatment that is not tainted by anti-LGBT bias.\textsuperscript{69}

To some extent, the challenges facing LGBT elders may be generational. The LGBT older adults who now are approaching senior status have benefitted more directly from greater freedom and recognition – not to mention the expanding legal protections.\textsuperscript{70} Younger generations of LGBT individuals are less likely to be estranged from their families and more likely to parent by creating intentional LGBT families.\textsuperscript{71} Despite these changing demographics, the experiences of our LGBT elders provide a cautionary tale about the effect of the aging process on our ability to withstand and navigate bias. Studies indicate that LGBT individuals who are approaching their senior years are more fearful of aging than their non-LGBT peers.\textsuperscript{72} They also worry about encountering anti-LGBT bias from service providers\textsuperscript{73} and express concern that they

\textsuperscript{68} When homosexuality was classified as a mental illness, it could also prompt medical intervention in the form of civil commitment, electro-shock therapy, and even a lobotomy. See generally WILLIAM N. ESKRIDGE, JR., GAYLAW: CHALLENGING THE APARTHEID OF THE CLOSET 62 (1999) (describing “lobotomies, electrical and pharmacological shock therapy, and... castration”).

\textsuperscript{69} In terms of health care, research suggests pre-Stonewall life experiences continue to inform the way LGBT elders approach their relationships with medical professionals. For example, Barker notes that older lesbians are “especially wary and fearful of health care and other service providers with their power to disrupt everyday life.” Barker, supra note 29, at 54. LGBT elders often fail to disclose their sexual orientation and will avoid encounters with medical professionals to the extent possible. For example, the Gay and Lesbian Medical Association (GLMA) found “in an effort to avoid... bias or because of internalized homophobia, LGBT patients frequently withhold personal information about their sexual orientation, gender identity, practices, and behavioral risks from their health care providers.” Gay & Lesbian Med. Assoc., Healthy People 2010: Companion Document For Lesbian, Gay, Bisexual, And Transgender (LGBT) Health 49 (2001), at http://www.glma.org/_data/n_0001/resources/live/HealthyCompanionDoc3.pdf.

\textsuperscript{70} Wisconsin was the first state to extend anti-discrimination protection on account of sexual orientation in 1981. Justin Tanis, 30 Years Since Wisconsin Became The First State To Ban Discrimination, Mar. 28, 2012, at http://outandequal.wordpress.com/2012/03/28/30-years-since-wisconsin-became-the-first-state-to-ban-discrimination/.

\textsuperscript{71} For a discussion of the increasing trend among gay men and lesbian to form recognized families see Jacqueline S. Weinstock, Lesbian Friendships at and Beyond Midlife: Patterns and Possibilities for the 21st Century, in GAY AND LESBIAN AGING, supra note ____, at 198–200. Some commentators have referred to the increase in intentional parenting within same-sex couples as the “gayby boom.” See Erica Goode, A Rainbow of Differences in Gays’ Children, N.Y. TIMES, July 17, 2001, at F18 (stating trend “has been called the ‘gayby boom’”). See also WESTON, supra note 46, at 24 (discussing absence of traditional family in the lives of gay men and lesbians).

\textsuperscript{72} According to a 2006 Metlife survey of 1000 LGBT individuals age 40 to 61, a high percentage reported a deep concern that they would be discriminated against as they get older on account of their sexual orientation. Metlife, Out and Aging: the Metlife Study of Lesbian and Gay Baby Boomers (2006) (on file with the author).

\textsuperscript{73} A recent study of the treatment of LGBT elders in long-term care facilities documents the fears of LGBT elders, as well as the experiences of friends and family of LGBT elders and social service providers. LONG-TERM CARE, supra note 63. Released in 2011, the study reports a widespread fear on the part of the LGBT elders regarding the treatment they will receive in a long-term care facility. Id. A majority of the LGBT respondents believed that both the staff and the other residents of long-term care facilities would discriminate against an LGBT elder, and only twenty-two percent thought that it would be safe to be open about one’s identity. Id. at 6. In terms of the mistreatment that they had experienced, respondents complained that service providers had refused to provide basic services, such as bathing, toileting, and feeding because they objected to touching an LGBT individual. Id. at 14-15. A number of respondents also reported that long-term care facilities attempted to discharge or refused to admit patients based on their sexual orientation or gender identity. Id. at 16. Additional problems included the restriction of medical care and the refusal to honor health care powers of attorney. Id. at 11-13. The most frequently reported problem was verbal abuse and harassment on the part of other residents. Id. at 10.
will not be able to be “out” in senior living facilities. The observation that fear of experiencing anti-LGBT bias or discrimination increases with age makes intuitive sense. It is easy to see how incidents that one may have successfully weathered at thirty-five may be much more menacing when experienced by a frail, housebound, eighty-five year old. In this regard, the aging process seems to amplify both feelings of difference and vulnerability.

As discussed below, marriage equality will not directly address this sense vulnerability, the fear of encountering anti-LGBT bias, or the need for LGBT-friendly senior housing alternatives. In terms of income insecurity and the legal fragility of chosen family, there can be no question that the advent of marriage equality will offer partnered LGBT elders and older adults a much needed measure of legal protection and security, but for some LGBT individuals marriage is a bit of a mixed bag and may not be a wise financial move. Going forward, LGBT individuals will have to weigh the benefits of marriage and their new found equality against its attendant costs. Additionally, marriage may simply be irrelevant for some LGBT elders and older adults who are not partnered or for whom marriage does not fit with their individual beliefs or worldview. For these individuals, the intense focus on marriage equality misses the mark entirely and fails to address their more urgent needs and concerns, including greater legal recognition for chosen families, countering anti-LGBT bias, and finding LGBT-friendly senior housing.

II. Living on the Edge of (Marriage) Equality

The recent advancements in marriage equality have left an uncertain landscape for LGBT individuals and their families. Planning considerations have been greatly complicated by conflicting federal and states rules. The multiple federal court challenges that are currently

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74 See Gross, supra note 50. Gross notes:
The most common reaction, in a generation accustomed to being in the closet, is a retreat back to the invisibility that was necessary for most of their lives, when homosexuality was considered both a crime and a mental illness. A partner is identified as a brother. No pictures or gay-themed books are left around.


76 See generally, SCOTT SQUILLACE, WHETHER TO WED: A LEGAL AND TAX GUIDE FOR LESBIAN AND GAY COUPLES (2014). For example, a portion of Social Security benefits may be subject to federal income when an individual’s income exceeds a specified threshold. SSA, Benefits Planner: Income Taxes and Your Social Security Benefits, http://www.ssa.gov/planners/taxes.htm (last visited May 10, 2014). For married couples, their incomes are combined, but the threshold is not double that of an individual. Id. As a result, seniors may recognize a “tax penalty” upon marriage.

77 Id.


79 Anthony Infanti has described this uncertain landscape for federal tax purposes as a “moonscape” that instead of living up to its “romantic” reputation is actually “scarred – pocked with craters left by past violent impacts.” Anthony C. Infanti, The Moonscape of Tax Equality: Windsor and Beyond, 108 NORTHWESTERN L. REV. COL. 110 (2013).
pending across the country have also introduced a high level of uncertainty as marriages have started in some states only to be later blocked by judicial stays.\textsuperscript{80} LGBT individuals who attempt to navigate this post-\textit{Windsor} landscape find that they may be legally married in some states, but not others.\textsuperscript{81} For legally married same-sex couples who reside in non-recognition states, the situation is even more complicated.\textsuperscript{82} Although they are not considered married under that laws of their state of residence, the federal government will recognize their marriage for federal tax purposes under a “state-of-celebration” rule.\textsuperscript{83} They will not, however, be considered married for all federal purposes because social security benefits are subject to a statutorily imposed “state-of-domicile” rule.\textsuperscript{84} The resulting confusion presents an ongoing source of stress and uncertainty.\textsuperscript{85}

This section provides an overview of the shifting landscape of marriage equality in the United States. It first reviews the current breakdown of marriage laws and marriage prohibitions, as well as the pending court cases. It then explores the confusing state of federal recognition of same-sex marriage, explaining the difference between the “state-of-celebration” rules versus the “state-of-domicile” rule, with special care paid to how they impact the lives of LGBT older adults with respect to federal taxes, social security benefits, Medicare/Medicaid, pension and retirement funds, and other federal benefits.

\textbf{A. The Present State of Marriage Equality.}

The history of marriage equality in the United States has been one of fits and starts, characterized by institutional jockeying where court-mandated marriage has often been thwarted by legislative action and state constitutional amendments.\textsuperscript{86} The campaign for marriage equality, both pro and con, has expended billions of dollars, consumed countless hours of judicial resources, created a variety of new legal relationships along the way, such as civil unions and reciprocal beneficiaries, and forever changed our understanding of family and relationships.\textsuperscript{87} Currently, forty-three percent of the population of the U.S. lives in jurisdictions where there is some form of state-wide relationship recognition for same-sex couples.\textsuperscript{88} Thirty-eight percent of the population lives in states with full marriage equality.\textsuperscript{89} Since the \textit{Windsor} decision in 2013, the state of marriage equality has been evolving rapidly, and it has become increasingly difficult

\textsuperscript{80} For a discussion of the post-\textit{Windsor} federal court decisions see \textit{infra} text accompanying notes 125-153.
\textsuperscript{81} Currently, seventeen states and the District of Columbia have marriage equality. \textit{See infra} text accompanying notes 91-103 (describing current state of marriage equality).
\textsuperscript{82} Thirty-three states continue to prohibit same-sex marriage. \textit{See infra} text accompanying notes 104-124 (describing marriage prohibitions).
\textsuperscript{84} \textit{See infra} text accompanying notes 189-207 (explaining eligibility for Social Security spousal benefits).
\textsuperscript{85} Early on in the marriage equality struggle, the American Association identified the lack of portability as a significant source of minority stress. American Psychological Association, \textit{Resolution on Sexual Orientation and Marriage} (July 2004), \texttt{http://www.apa.org/pi/lgbc/policy/marriage.pdf}. The current state of marriage laws in the U.S. is further complicated by the fact that laws recognizing same-sex relationships often remain under attack through citizen initiatives and court challenges.
\textsuperscript{89} Id.
to stay up-to-date with the latest developments. The Human Rights Campaign (HRC) maintains state-wide maps that show the current status of relationship recognition (and prohibitions) at glance.\textsuperscript{90} The following summary is current as of May 2014.

1. Marriage and Marriage Equivalence.

Seventeen states and the District of Columbia issue marriage licenses to same-sex couples.\textsuperscript{91} In addition to these states, Oregon’s Chief Operating Officer and Director of Administrative Services has ordered all state agencies to recognize all legally performed out-of-marriages, including those of same-sex couples.\textsuperscript{92} Same-sex marriages have been legally performed in the United States for over ten years when Massachusetts became the first state to adopt marriage equality pursuant to the 2003 state supreme court decision \textit{Goodrich v. Public Health}.\textsuperscript{93} States first began recognizing same-sex relationships in 1996 when Hawaii enacted its reciprocal beneficiary legislation, granting same-sex couples (and others) the right to designate individuals for certain limited rights.\textsuperscript{94} Vermont followed in 1997 with the status of Civil Union that extended same-sex couples all the rights and obligations of marriage.\textsuperscript{95} In both instances, the legislative creation of an alternate status was designed to forestall the judicial imposition of marriage rights for same-sex couples.\textsuperscript{96}

Other states eventually followed suit. By 2004 two additional states, California and Maine, extended partial rights to same-sex couples,\textsuperscript{97} bringing the total number of states...

\textsuperscript{94} Act 383, Session Laws of Hawai’i 1997; HAW. REV. STAT. ANN. § 572C (2013). The Reciprocal Beneficiary Act extends some rights and benefits to same-sex partners, primarily those related to property interests, but the status of reciprocal beneficiaries is not limited to same-sex couples. It is available to two single adults who are not eligible to marry. It grants approximately 60 rights and responsibilities commonly associated with marriage, including wrongful death rights, the right to inherit through intestate succession, and the right to make certain health care decisions. Individuals must sign a “declaration of reciprocal beneficiary relationship” in order to be eligible for the benefits. HAW. REV. STAT. ANN. § 572C-5. A reciprocal beneficiary is afforded the same status as a spouse under the rules of intestate succession. HAW. REV. STAT. ANN. § 560:2-102.
\textsuperscript{95} Act Relating to Civil Unions, § 3, 2000 VT. ADV. LEGIS. SERV. 91 (LexisNexis); VT. STAT. ANN. tit. 15, §§ 1201-1207 (2004).
\textsuperscript{96} See e.g. Baker v. Vermont, 744 A.2d 864 (Vt. 1999) (holding that same-sex couples are entitled under the Vermont state constitution to all of the protections and benefits provided by marriage). In 2004, the California legislature extended to “registered domestic partners” a number of rights traditionally reserved for spouses, including inheritance rights, certain health care decision-making authority, and standing to sue for wrongful death. CAL. CIV. PRO. CODE § 377.60 (2004). The next year, the legislature expanded these rights and obligations to allow “registered domestic partners” substantially all the rights and responsibilities enjoyed by spouses under California law. CAL. FAM. CODE §§ 297, 297.50, 290, 298.5 (West 2004) (establishing procedure for
providing some form of state-wide recognition of same-sex relationships to five.\(^98\) In recent years, the number of states with an alternative status relative to marriage has declined as states have begun to transition to full marriage equality.\(^99\) For example, the first states to offer same-sex couples legal recognition, Hawaii and Vermont, now have full marriage equality.\(^100\) Other early movers, including California and Maine, also have full marriage equality.\(^101\) Currently, only three states offer same-sex couples an equivalent status in lieu of marriage,\(^102\) and only one state provides a lesser degree of rights.\(^103\) All of these states have created the alternative status through legislative action that was not prompted by the threat of judicially mandated same-sex marriage.


The organized drive for marriage equality began in the 1990s with the litigation that led to the groundbreaking Hawaii state supreme court case, *Baehr v. Lewin.*\(^104\) Not surprisingly, the pushback against marriage equality started almost immediately, led by organizations describing themselves as “pro-family.”\(^105\) At the time, the majority of marriage statutes in the U.S. were

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\(^98\) “Registered domestic partners”). In 2005, the California legislature passed legislation that would have legalized same-sex marriage, but Governor Schwarzenegger vetoed the bill. Dean E. Murray, *Schwarzenegger to Veto Same-Sex Marriage Bill*, N.Y. TIMES, Sept. 8, 2005. Also in 2004, Maine enacted legislation establishing a state-wide domestic partner registry and extending to same-sex couples certain health-care decision-making authority and inheritance rights equivalent to spouses. 22 M.R.S. § 2710 (2004).


\(^101\) Same-sex marriage in California was mandated by the U.S. Supreme Court decision in *Perry v. Hollingsworth* which let stand a Federal District Court ruling that had invalidated Proposition 8. Perry v. Hollingsworth, 133 S. Ct. 2652 (2013). Maine first enacted state-wide recognition in 2004 when the legislature established a state-wide domestic partner registry and extended to same-sex couples certain health-care decision-making authority and inheritance rights equivalent to spouses. 22 M.R.S. § 2710 (2012). In 2009, the Maine legislature passed marriage equality legislation, but it was repealed by a voter referendum in November 2009 before it could take effect. Abby Goodnough, *Gay Rights Rebuke May Change Approach*, N.Y. TIMES, Nov. 4, 2009. Three years later, Maine became one of the first states to approve same-sex marriage by voter initiative. Erik Eckholm, *In Maine and Maryland, Victories at the Ballot Box for Same-Sex Marriage*, N.Y. TIMES, Nov. 7, 2012.

\(^102\) The three states that provide an alternative status that is equivalent to marriage: Colorado (i.e., civil unions, 2013), Nevada (i.e., domestic partnerships, 2009), and Oregon (i.e., domestic partnerships, 2008). COLO. REV. STAT. § 14-15-107; NEV. REV. STAT. ANN. § 122A.500 (LexisNexis 2010); OR. REV. STAT. §§ 106.300--340 (2011).


\(^105\) See generally DIDI HERMAN, *THE ANTIGAY AGENDA: ORTHODOX VISION AND THE CHRISTIAN RIGHT* (1997) (describing development of a “pro-family” political strategy). Chaucey notes that “defending marriage” as the union of one man and one woman had special symbolic significance for the opponents of gay rights.” GEORGE
gender neutral and did not specify that marriage had to be between a man and a woman. The inherently gendered understanding of marriage, or what could be referred to as heteronormativity, was so strong that there was no perceived need to limit access to different-sex couples. In the 1970s, several cases brought by same-sex couples seeking marriage licenses were swiftly resolved on definitional grounds. The courts easily ruled that marriage, by definition, was necessarily between a man and a woman.

The 1993 decision of *Baehr v. Lewin* placed that definitional certainty in doubt. When the Supreme Court of Hawaii held that the denial of marriage licenses to same-sex couples constituted discrimination on account of sex and had to satisfy strict scrutiny, legislatures all over the country began to take notice. Many legislatures amended their marriage statues to provide that marriage is a union that can only exist between a man and a woman. In 1996, a favorable trial court decision on remand held that the statute was presumptively unconstitutional. On the first day of the trial, the U.S. Congress passed the Defense of Marriage Act (DOMA) to clarify that the federal government would only recognize marriages between one man and one woman. DOMA also addressed the concern that same-sex marriage would spread across the country via the Full Faith and Credit clause of the U.S. Constitution, by purporting to authorize states to refuse to recognize same-sex marriages legally performed in other states. The concern that Hawaii would export same-sex to other states proved

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CHAUNCEY, *WHY MARRIAGE? THE HISTORY SHAPING TODAY’S DEBATE OVER GAY EQUALITY* 145 (2004) The traditional values movement considers same-sex marriage “both the ultimate sign of gay equality and the final blow to their traditional ideal of marriage[.]” *Id.*

106 *Id.* at 90-91(discussing non-gender specific marriage laws).

107 Chauncey notes that changed after a few early attempts by same-sex couples to secure marriage licenses. *Id.* Fifteen states amended their marriage law to be gender specific. *Id.* at 91.

108 There were several same-sex marriage cases that date from the early 1970s around the same time when states began adopting Equal Rights Amendments and ratification of the federal Equal Rights Amendment was pending before the states. Jones v. Hallahan, 501 S.W.2d 588 (Ky. 1973); Baker v. Nelson, 191 N.W.2d 185 (Minn. 1971), appeal dismissed, 409 U.S. 810 (1972); Singer v. Hara, 522 P.2d 1187 (Wash. App. 1974). See Chauncey, *supra* note 105, at 146-47 (describing Equal Rights Amendment). The claims for equal marriage rights were rejected largely on definitional grounds: marriage can only exist between a man and a woman. *Id.*

109 For example, in Jones v. Hallahan, the Court of Appeals of Kentucky had only to consult two dictionaries to determine that the failure to issue a marriage license to Marjorie Jones and Tracey Knight did not implicate any constitutional rights. Jones v. Hallahan, 501 S.W.2d 588 (1973). The state statute did not specify that the applicants for a marriage license had to be of opposite sex. *Id.* at 589. That notwithstanding, the court concluded that by definition Jones and Knight could not marry. *Id.* The judge reasoned: “It appears to us that appellants are prevented from marrying, not by the statutes of Kentucky or the refusal of the County Court Clerk of Jefferson County to issue them a license, but rather by their own incapability of entering into a marriage as that term is defined.” *Id.*

110 *Baehr v. Lewin*, 74 Haw. 530, (Haw. 1993). The court found that the marriage ban violated the Equal Rights Amendment to the Hawai’i state constitution and, therefore, the state must establish a compelling state interest. *Id.*

111 The Hawai’i Supreme Court remanded the case to be considered under the appropriate constitutional standard of strict scrutiny. *Baehr v. Lewin*, 74 Haw. 530, 572 (1993) (“HRS 572-1, on its face and as applied, regulates access to the status of marriage and its concomitant rights and benefits on the basis of the applicants’ sex [and] establishes a sex-based classification.”). The trial was postponed for three years, and finally started in 1996 on the same day the U.S. Senate approved DOMA. Chauncey, *supra* note 105, at 125.

112 In 1996, fifteen state legislatures enabled marriage prohibitions. *Id.* at 126-7.


114 Chauncey, *supra* note 105, at 125.

115 Section 2 of DOMA purports to authorize the individual states to choose not to recognize same-sex marriages performed in sister states. Defense of Marriage Act, Pub. L. No. 104-199, 110 Stat. 2419 (1996), codified at 28 U.S.C. § 1738C. This section of DOMA was not challenged in Windsor and, therefore, remains in effect. For a
premature. In 1998 the voters of Hawaii approved a the first state constitutional amendment that restricted marriage to opposite-sex couples,\textsuperscript{116} effectively mooting the pending decision of the Supreme Court of Hawaii.

The chain of events in Hawaii showed the pro-family forces that legislation alone would not be sufficient to withstand a court decision based on state constitutional grounds.\textsuperscript{117} Turning to citizen initiatives and referenda, the pro-family forces organized highly successful campaigns to amend state constitutions to prohibit same-sex marriage.\textsuperscript{118} A proposed Federal Marriage Amendment was introduced in 2004, but ultimately failed to receive sufficient Congressional support.\textsuperscript{119}

Currently, a total of thirty-three states continue to have either a constitutional amendment\textsuperscript{120} or a law prohibiting same-sex marriage.\textsuperscript{121} Many states have both a constitutional amendment and a statutory prohibition.\textsuperscript{122} In addition, eighteen states have particularly

\begin{itemize}
  \item The Federal Marriage Amendment (“FMA”) provides in full:
    \begin{quote}
      Marriage in the United States shall consist only of a union of a man and a woman. Neither this Constitution nor the constitution of any State, nor State or federal law, shall be construed to require that marital status or the legal incidents thereof be conferred upon unmarried couples or groups.
    \end{quote}
  \end{itemize}


\textsuperscript{117} The Report of the House Judiciary Committee warned that there was “an orchestrated legal assault” on tradition marriage. Eric Eckholm, \textit{Gay Marriage Battle Nears End in Hawaii, the First Front Line}, N.Y. TIMES, Nov. 8, 2013.

\textsuperscript{118} Hawai‘i was the first state to amend its state constitution to include a DOMA restriction in 1998. \textit{Chauncey, supra} note 105, at 125.

\textsuperscript{119} The Federal Marriage Amendment (“FMA”) provides in full:
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  \end{quote}


\textsuperscript{121} Human Rights Campaign, \textit{Statewide Marriage Prohibitions} (Feb. 19, 2014) at \url{http://hrc-assets.s3.amazonaws.com/files/assets/resources/marriage_prohibitions_3-2014.pdf}. In addition, there are four states with statutory prohibitions against same-sex marriage, but no constitutional amendment: Indiana, Pennsylvania, West Virginia and Wyoming. 23 PA. CONS. STAT. ANN. § 1704 (2013) (“It is hereby declared to be the strong and longstanding public policy of this Commonwealth that marriage shall be between one man and one woman. A marriage between persons of the same sex which was entered into in another state or foreign jurisdiction, even if valid where entered into, shall be void in this Commonwealth.”).

\textsuperscript{122} For example, North Carolina first prohibited same-sex marriage by statute. N.C.G.S. §51-1.2 (2013). In 2012, the North Carolina voters passed Amendment 1 that amends the state constitution to prohibit same-sex marriage. Campbell Robertson, \textit{North Carolina Voters Pass Ban on Same-Sex Marriage}, N.Y. TIMES, MAY 8, 2012.
aggressive constitutional amendments that seek to ban any form of legal recognition of same-sex relationships. These so-called mini-DOMAs “with teeth” purport to ban the grant of any of the “incidents of marriage,” which would include the creation of any equivalent or alternative status, such as domestic partnership or civil unions.

3. Marriage litigation.

Marriage litigation is pending in federal courts in many states, where same-sex couples are now challenging state-level marriage prohibitions under the federal constitution. The federal constitutional challenges represent a new chapter in the struggle for marriage equality and could potentially have national application. Up until this point, the road to marriage equality has been very state specific. Some states adopted marriage equality as the result of legislative action, whereas others did so as a result of a judicial mandate. Three states have embraced marriage equality as a result of a popular referendum. All but one of the pro-marriage judicial decisions were based on and state constitutional protections. Only the California decision, Perry v. Schwarzenegger, which later became Perry v. Hollingsworth, was based on federal constitutional principles.

Amendment 14 of the North Carolina State Constitution now reads:

Marriage between one man and one woman is the only domestic legal union that shall be valid or recognized in this State. This section does not prohibit a private party from entering into contracts with another private party; nor does this section prohibit courts from adjudicating the rights of private parties pursuant to such contracts.


The states are: Alabama, Arkansas, Florida, Georgia, Kentucky, Idaho, Louisiana, Michigan, Nebraska, North Carolina, North Dakota, Ohio, Oklahoma, South Carolina, South Dakota, Texas, Virginia and Wisconsin. This type of prohibition has been held to prohibit the grant of domestic partner benefits to public employees. National Pride at Work v. Cox, 481 Mich. 56 (2008).

For example, the amendment to the Ohio Constitution adopted in 2004 specifically addresses attempts “to approximate the design, qualities, significance or effect of marriage.” OHIO. CONST. art. XV, § 11 (2005). This language differs from the standard type of DOMA that was adopted by Mississippi in 2004. MISS. CONST. art. 14, § 263A (2005). Section 263A of the Mississippi Constitution provides:

Marriage may take place and may be valid under the laws of this State only between a man and a woman. A marriage in another State or foreign jurisdiction between persons of the same gender, regardless of when the marriage took place, may not be recognized in this state.

Id.

Editorial Board, Surge Forward on Marriage Equality, N.Y. TIMES, May 1, 2004 (noting cases are pending in more than thirty states). Reliance on federal constitutional protections represents a change in strategy that began in earnest after Perry v. Hollingsworth. The earlier state supreme court decisions that led to marriage equality had all been based on state constitutional principles, making the state supreme court decision the final appeal, but also limiting the scope of the ruling to that state. See e.g., Goodridge v. Dep’t of Pub. Health, 798 N.E.2d 941 (Mass. 2003).

See e.g. A.P., Hawaii: Same-Sex Marriage Becomes Law, N.Y. TIMES, Nov. 13, 2013 (reporting governor signed the Marriage Equality Bill of 2013).


In Perry v. Schwarzenegger, the U.S. District Court for the Northern District of California invalidated the citizen’s initiative known as Proposition 8, which had banned same-sex marriage. Perry v. Schwarzenegger, 704 F.
The pending cases have the potential to require nation-wide marriage equality. Since the Windsor decision, U.S. District Courts in seven states (Kentucky, Michigan, Oklahoma, Tennessee, Texas, Utah, and Virginia) have invalidated state constitutional marriage bans on the basis that they violate the Due Process Clause and the Equal Protection Clause of the 14th Amendment of the U.S. Constitution. It is likely that one of the first Circuit Court decisions will come out of the 10th Circuit where two cases are currently pending, Bishop v. U.S. from Oklahoma and Kitchen v. Herbert from Utah. A three-judge panel of the 10th Circuit heard argument in both cases in early 2014.

131 See e.g. Bostic v. Rainey, 970 F. Supp. 2d 456 (E.D. Va 2014) (“We have arrived upon another moment in history when We the People becomes more inclusive, and our freedom more perfect.”).
The two lower court decisions from the 10th Circuit were issued within a month of each other. In the first decision, the U.S. District Court for Utah held that the Utah marriage ban “conflicts with the United States Constitution’s guarantees of equal protection and due process under the law.” The decision applied rational basis review and found that the prohibition on same-sex marriage served to “deny its gay and lesbian citizens their fundamental right to marry and, in so doing, demean[s] the dignity of these same-sex couples for no rational reason.” The decision was not stayed until the state appealed to the U.S. Supreme Court for an emergency stay pending final disposition by the 10th Circuit. As a result, same-sex couples in Utah were able to marry for a period of several weeks. The U.S. Attorney General Eric Holder has ruled that the federal government will recognize those couples as legally married for federal purposes. The Utah State Tax Commission has also ruled that it would recognize the estimated more than 1300 marriages that took place in Utah before the stay was approved.

In Bishop v. U.S., the U.S. District Court for the Northern District of Oklahoma ruled that the Oklahoma marriage ban that was passed overwhelmingly by voters in 2004 violated the Equal Protection Clause of the 14th Amendment of the U.S. Constitution. Applying rational basis review, the decision held that the marriage ban was “an arbitrary, irrational exclusion of just one class of Oklahoma citizens from a governmental benefit.” Noting the uncertainty regarding the appropriate standard of review, the decision stated:

The Supreme Court has not expressly reached the issue of whether state laws prohibiting same-sex marriage violate the U.S. Constitution. However, Supreme Court law now prohibits states from passing laws that are born of animosity against homosexuals, extends constitutional protection to the moral and sexual choices of homosexuals, and prohibits the federal government from treating opposite-sex marriages and same-sex marriages differently. There is no precise legal label for what has occurred in Supreme Court jurisprudence beginning with Romer in 1996 and culminating in Windsor in 2013, but this Court knows a rhetorical shift when it sees one.

The judge stayed his decision pending appeal to the 10th Circuit, so same-sex marriages did not immediately take place in Oklahoma.

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145 Id.
146 Kitchen v. Herbert, 134 S. Ct. 893 (2014)
147 Jack Healy and Adam Liptak, Justices’ Halt to Gay Marriage Leaves Utah Couples in Limbo, N.Y. TIMES, Jan. 6, 2014.
149 Matt Pearce, Utah Says Married Same-Sex Couples Can File Joint Tax Return, LA TIMES, Jan. 17, 2014.
151 Id. at 1296.
152 Id.
153 Id.
B. Post-Windsor Federal Marriage Recognition

In *U.S. v. Windsor*, the U.S. Supreme Court invalidated Section 3 of DOMA, declaring it unconstitutional under the Due Process Clause and Equal Protection guarantees of the 5th Amendment.\(^{154}\) Section 3 of DOMA had amended the Dictionary Act to provide that for all federal purposes marriage was only between one man and one woman.\(^{155}\) Prior to DOMA, marriage had been the traditional province of the states, and there was generally no federal common law definition of marriage.\(^{156}\) In questions involving federal law, the validity of a marriage would be determined by reference to state law.\(^{157}\) As early as 1993, however, *Baehr v. Lewin* and the ongoing Hawaii marriage litigation raised the possibility that a state might recognize same-sex marriage or might be forced to do so by its courts.\(^{158}\)

DOMA was designed to address the eventuality of same-sex marriage by adopting a restrictive definitional standard on the federal level.\(^{159}\) Section 3 of DOMA made it clear that same-sex couples who were legally married under state law would not qualify for any of the 1,138 federal statutory provisions under “which marital status is a factor in determining or receiving benefits, rights, and privileges.”\(^{160}\) Once same-sex marriage began to be recognized at the state level, the federal restriction was a continuing source of complexity, as well as inequality. For example, a same-sex couple who was legally married and lived in Massachusetts could file their state income taxes jointly, but had to file their federal taxes as if they were unmarried.\(^{161}\)

The *Windsor* decision overturned the blanket ban on recognizing same-sex marriage on the federal level, but its implementation has not been seamless.\(^{162}\) *Windsor* has raised a number

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\(^{154}\) *U.S. v. Windsor*, 133 S.Ct. 2675 (2013)


- In determining the meaning of any Act of Congress, or of any ruling, regulation, or interpretation of the various administrative bureaus and agencies of the United States, the word “marriage” means only a legal union between one man and one woman as husband and wife, and the word “spouse” refers only to a person of the opposite sex who is a husband or wife.

*Id.*

\(^{156}\) When DOMA was enacted in 1996, the House Judiciary Report stated that the legislation furthered four government interests: 1) defending and nurturing the institution of traditional marriage, 2) defending traditional notions of morality, 3) protecting states’ sovereignty and democratic self-governance, and 4) preserving scarce government resources. H.R. REP. NO. 104-664, at 10 (1996), reprinted in 1996 U.S.C.C.A.N. 2905, 2914.

\(^{157}\) See infra note 166 (listing conflicting precedent).

\(^{158}\) The U.S. Senate voted to approve DOMA on the day the trial began in *Baehr v. Lewin* on remand from the state supreme court. See supra note 114 (citing Chauncey).

\(^{159}\) Section 2 of DOMA also purports to authorize states to refuse to recognize same-sex marriages from sister states in order to stop the potential spread of same-sex marriage. Defense of Marriage Act, Pub. L. No. 104-199, 110 Stat. 2419 (1996), codified at 28 U.S.C. § 1738C. *Windsor* did not address this section of DOMA and the Full and Faith and Credit concerns.


of difficult questions, the most central of which is whether federal law should respect all marriages that were legal in their state of celebration or only marriages that are legal in the state where the couple is domiciled. Justice Scalia specifically raised this concern in his dissent in Windsor, noting that the majority decision left unanswered “difficult choice-of-law issues.” This section discusses the application of the two competing rules in the context of the major federal benefits that are most relevant to LGBT older adults, including social security and Medicare/Medicaid, as well as the rules governing pension and retirement funds.

1. State of Domicile or State of Recognition?

Windsor invalidated federal definition of marriage and reinstated the importance of state law to determine whether a marriage is valid. However, given the patchwork nature of marriage equality, it was not always clear exactly which state law should control. Many same-sex couples who live in non-recognition states are legally married under the laws of another state or a foreign country. They either traveled to a recognition jurisdiction to get married and then returned home or they lived in a recognition jurisdiction at the time of their marriage, but have since moved to a non-recognition state. For example, Edie Windsor and her long-term partner Thea Spryer traveled to Canada in 2007 to get married when Thea was diagnosed with a life-threatening disease because they were worried that their home state of New York would not recognize same-sex marriages in the time they had remaining. For couples such as Edie and Thea, who return to non-recognition states, the question becomes whether federal law should respect only marriages that are valid in the couple’s state or domicile or whether the state of celebration should control.

Shortly after the Windsor decision, President Obama signaled that his administration would take an expansive view of marriage and adopt a state of celebration rule wherever possible. Despite the willingness of the administration, some statutory schemes specifically

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163 The question of which state law applies not only goes to whether a marriage is valid, but also when a marriage is valid. The length of a marriage is significant for a number of different federal spousal benefits.


169 Lisa Rein and Steve Vogel, Administration Says It Will Press To Provide Marriage Benefits In All States, WASH. POST, June 27, 2013. Speaking at a news conference while in Dakar, Senegal, President Obama remarked:
reference state of domicile, thereby making it much more difficult to adopt a state of celebration rule. Although a number of agencies were quick to issue guidance, the administrative implementation of Windsor continues to have some significant gaps, especially in the area of Social Security benefits. The following outlines the rules currently in place with respect to a number of benefits of special interest to LGBT elders and older adults.


The Internal Revenue Service (IRS) has adopted a state of celebration rule, but it does not recognize any marriage equivalents, such as civil unions or domestic partnerships. Marriage equality is important in the tax context because, for many federal tax purposes, a married couple is considered to be a single taxable unit. This is evident from the joint filing provisions in the income tax arena, as well as the unlimited marital deduction for estate and gift tax purposes. The spousal provisions in federal tax law do not always favor marriage, and, in some instances, may give rise to a marriage penalty for certain taxpayers.

The Windsor decision was a federal tax case that involved one of the instances where married couples are treated quite favorably – the federal estate tax. When Edie Windsor’s spouse, Thea, died in 2009, Edie did not qualify for the marital deduction that is designed to benefit surviving spouses because DOMA treated Edie and Thea as if there were unmarried taxpayers. As married taxpayers, Edie would have owed no federal estate tax, but under DOMA she was presented with a staggering federal estate tax bill for $363,053. Edie paid the tax and then sued for a refund on the grounds that DOMA violated the Due Process Clause and Equal Protection guarantees of the 5th Amendment. While the litigation was pending, Edie

“My personal belief, but I’m speaking now as a president as opposed to as a lawyer, is that if you’ve been married in Massachusetts and you move someplace else, you’re still married, and that under federal law you should be able to obtain the benefits of any lawfully married couple.” Id. See also Michael D. Shear, Obama, in Africa, Praises U.S. Ruling on Gay Marriage, N.Y. TIMES (June 27, 2013), http://www.nytimes.com/2013/06/28/world/africa/obama-in-africa.html.

170 See supra text accompanying notes 189-207 (discussing Social Security).
172 For example, due to the specific on older adults and seniors, this section does not cover immigration and spousal preferences.
174 Married couples are permitted to file a joint federal income tax return and are subject to a separate rate of tax.
177 Tara Siegel Bernard, Gay and Married Couples in New Land of Taxation, N.Y. TIMES, Aug. 30, 2013 (noting “plenty will pay more [taxes]”).
180 In order to get into federal court, a taxpayer must first pay the tax and then sue for a refund. A taxpayer can refuse to pay the tax purported due, but then must sue in Tax Court.
explained to reporters that if the name of her spouse been Theo instead of Thea, she would have owed no tax.\textsuperscript{181}

In \textit{Windsor}, the Court did not expressly address the question of which state law applies – state of celebration or state of domicile – because the trial court had established that Edie and Thea were legally married in New York at the time of Thea’s death.\textsuperscript{182} Accordingly, the decision left open the possibility that a couple who lived in a nonrecognition state, but had legally married in another state could be considered married for federal tax purposes. In the deferral tax context, the Internal Revenue Code is silent as to which state law controls, and there is a confusing and sometimes conflicting assortment of case law dealing with common law marriage and \textit{ex parte} divorces.\textsuperscript{183}

A little over two months after the \textit{Windsor} decision, the IRS released Revenue Ruling 2013-17, which set forth the state of celebration rule and clarified that an equivalent status in lieu of marriage would not constitute marriage for federal tax purposes.\textsuperscript{184} Under DOMA, legally married couples who lived in marriage equality states could file their state taxes jointly, but then had to file their federal taxes separately as unmarried taxpayers.\textsuperscript{185} Although \textit{Windsor} eliminated this breach of uniformity, the adoption of a state of celebration rule created a new difficulty. Currently, legally married couples who live in nonrecognition states may now file their federal taxes jointly, but remain unmarried for state tax purposes.\textsuperscript{186} To further complicate matters, a number of states require taxpayers to use the same filing status for state purposes as they did for federal purposes.\textsuperscript{187} Some states, such as Utah, have acquiesced and will allow same-sex married couples to file jointly, whereas others have hastily amended their state income tax rules to provide an exception for same-sex couples.\textsuperscript{188}

3. \textit{Social Security – Domicile}

Social Security provides a number of different spousal benefits, including retirement benefits, disability benefits, and survivor benefits.\textsuperscript{189} The rules regarding who qualifies for spousal benefits are complicated by statutory language that makes an administrative imposition

\textsuperscript{181} Nina Totenberg, \textit{Meet The 83-Year-Old Taking On The U.S. Over Same-Sex Marriage}, NPR, Mar. 21, 2013, available at http://www.npr.org/2013/03/21/174944430/meet-the-83-year-old-taking-on-the-u-s-over same-sex-marriage (“If Thea was Theo . . . I would not have had to pay”).


\textsuperscript{183} Boyter v. Comm’r, 668 F.2d 1382, 1385 (4th Cir. 1981) (“We agree with the government’s argument that under the Internal Revenue Code a federal court is bound by state law rather than federal law when attempting to construe marital status.”).

\textsuperscript{184} U.S. Department of the Treasury, \textit{All Legal Same-Sex Marriages Will be Recognized for Federal Tax Purposes}, August 29, 2013.

\textsuperscript{185} See E.J. Graff, \textit{Marrying Outside the Box}, N.Y. TIMES MAG., Apr. 10, 2005, at 22 (noting for first time individuals married under state law will be denied right to file as married for federal income tax purposes).

\textsuperscript{186} Infanti, supra note 79.


\textsuperscript{188} Matt Pearce, \textit{Utah Says Married Same-Sex Couples Can File Joint Tax Return}, LA TIMES, Jan. 17, 2014.

\textsuperscript{189} The Congressional Budget Office (CBO) estimated that thirty percent of same-sex couples would receive higher benefits, if federal law recognized same-sex marriage and all partnered same-sex couples chose to marry. Congressional Budget Office, \textit{The Potential Budgetary Impact of Recognizing Same-Sex Marriages}, available at http://www.cbo.gov/ftpdocs/55xx/doc5559/06-21-SameSexMarriage.pdf. The CBO Report estimated that by 2014 recognizing same-sex marriage would translate to an increase in benefits of $350 million annually. \textit{Id}. 
of a state of celebration rule more challenging, but the language also leaves room for the recognition of marriage equivalents. The fact that some married same-sex couples may not qualify for Social Security benefits is particularly disturbing given that benefits are based on work history and contributions made over a worker’s lifetime.

The potential amount of a spousal benefit can be quite significant. Social security is the major source of income for seniors in the U.S. For many seniors, a spousal benefit may be the only thing keeping them above the poverty level. It is estimated that Social Security benefits lift more than one-third of all seniors out of poverty. More than one in five seniors rely on Social Security benefits for their sole source of income. Approximately, sixty-five percent of all seniors rely on Social Security benefits for at least fifty percent of their income.

Out of all the potential spousal benefits, the retirement benefit and the survivor benefit are the most significant social security benefits that include a spousal benefit. Upon retirement, the spouse of the retired worker is entitled to up to fifty percent of her spouse’s retirement benefit in addition to the worker’s benefit. Upon the death, a surviving spouse is entitled to receive the entire amount of the benefit that had been paid to the deceased spouse if that amount is greater than what the survivor would be entitled to in her own right. Even divorced spouses are eligible for a spousal benefits provided the marriage lasted at least ten years and the non-worker divorced spouse has not remarried. The amount a divorced spouse

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190 For Social Security purposes, marital status also includes individuals who would be treated as spouses under state law. 42 U.S.C. § 416 h (1)(A)(ii).
194 John Waggoner, Millions of Americans Get by on Social Security Alone, USA TODAY, Aug. 15, 2005.
196 When a worker is entitled to receive social security disability insurance, the worker’s spouse is qualified to receive a payment equal to up to one half of the worker’s disability benefit, if the spouse is 62 or older or is caring for the worker’s child who is less than 16 years of age or disabled. As with the retirement benefit, a divorced spouse may also qualify for the benefit provided the marriage lasted ten years.
198 A surviving spouse qualifies for social security death benefits. 42 U.S.C. § 402 (2013). The surviving spouse of a deceased retired worker receives one hundred percent of the deceased spouse’s benefits. 42 U.S.C. § 402 (2013). The requirement that a former spouse must have been married at least ten years introduces another complication because it means that the SSA must determine the legality of the marriage over time. The SSA has issued guidance that purports to establish when states first recognized same-sex marriages, although it contains several inaccuracies. POMS GN 00210.100 Same-Sex Marriage -- Benefits for Aged Spouses, Mar. 11, 2014 at https://secure.ssa.gov/poms.nsf/lhx/0200210100. Moreover, it is difficult to establish a time frame in instances where a law is subsequently declared unconstitutional. If a same-sex couple marries in Massachusetts in 2004 and then moves to New Jersey in 2007 and divorces in 2015, they should satisfy the ten year minimum requirement, even though New Jersey did not start recognizing same-sex marriages until 2013.
receives does not reduce the amount a current spouse receives and a single worker can generate more than one spousal retirement benefit.  

For Social Security purposes, an individual will qualify as a spouse provided 1) she is recognized as a spouse by her state of domicile, referred to as a “legal spouse,” 2) she is entitled to inherit under the rules of intestacy as if she were a spouse, referred to as a “putative spouse,” and 3) the couple tried to marry there was a legal impediment, referred to as a “deemed spouse.” The Social Security Administration (SSA) has issued guidance confirming that married same-sex couples who live in states with marriage equality qualify for spousal benefits. In order to qualify as a “legal spouse,” the state of domicile must recognize the marriage that at the time of 1) application for benefits, 2) the death of the first spouse to die, or 3) at any point while the application for benefits is pending. The SSA has not yet released guidance regarding the application of the putative spouse rules to same-sex couples, although same-sex couples who are in civil unions and other marriage equivalents, as well as couples who are registered domestic partners in Wisconsin should qualify.

4. **Medicare and Medicaid – Domicile and Celebration**

Medicare is the primary health insurance program for seniors, and Medicaid is a health insurance program for low income individuals. Some seniors will qualify for both Medicare and Medicaid, provided they meet certain income and asset limitations. Medicare and Medicaid take marriage into account for in a number of instances, including benefits eligibility and certain income and asset limitations. Spouses are also entitled to special protections, such as the Medicaid spousal impoverishment rule. For Medicare/Medicaid purposes, the definition of spouse is generally the same as that used for Social Security purposes, although the

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206 Id.

207 Although the status of a domestic partner under Wisconsin law does not grant an individual all the rights and responsibilities of marriage, it does provide the surviving partner the equivalent of spousal intestacy rights. Wis. STAT. § 770 et seq.


210 For example, the amount of premium an individual is required to pay for Medicaid Part B and Part D is determined by income, and spousal incomes are combined. See Social Security, Medicare Premiums: Rules for Higher-Income Beneficiaries, at www.socialsecurity.gov/pubs/10536.pdf.

Center for Medicare and Medicaid Services (CMS) has recently released guidance that follows a state of celebration rule in certain limited circumstances.\textsuperscript{212}

Although eligibility for Medicare is primarily based on age, there are a number of instances where work history and income can play a role.\textsuperscript{213} As with Social Security, spouses and certain former spouses can qualify for Medicaid based on their spouse’s work history.\textsuperscript{214} Medicare is divided into four separate parts, each of which provides a distinct type of coverage. Part A provides hospital coverage, skilled nursing care, and hospice care.\textsuperscript{215} Part B covers doctors’ visits, outpatient services, medical supplies, and preventive care.\textsuperscript{216} Part C allows for Medicare Advantage plans that are private health plans that supplement Medicare coverage.\textsuperscript{217} Part D provides prescription drug coverage provides.\textsuperscript{218}

All four parts of Medicaid involve spousal benefits. To qualify for Medicaid Part A insurance without paying a premium an individual must be 65 years of age and must have worked for forty quarters (i.e., ten years).\textsuperscript{219} If an individual does not have sufficient work history, she may qualify based on her spouse’s work history, even if the spouse is deceased.\textsuperscript{220} Former spouses who were married for at least ten years can also qualify.\textsuperscript{221} Current spouses must have been married for at least one year before applying for benefits.\textsuperscript{222} Spousal eligibility under Part A follows the rules applicable for Social Security benefits that are discussed above.\textsuperscript{223}

Medicare Part B requires that individuals must enroll during an “initial enrollment period” that begins three months before they turn 65 or face a lifetime penalty of higher premiums.\textsuperscript{224} The penalty does not apply if an individual is still working and has coverage through her employer or has coverage through her spouse’s employment-based health insurance plan.\textsuperscript{225} In this instance, CMS takes that position that the more restrictive Social Security rules

\begin{footnotesize}
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\item\textsuperscript{213} An individual can qualify for benefits at age 65, provided that either she or her spouse worked for at least forty quarters (i.e., ten years). An individual can also qualify for Medicare on her spouse’s work record, provided her spouse is at least 62 and she is at least 65.
\item\textsuperscript{214} \textit{Id.}
\item\textsuperscript{215} 42 U.S.C. § 1395c \textit{et seq.} (2013).
\item\textsuperscript{216} 42 U.S.C. § 1395j \textit{et seq.} (2013).
\item\textsuperscript{217} 42 U.S.C. § 1395w21 \textit{et seq.} (2013).
\item\textsuperscript{218} 42 U.S.C. § 1395w101 \textit{et seq.} (2013).
\item\textsuperscript{219} 42 U.S.C. § 1395c \textit{et seq.} (2013).
\item\textsuperscript{220} 42 USCS § 1395p (2013). The couple must have been married for at least nine months prior to the date of death. This requirement is another instance where it is essential to know the length of a marriage. \textit{See supra} note 200 (describing importance of length of marriage for Social Security purposes).
\item\textsuperscript{221} \textit{Id.}
\item\textsuperscript{222} \textit{Id.}
\item\textsuperscript{223} CMS, \textit{Important Information for Individuals in Same-Sex Marriages}, at \textit{http://medicare.gov/sign-up-change-plans/same-sex-marriage.html} (last visited May 10, 2014). CMS explains, “When the work history of your same-sex spouse is needed for you to be eligible for premium-free Part A, Social Security will use the same rules for recognizing your marriage when determining eligibility for Medicare as it uses for determining eligibility for Social Security benefits.” \textit{Id.}
\item\textsuperscript{224} The penalty is an additional ten percent for every year the individual fails to enroll. If an individual is covered by her spouse’s health insurance, then she can delay enrollment in both Part B and Part D without paying late enrollment penalties.
\item\textsuperscript{225} 42 CFR 407.20 (2012). In such case, the individual qualifies for a “special enrollment period.” 42 USCS § 1395p(i) (2012). Problems have occurred for same-sex couples when one spouse turns 65 and assumes that she does
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\end{footnotesize}
do not apply, and it applies a state of celebration rule. CMS has also adopted a state of celebration law with respect to spouses covered by the Part C Medicare Advantage plans. In August 2013, CMS announced that all beneficiaries in private Medicare Advantage plans must have access to equal coverage when it comes to care in a nursing home where their spouse lives, including joint placement.

One of the most important protections afforded spouses under Medicare/Medicaid is the exception to the Medicaid “spend down rules” that is designed to ensure that a healthy spouse is not left destitute in order to qualify the other spouse for Medicaid benefits, referred to as the “spousal impoverishment rules.” Because Medicare does not cover the cost of long-term care, Medicaid is often the only option for many middle-income seniors who do not have long-term care insurance. In order to satisfy the income and asset thresholds imposed by Medicaid, individuals have to “spend down” or transfer their assets in order to qualify for coverage. The spousal impoverishment rules protect the healthier spouse by exempting the marital home, prohibiting a Medicaid lien from attaching to the marital home until after the death of the non-institutionalized spouse, and allowing the non-institutionalized spouse to keep one-half (or more) of the couple’s joint assets. Prior to Windsor, Health and Human Services (HHS) notified the states that they had the discretion to treat same-sex “domestic partners” as “opposite-sex

not need to sign up for Part B supplemental insurance because she is already covered under her spouse’s health plan. CMS had taken the position that DOMA prohibited a same-sex spouse or partner from qualifying for the special enrollment period by reason of his spouse’s employment status. There is a provision for a waiver of the penalty. 42 USC § 1395p(h) (2012); 42 CFR 407.32 (2012).


42 U.S.C. § 1328b (2013) (exempting certain resources including residence, car, qualifying irrevocable trusts, limited burial expenses, and life insurance policies).

The Medicaid program differs from Medicare in that it is organized on a state-by-state basis, but with significant funding coming from the federal government.


See also Catherine M. Reif, A Penny Saved can be a Penalty Earned: Nursing Homes, Medicaid Planning, the Deficit Reduction Act of 2005, and the Problem of Transferring Assets 34 N.Y.U. Rev. L. & Soc. Change 339 (2010)


42 U.S.C.§1396p(a) (2010) (“Any adjustment or recovery ... may be made only after the death of the individual’s surviving spouse, if any ... and only at a time ... when he has no surviving child who is under age 21, or ... is blind or permanently and totally disabled ... “). In addition, no lien may attach to the residence if a qualified sibling, son, or daughter of the decedent resides in the home. 42 U.S.C. §1396p(b)(2)(B).
spouses” for purposes of the spousal impoverishment rules. HHS has not revisited or clarified this guidance, but it seems clear that HHS would recommend a state of celebration approach given the previous guidance.

5. Pension and Retirement Benefits – Celebration

The Employee Retirement Security Act of 1974 (ERISA) regulates employer-sponsored retirement funds, (both defined benefit and defined contribution plans), as well as the welfare plans that provide health insurance and disability benefits. ERISA generally pre-empts state law. It mandates a number of spousal protections, including favorable tax treatment for amounts received from a decedent spouse’s retirement fund. Prior to Windsor, DOMA barred legally married same-sex couples from qualifying for these protections. In some instances, same-sex spouses were even denied survivor benefits from plans that restricted permissible beneficiaries to “spouses.”

Through administrative guidance, the Department of Labor (DOL) has announced that it will follow a broad state of celebration rule.


235 Id.


238 A taxpayer can roll-over her spouse’s interest in a qualified retirement plan, government plan, or tax sheltered annuity and will not be taxed until distributions are taken. IRC §402(c). This favorable treatment gives the survivor the benefit of tax-deferred savings.

239 The restrictive definition of DOMA applied for all federal purposes. See supra note 155.

240 Prior to Windsor, when a plan limited the class of beneficiaries to the exclusion of same-sex spouses and partners, the only option for a plan participant was to urge the employer to amend the terms of the plan. In 2006, Laurel Hester, a police lieutenant in Ocean County, New Jersey, successfully lobbied the county board of freeholders to pass a resolution allowing county law enforcement officers to designate someone other than their spouse as the beneficiary of their pension funds. Damien Cave, Deal Would Let Dying Officer Leave Pension to Companion, N.Y. TIMES, Jan. 22, 2006. Laurel had been a police investigator with the Ocean County Prosecutor’s Office for 25 years. Id. When she was diagnosed with terminal cancer, Laurel realized that her partner would not receive her accrued pension benefits. See e.g. Damien Cave, Dying Officer Again Turned Down on Benefits for Companion, N.Y. TIMES, Jan 19, 2005. For over a year, Laurel urged the county Freeholders to pass the resolution. Laurel died shortly after the county approved the change, at the age of 49. Michael Wilson, Lieutenant Who Won Pension Rights for Her Domestic Partner Dies at 49, N.Y. TIMES, Feb. 20, 2006. A film about the ordeal, titled Freeheld, received the Academy Award for best short documentary in 2008. Robin Finn, A Filmmaker Triumphant, a Film About Triumph, N.Y. TIMES, Mar. 7, 2008.

241 DOL Technical Release No. 2013-04. Guidance to Employee Benefit Plans on the Definition of "Spouse" and "Marriage" under ERISA and the Supreme Court's Decision in United States v. Windsor (Sept. 18, 2013) http://www.dol.gov/ebsa/newsroom/tr13-04.html. The stated rationale is to “provide[] a uniform rule of recognition that can be applied with certainty by stakeholders, including employers, plan administrators, participants, and beneficiaries.” Id.

242 Id.
union or domestic partnership. The blanket state of celebration rule should ensure legally married same-sex spouses equal treatment in the context of retirement funds. However, there is continuing concern that some defined benefit plans may use exclusionary language that defines “spouse” to mean only different sex couples or references a discriminatory state law. In those cases, the plan document will have to be amended in order to comply with the DOL interpretation of the meaning of spouse.

6. Veterans and Other Federal Benefits – Celebration

There are numerous other federal benefits that include spousal protections, including veterans’ benefits and the benefits extended to federal workers. Within weeks after the Windsor decision, the Office of Personnel Management announced that it would apply a state of celebration rule and recognize legally married same-sex couples regardless of the laws of their state of domicile. The extension of veterans’ spousal benefits was more difficult because the relevant statutory language had been amended to include a DOMA-like restriction that specifically defined “spouse” as “a person of the opposite sex.” In September 2013, the U.S. Attorney General, Eric Holder, announced that the Department of Justice would no longer enforce the restriction, citing Windsor and a recent decision from the Central District of California that declared the restriction unconstitutional in light of Windsor.

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243 The guidance specifically excludes marriage equivalents, such as civil unions and domestic partnerships. It provides that:

The terms “spouse” and “marriage,” however, do not include individuals in a formal relationship recognized by a state that is not denominated a marriage under state law, such as a domestic partnership or a civil union, regardless of whether the individuals who are in these relationships have the same rights and responsibilities as those individuals who are married under state law.

244 When Jennifer Farley died in 2010, she was a partner in the Chicago office of the Philadelphia-based firm of Cozen & O’Connor. She left the bulk of her estate to her surviving spouse, Ellyn Tobits, whom she had married in Canada in 2006. When Jennifer died, her parents claimed that they should be entitled to receive the proceeds of her profit sharing plan, arguing that Tobits does not qualify as a spouse in light of DOMA. O’Connor v. Tobits, Brief in Opposition, E.D. PA., Case Number 2:11-cv-00045, available at http://www.nclrights.org/site/DocServer/2011_09_22_Tobits_Opp_to_Cozen_MJP.pdf?docID=8881. The case was pending when the Windsor decision was announced.

245 There are instances where individuals have successfully changed the plan document. For example, when William Swensor died unexpectedly at the age of 66, his surviving same-sex partner of 51 years did not qualify as a surviving “spouse.” NCLR, Press Release, Union Changes Policy To Provide Equal Pension Benefits To Domestic Partners: After Two-Year Struggle, Gay Man Receives Deceased Partner's Pension Benefits, at http://www.nclrights.org/site/PageServer?pagename=press_unionbenefits_082207. Two years later, the International Longshore and Warehouse Union was able to re-negotiate the terms of its contract to provide pension benefits for domestic partners and made the new contract coverage retroactive to the date of Swensor’s death. Id. By that time, however, his surviving partner had lost the house that they had shared for 35 years. Id.


247 38 U.S.C §§ 101(3) and 101(31) (2013)


III. The Importance of Advance Planning

As discussed in the prior section, the Windsor decision has increased access to marital benefits for married same-sex couples, but also added new layers of complexity for those married couples living in non-recognition states. It has also created a ripple effect across the country, as federal district courts have begun to invalidate state constitutional restrictions on federal constitutional grounds. However, even nationwide marriage equality will not address some of the most pressing concerns facing LGBT elders and older adults, including the persistence of anti-LGBT bias and discrimination and the need for culturally competent senior services, especially in the context of housing. Accordingly, LGBT elders and older adults find themselves at a unique moment in history. Living on the edge of equality, they must balance their hopes for the future with the reality of the present.

As advocacy organizations and others continue to work for change, it is incumbent on LGBT individuals to use all available planning methods to secure a future that allows them to age in dignity and security while preserving their autonomy and their preferences. For partnered LGBT individuals, part of this planning will include determining whether to marry and where to retire. Although private planning documents can go a long way to providing a certain level of security, there are obvious limitations. Private ordering will always be, at best, an imperfect substitute for systemic legal, social, and political change.

This section breaks down these opportunities for personal planning into three distinct, yet interrelated categories: planning for income security, traditional estate planning, and elder care planning. In all three instances, LGBT elders and older adults can leave nothing to chance because the default rules that are in place prioritize legally recognized spouses and next of kin and may not reflect their choices or preferences. Accordingly, LGBT elders and older adults should create an integrated elder care plan that goes beyond the typical estate plan and includes express directions regarding such important issues as gender identity, caregiving, and housing.251

A. Income Security – whether to wed and where to retire

Planning for financial security in retirement is especially important for LGBT older adults given the current state of marriage equality, the uncertainty regarding some federal spousal benefits, and the high levels of income insecurity reported by the current generation of LGBT elders.252 As explained in Part I, elder same-sex partnered households lag behind different-sex married elders on all important financial indicators, including income, retirement savings, and home ownership.253 The disparity is most striking at the lower rungs of the economic ladder where elder same-sex partnered households are more likely to live in poverty than different-sex married elders, and elder female same-sex partnered households are nearly

250 See supra text accompanying notes 125-153 (describing federal court challenges).
251 See infra text accompanying notes 306-360 (describing the integrated elder care plan).
252 The three basic components of an individual’s retirement savings are: individual non-deferred savings, social security benefits, and pensions or other retirement vehicles. Obviously, the ability to save is a function of income level. Pension and other tax-deferred retirement savings plans are often tied to an individual’s employment. Social security benefits are also tied to employment and earnings history, as well as marital status.
twice as likely to live in poverty than the different-sex married elders.\textsuperscript{254} To some extent, these statistics should not be surprising because LGBT elders are long-time survivors of homophobia and transphobia.\textsuperscript{255} The statistics also reflect, at least in part, the historical disparity in spousal Social Security, pension, and veterans’ benefits – a disparity that continues in some instances even after the \textit{Windsor} decision.\textsuperscript{256}

For LGBT older adults who are partnered, marriage is now a viable and obtainable option, even if it entails traveling out of state. However, it is not always a smart financial move. Accordingly, it is important to weigh the positive impact of marriage with its potential downside. Individuals who are receiving benefits must determine whether marriage will adversely affect their eligibility. This includes individuals who are receiving any sort of means tested benefits or individuals who may be receiving benefits through a former or deceased spouse.\textsuperscript{257} Marriage can also have an adverse impact on federal tax liability, with some individuals experiencing a so-called marriage penalty.\textsuperscript{258}

Even if marriage does make sense financially, it should never be entered into lightly. LGBT individuals, regardless of age, should consider pre-nuptial agreements and the possibility that marriage may not be forever.\textsuperscript{259} Unfortunately, it is currently much easier to enter into a same-sex marriage than to dissolve one.\textsuperscript{260} States do not generally impose residency requirements on marriage (or a marriage equivalence), whereas they frequently impose residency restrictions on divorce.\textsuperscript{261} This difference has created significant problems due to the number of same-sex couples who live in non-marriage jurisdictions, but have traveled out-of-state to get married, as did Edie and Thea.\textsuperscript{262} Given the present state of divorce laws, such couples may end up making a much stronger commitment than they anticipated.\textsuperscript{263} When they return home, they will be considered married for certain federal purposes, but will not be legally married for state purposes nor will they be able to divorce in their state of domicile.\textsuperscript{264} The unhappy couple can only secure a divorce if they married in one of the states that retains jurisdiction of marriages or if they establish residency in a state that has marriage equality.\textsuperscript{265} Accordingly, if a same-sex couple does choose to marry out-of-state, they should pick the state carefully. Otherwise, their only option will be to establish another domicile, which will be costly and may not be feasible.\textsuperscript{266}

\begin{thebibliography}{99}
\bibitem{note254} Id.
\bibitem{note255} For a discussion of the conditions for LGBT individuals in pre-Stonewall see Knauer, supra note 39.
\bibitem{note256} See supra text accompanying notes 165-172 (discussing difference between state-of-celebration and state-of-domicile rule).
\bibitem{note257} Spousal benefits based on the work history of a former or deceased spouse will terminate on remarriage. See supra note 199.
\bibitem{note258} See supra note 176 (discussing marriage penalty).
\bibitem{note259} See generally Monica J. Franklin, \textit{Senior Moment: Late-Life Love, Part I: To Tie The Knot Or Not: Planning For Long-Term Care} 49 TENN. B.J. 30 (2013).
\bibitem{note261} Margaret Klaw, \textit{Gay Divorce, the Next Frontier}, WASH. POST (July 5, 2013) \url{http://articles.washingtonpost.com/2013-07-05/opinions/40390073_1_marriage-equality-marriage-license-marriage-act}.
\bibitem{note262} See supra text accompanying notes 2-3 (discussing Edie and Thea’s trip to Canada).
\bibitem{note263} Joslin, supra note 260.
\bibitem{note264} Id.
\bibitem{note265} Jurisdictions are increasingly passing legislation that maintains continuing jurisdiction over out-of-state marriages, thereby eliminating the residency requirement. Tracy A. Thomas, \textit{Same-Sex Divorce}, 5 CALIF. L. REV. CIR. 218 (2014).
\bibitem{note266} Id.
\end{thebibliography}
In addition to choosing where to wed, LGBT elders and older adults must consider carefully where to retire. As discussed in Section A of Part II, nation-wide marriage equality has not yet been achieved. Married same-sex couples will find that in some states and for some federal purposes their spouses may be considered legal strangers. For example, the two major retirement states of Arizona and Florida are both anti-marriage states. If a legally married same-sex couple moves from New York to Florida, they will still be recognized as married when they are traveling in the seventeen states with marriage equality, as well as the District of Columbia, but they will not be considered married under Florida law. Instead, the spouses will be considered legal strangers under Florida law, which can have profound consequences in terms of probate and property law, medical decision making, and fiduciary appointments.

For federal purposes, the couple will be considered married for tax purposes, but the question of Social Security benefits is much more complicated. As explained in Section B of Part II, Social Security spousal benefits are determined by a modified domicile rule. The operative point in time is when the application for benefits is made. Accordingly, it is essential for the couple to file for benefits in New York state before they establish a new domicile. A similar rule applies for certain Medicare benefits. If the couple moves to Florida in anticipation of retirement and then files for Social Security benefits once they relocate, they will not qualify as spouses for Social Security purposes because the are not spouse under the law of their state of domicile, and they are not entitled to inherit under the rules of intestacy. Married same-sex couples who live in non-recognition states and are not able to move before applying for Social Security benefits will have to continue to plan for retirement as unmarried individuals and not rely on the availability of spousal benefits.

In light of the disproportionate level of income insecurity among LGBT elders, it is likely that Social Security plays a central role in their retirement plans. For example, research shows that elder female-partnered households rely more heavily on social security income as a percentage of their overall income than different-sex married couples. They also receive, on average, fifteen percent less in social security benefits than their peers in different-sex marriages. Accordingly, LGBT elders and older adults must plan carefully to maximize the availability of these benefits.

267 See supra text accompanying notes 91-106 (describing current state of marriage equality).
268 See supra note 120(listing non-marriage states).
269 See infra text accompanying notes 299-304 (discussing strong preference for next of kin).
270 See supra text accompanying notes 189-207 (describing Social Security eligibility rules).
271 See supra note 206.
273 Id.
274 Of course, their recognized status may change depending on the outcome of the pending court challenges, which means that LGBT individuals must carefully monitor legal developments. Nancy J. Knauer, Legal Consciousness and LGBT Research: Law and the Everyday Lives of LGBT Individuals, 59 JOURNAL OF HOMOSEXUALITY 748 (2012) (discussing importance of law in the everyday lives of LGBT individuals).
275 See supra text accompanying notes 65-69 (discussing high level of financial insecurity among LGBT older adults).
276 Mari and Estes, supra note 19 (explaining disparities).
277 Id.
In addition to Social Security, it is important to consider the other two major sources of retirement income: savings and pensions or retirement funds. In the case of savings, a primary concern is to make sure that any investments are accurately titled or disposed of correctly at death. As explained in the following section, it is not possible to rely on the default settings that govern the rules of intestacy to make sure that an individual’s preferences are respected. Accordingly, LGBT individuals must execute wills or retitle assets such that they do not become part of the probate estate at death. Avoiding probate can be accomplished by titling the property, including real estate, in joint name with right of survivorship or using other designations applicable to investment accounts, such as Payable on Death (POD) or Transfer on Death (TOD).

Benefits payable under retirement and pension plans are nonprobate assets meaning that they do not pass under the decedent’s will or the rules of intestate succession. Accordingly, it is of the utmost importance that covered individuals execute the appropriate beneficiary designations. As explained in Section B of Part II, the Department of Labor has clarified that it will apply a state of celebration rule in the case of all retirement plans governed by ERISA. Accordingly, where a plan document directs that benefits are payable to a surviving “spouse,” a legally married same-sex spouse will qualify as a “spouse.” Spouses qualify for favorable tax treatment on any amounts payable under the retirement plan of a deceased spouse. Legally married spouses are also entitled to certain ERISA spousal protections. For example, an individual cannot designate a non-spousal beneficiary without the written consent of her spouse. Divorced spouses are entitled to a Qualified Domestic Order (QDRO), which splits the value of a retirement fund to reflect the contribution of the divorced spouse during the marriage.

Traditional pension plans, also referred to as defined benefit plans, sometimes prescribe the beneficiaries and do not grant the covered employee power to designate a beneficiary of her own choosing. In such case, chosen family will be left out unless the plan is amended. For this reason, it is always important to check the terms of the plan document. Some plans that were amended or drafted in recent years may include DOMA-like language that defines spouse and marriage to the exclusion of same-sex couples. It is likely that such plan restrictions

278 Emily Brandon, 4 Major Sources of Retirement Income (Mar. 22, 2012) available at http://money.usnews.com/money/blogs/planning-to-retire/2012/03/22/the-4-most-important-sources-of-retirement-income (reporting that the fourth most important source is employment).

279 This concern is primarily focused on the well being of surviving beneficiaries. Accounts can be titled with right of survivorship.

280 See infra text accompanying notes 291-297 (describing default rules).

281 LGBT individuals who do not have children and who rely on single-generational chosen family may find some limitations when attempting to follow traditional estate planning techniques. For example, in some instances, the threat of a will challenge by estranged next of kin may make it advisable for LGBT individuals to try to avoid probate entirely. However, the type of lifetime giving that is necessary to avoid or minimize probate may be impracticable where the potential beneficiaries are all of the same generation.


283 Life insurance is another important nonprobate asset that can provide significant financial assistant to survivors.

284 See supra text accompanying notes 241-244 (describing DOL guidance).


286 Defined benefit plans are distinct from the more popular employee-directed defined contribution plans.


would not be enforced in light of the DOL guidance, but they should be amended to remove the offending language.289

B. **Estate Planning: the Basics**

For LGBT individuals and their families, estate planning documents have long been recognized as an essential part of relationship and family formation.290 Before the advent of legal relationship recognition, individuals could use the standard set of estate planning documents to grant their partners a wide range of rights and responsibilities.291 For example, a durable power of attorney could authorize a partner to manage the finances and make medical decisions.292 An Advance Medical Directive could empower a partner to withdraw life-sustaining treatment and make decisions regarding organ donation.293 A Will could appoint a partner as representative and beneficiary of the estate. Combined, these documents provided a modicum of security for partners, but they were, and remain, an imperfect substitute for legally recognized relationships.294 Such documents are susceptible to challenge by next of kin on multiple grounds, including lack of mental capacity and undue influence.295 They are also ineffective at addressing a number of instances where the law or social norms grant decision making authority to legally recognized next of kin, such in the case of funeral and burial instructions or hospital visitation.296

Ignoring these considerable shortcomings, anti-marriage opponents have incorrectly argued that same-sex couples do not need marriage equality because they can secure all the rights and benefits of marriage through personal planning documents.297 Of course, even the best estate plan will not entitle a beneficiary or fiduciary to receive Social Security spousal benefits.298 Personal planning can establish property rights vis a vis the parties and appoint fiduciaries, but it cannot force third parties, including the government, to respect the relationships that the documents are designed to protect.

289 **Id.**
290 CHAUNCEY, supra note 105, at 100-04.
291 **Id.** at 104.
292 UNIF. PROB. CODE § 5B-101 et seq.
293 **See generally** UNIF. HEALTH CARE ACT (1994).
294 These documents can also provide limited security for chosen family members.
295 **See infra** text accompanying notes 350-360 (discussing burial and visitation issues).
296 Same-sex couples can draft documents that try to anticipate such circumstances, but the extent to which the documents can legally bind third parties such as funeral directors or cemeteries is uncertain, except where such documents are expressly authorized by law. For example, Virginia expressly authorizes the designation of an individual who “shall make arrangements for [the declarant’s] burial or the disposition of [the declarant’s] remains, including cremation, upon [the declarant’s] death.” VA. CODE ANN. § 54.1-2825 (2001). See Jennifer E. Horan, ‘When Sleep at Last has Come’: Controlling the Disposition of Dead Bodies for Same-Sex Couples, 2 J. GENDER RACE & JUST. 423 (1999) (discussing obstacles encountered by surviving same-sex partners).
298 The fact that individuals in a chosen family tend to be in the same age cohort also complicates fiduciary designations. In a traditional estate plan, an individual would usually appoint his or her spouse and then a child or perhaps even a grandchild to serve as the alternate fiduciary. When the grantor of the power of attorney, the attorney-in-fact, and the alternate attorney-in-fact are all in the same generation, it is important to name more than one alternate to guard against the possibility that the attorneys-in-fact may not be able to serve due to death or incapacity, thereby resulting in the need for a guardianship. **See supra** note 281 (discussing other limitations of planning with single-generational chosen family)
Even with these clear limitations, LGBT individuals cannot afford to forego basic estate planning because the default settings that arise automatically by operation of state law generally do not reflect their preferences or the composition of their chosen families.\(^{299}\) Approximately two-thirds of all decedents in the United States die without a valid will, but intestacy is simply not a luxury that LGBT individuals can afford.\(^{300}\) The order of priority established by the law of intestacy privileges next of kin to the exclusion of all others, which means that spouses in marriage equality states or partners in those states with marriage equivalence will be protected, but chosen family members will not be protected in any state.\(^{301}\) In the absence of legal recognition, partners and chosen family will be considered legal strangers. They will not take under traditional intestacy rules or be included in the order of priority for guardianship appointments or other similar fiduciary appointments.\(^{302}\) This strong preference for next of kin is ubiquitous throughout the law and extends far beyond the distribution of a decedent’s probate estate. It is replicated across the board in situations involving substituted decision making and other benefits, ranging from the right to receive crime victim compensation to the power to authorize organ donation.\(^{303}\) It also informs who has standing to contest a will.\(^{304}\)

C. Developing an Integrated Elder Care Plan

For LGBT older adults, the traditional trio of estate planning documents – will, durable power of attorney, and advance directive – are not sufficient to preserve their autonomy and protect their chosen families. For example, as typically drafted, health care powers of attorney and advance directives do not address a number of important decisions that are customarily left to “family,” such as funeral or burial instructions, and they do not address issues specific to transgender individuals.\(^{305}\) To supplement the traditional estate planning documents, LGBT older adults should develop an integrated elder care plan that may require the assistance of financial advisers and medical service providers, as well as the coordination of both formal and


\(^{301}\) The state has priority over legal strangers – no matter how well the “strangers” might know the individual in question. For example, when a decedent is not survived by any relatives within the prescribed degrees of relationship, the decedent’s probate property will escheat to the state. Unif. Probate Code § 2-105 (2014).


\(^{303}\) All states have crime victim compensation boards that provide monetary assistance to the victims of crime and their survivors. The National Association of Crime Victim Compensation Boards provides links to each of the state programs. National Association of Crime Victim Compensation Boards, State Compensation Web Sites, at http://www.nacvcb.org/index.asp?sid=6 (last visited May 10, 2014). The assistance awards are designed to meet emergency expenses, but not to compensate for amounts that would otherwise be recoverable in tort. A survivor is generally eligible to receive compensation if she is either related to the victim or economically dependent on the victim for her “principal support.” Id.

\(^{304}\) Individuals who would stand to gain under the rules of intestate succession have standing to challenge a will. Accordingly, in the absence of marriage or its statutory equivalent, when a surviving same-sex partner is the primary beneficiary under the will, the decedent’s intestate heirs have standing to challenge the will. Gifts to chosen family members will always be subject to challenge by legally recognized next of kin. See In re Getty Estate, 149 Cal. Rptr. 656 (1978) (holding contingent trustee lacked standing to challenge the will of J.P. Getty because she did not have a “pecuniary interest” if the will were invalidated).

informal caregivers. The comprehensive elder care plan can incorporate the traditional estate planning documents while also providing clear written instructions with respect to caregivers, housing, visitation, burial, gender identity, and anything else an individual feels strongly about, such as the care of their pets or organ donation. In many instances, the actual legal force of these instructions may be unclear, but, at the very least, they will provide some indicia of what the individual would have wanted had she been able to express her wishes. They should be designed to speak beyond incapacity and provide protection for both the individual and her chosen family from the potentially conflicting wishes and values of next of kin or public guardians.

The following outlines five different areas where an LGBT older adult may wish to memorialize her wishes and preferences: gender identity, housing, caregiving and capacity, visitation, and burial and funeral instructions. In each case, the individual’s wishes and preferences can be reflected in a single document or incorporated in another document, such as an advance directive. Whenever possible, the document should be executed with the same legal formalities applicable to wills — signed, dated, witnessed, and notarized. Given the potential for a will challenge, it is also important to maximize and memorialize that the individual has the requisite capacity to execute the documents.

1. Gender identity.

As discussed in Part I, aging can pose a set of specific challenges for transgender individuals, who often express a deep concern over encountering transphobic service providers, especially in senior living facilities. There are reports that senior living facilities sometimes refuse to respect an individual’s gender identity, resulting in extreme dignitary and psychological

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306 See infra text accompanying notes 306-360 (explaining components of elder care plan).
307 The increased risk for social isolation among LGBT older adults and elders means that it is likely that there may not be any relatives or next of kin who would want to interfere or take responsibility. In such cases, the concern is that the local equivalent of the office of public guardian would step in and assume responsibility. This was what occurred in the tragic case of two older gay men in Sonoma County California when the county officials separated them and placed them both in secure “dementia” facilities. Gerry Shih, Suit Charges Elderly Gay Partners Were Forced Apart, N.Y. Times, Apr. 20, 2010, available at http://bayarea.blogs.nytimes.com/2010/04/20/suit-charges-elderly-gaycouple-was-forced-apart/?scp=1&sq=elderly%20gay%20partners&st=cse.Shih (“For gay men and lesbians, the series of events outlined in the complaint hits very close to home”). It took Clay Greene nine months to gain his release, but which time his long-time partner, Harold Scull was dead, and the county had sold all of the couples belongings to pay for their care. Id. Their cats, Sassy and Tiger, were also gone and unaccounted for by the time Clay was released. Id. He ultimate sued the county and settled shortly before trial. Sonoma County Press Release, Sonoma County Lawsuit Resolved: Clay Greene Harold Scull Settlement Announced, July 22, 2010, available at http://press.sonoma-county.org/content.aspx?sid=1018&id=1367.
309 The precautions are especially important given the fact that a planning scheme that favors chosen family over next of kin will be considered unusual, and there is a high prevalence of dementia among older adults. When the potential for dementia is combined with non-normative estate plans, the wills of LGBT elders and older adults are vulnerable to challenges brought by disappointed heirs on the grounds of lack of capacity. Potential precautions that can be taken include: monitoring medication to make sure a client is functioning at peak when the documents are signed, securing the equivalent of a doctor’s note, and videotaping the execution of the documents. See generally ABA Commn. on L. & Aging & Am. Psychological Assn., Assessment of Older Adults with Diminished Capacity: A Handbook for Lawyers (2005).
310 See supra text accompanying notes 59-64 (discussing unique challenges facing transgender older adults).
harm to the elder.\textsuperscript{311} For example, facilities may force a transgender elder to wear gender inappropriate clothing or insist on calling the elder by the wrong name and using the wrong pronouns.\textsuperscript{312} Dementia or cognitive issues can greatly increase the likelihood that a transgender elder may experience such bias and discrimination.\textsuperscript{313}

Accordingly, it is extremely important to leave express and detailed directions regarding gender identity issues, including pronouns and gender appropriate clothing, as well as desired supportive medical therapy. These directions can be easily incorporated into a durable medical power of attorney or advance directive to the extent they are directed at service providers and involve medical care. It is also important to make sure that any substituted decision makers are aware of the individual’s wishes, especially if estranged next of kin would be hostile to these wishes. For many LGBT elders who struggle with social isolation, it is possible that there may be no next of kin or chosen family, in which case a public guardian would assume responsibility for the individual’s care.\textsuperscript{314} It is especially crucial in that situation to leave clear and uncontroverted evidence of gender identity, so there can be no questions raised by either the public guardian or a senior living facility.\textsuperscript{315}

\section{Housing and “aging in place.”}

LGBT individuals overwhelmingly report that they would prefer to “age in place,” and they express extreme trepidation over the prospect of moving to any form of congregate living facility, such as a nursing home or assisted living facility.\textsuperscript{316} As explained in Part I, gay and lesbian seniors who do enter into senior-specific housing have reported strong pressure to remain closeted, but transgender elders may not have that same option.\textsuperscript{317} For individuals who enter senior facilities, the closet can take a decisive toll on their health and well being.\textsuperscript{318} Those who attempt to age in place, however, often underutilize the supportive service that are designed to help seniors remain in the community because they fear of encountering anti-LGBT bias on the part of service providers.\textsuperscript{319} This reluctance to access services can place LGBT elders at an increased risk of social isolation and self neglect.\textsuperscript{320}

Assuming an LGBT older adult desires to age in place, the goal of her elder care plan should be to maximize autonomy and the ability to live independently for as long as possible. In

\begin{enumerate}
\item[]\textsuperscript{312} Id.
\item[]\textsuperscript{313} In one recent study, the prevalence of dementia among individuals age 71 and older was 13.9 percent, but the percentage increased to 37.4 percent for individuals aged 90 and older Brenda L. Plassman et al, \textit{Prevalence of Dementia in the United States}, 29 NEUROEPIDEMIOLOGY 125 (2007).
\item[]\textsuperscript{314} See supra note 308 (discussing role of public guardians).
\item[]\textsuperscript{315} See supra note 64 (discussing abuse of transgender residents at long-term care facilities).
\item[]\textsuperscript{316} To “age in place” means to age within the community as opposed to in some form of senior living facility. The preference the LGBT elders and older adults voice to age in place is reinforced by fear that they will experience discrimination and anti-LGBT bias in mainstream senior housing options. Nancy Orel, \textit{Community Needs Assessment: Documenting the Need for Affirmative Services for LGB Older Adults}, in \textit{LESBIAN, GAY, BISEXUAL, AND TRANSGENDER AGING: RESEARCH AND CLINICAL PERSPECTIVES} 233 (Douglas Kimmel, Tara Rose & Steven David eds., 2006).
\item[]\textsuperscript{317} See supra text accompanying notes 59-64 (discussing transgender elders and older adults).
\item[]\textsuperscript{318} See supra text accompanying notes 57-58 (quoting Dr. Lantz on negative health effects of the closet).
\item[]\textsuperscript{319} See supra note 52 (noting LGBT elders and older adults underutilize services).
\item[]\textsuperscript{320} See supra note 52 (defining social isolation).
\end{enumerate}
addition to supportive services, the prospect of aging in place often requires assistance from informal caregivers. As discussed in Part I, the vast majority of informal care in the U.S. is provided by younger relatives. This strong reliance on informal caregiving presents a difficulty for LGBT elders and older adults, who are much more likely than their non-LGBT peers to be estranged from their next of kin and less likely to have had children. Chosen families may also be limited in how much support they can provide because their members will all age together at the same time, thereby creating overlapping and reciprocal caregiving responsibilities likely to require home health care assistance and other supportive services, but, as explained above, they are less likely to access these services. They are also less likely that their non-LGBT peers to have the financial wherewithal to pay for long-term care, leaving Medicaid as their only financing option.

In terms of housing and other long-term care, the market has recently begun to respond to the concerns of LGBT elders and older adults by creating LGBT-friendly or even LGBT-centered senior housing developments. Although these proposed projects have garnered considerable press coverage, relatively few expressly LGBT-centered facilities that are currently open and serving clients, and presently the demand for such housing far outstrips supply.

For LGBT elders who can no longer live independently and do not have access to LGBT-centered housing, it is important to identify a facility that is at least LGBT-friendly. At a minimum, this would require a facility to have an antidiscrimination policy that includes sexual orientation and gender identity. Ideally, in addition to an anti-discrimination policy, a facility should have LGBT inclusive policies and programs, cultural competency training for staff, and anti-bullying policies to control the homophobic and transphobic behavior of other residents. It is important to identify these types of housing options well in advance before they are actually needed, and an integrated elder care plan should list potential housing options in order of preference.

3. Caregiving and capacity questions

LGBT elders and older adults who rely on chosen family must be take special care to spell out their wishes with respect to their preferred caregivers and appoint substitute decision

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321 See supra text accompanying notes 34-47 (discussing informal caregiving).
322 See supra note 34.
323 See supra note 45.
324 See supra note 52 (noting LGBT elders and older adults underutilize services).
325 See supra text accompanying notes 65-69 (discussing financial insecurity).
327 Id. See also Catherine Trevison, Gay Retirement Homes Still Difficult to Market, ST. PAUL PIONEER PRESS (Minn.), Mar. 20, 2008, at 7E (noting some developments have “difficulty filling”).
328 Larger metropolitan areas increasingly have resources specifically for LGBT seniors that are provided by LGBT organizations, but LGBT elders may be unable or unwilling to access the services because many members of the pre-Stonewall generation have little contact with LGBT organizations and may be reluctant to initiate such contact.
matters through health care proxies and durable medical powers of attorney. Their durable medical powers of attorney should also nominate an individual or individuals whom they wish to serve as guardian should one be needed. In the absence of these documents, the law will privilege next of kin over chosen family, regardless of the strength of the relationship. Where no next of kin are available or willing to serve, the state will assume the responsibility for elders in need of care through the office of the public guardian or a private fiduciary, if the elder has private funds. In most instances, the state will be deemed to have a greater interest in an individual than chosen family, who will be considered legal strangers.

Although an adult guardianship is considered an option of last resort, there are an estimated 1.5 million adults in the U.S. living under a plenary guardianship. The adoption of broad durable power of attorney laws in the 1970s was designed, in part, to avoid the need for plenary guardianships. However, guardianships are sometimes necessary to prevent harm or neglect and, even with fair warning, not everyone has a durable power of attorney. Some LGBT elders and older adults who are socially isolated may find themselves in a position where they have no one to appoint as attorney in fact or nominate as a guardian. In which case, the public guardian may indeed be the option of last resort.

4. Visitation Issues

A hospital visitation authorization form became a fairly common feature of LGBT estate planning after the first wave of the HIV/AIDS epidemic in the 1980s. They were necessitated

331 UNIF. PROB. CODE § 5-310 (2014). The law gives priority to an individual appointed to serve as guardian under a power of attorney. Id.
332 Id.
333 Brenda K. Uekert, Adult Guardianship and Court Data from an Online Survey, Mar. 2, 2010, available at http://www.guardianship.org/reports/Guardianship_Survey_Report.pdf. Although there is no reliable national data set, estimates show that approximately seventy-two percent of appointed guardians are family or friends of the ward, fourteen percent are handled by private professional guardians, and fourteen percent by public guardians. Id.
335 There are no reliable statistics on the number of adults in the United States who are under guardianships, but estimates place the number at upwards of 1.5 million. Brenda K. Uekert and Richard Van Duizend, Adult Guardianships: A “Best Guess” National Estimate and the Momentum for Reform (2011) http://ncsc.contentdm.oclc.org/cdm/ref/collection/ctadmin/id/1846. There is also some indication that the use of guardianships has been increasing. Id.
337 An elder living in this type of isolation is also referred to as an “unbefriended elder.” See generally Volunteers of Am. Minn., Unbefriended Elders Project, http://www.voamn.org/Learn-About-our-Services/Senior-Services/Protective-Services/Unbefriended-Elders-Project.pdf (last visited May 12, 2014).
338 In the 1980s the legal fragility of chosen family was exposed during the first wave of the HIV/AIDS epidemic as a generation of young men faced a premature death and the prospect that their partners and chosen family would be denied access to their hospital rooms by often estranged and disapproving parents or hospital staff. See CHAUNCY, supra note 105, at 95-104 (discussing role of HIV/AIDS epidemic in creating demand for same-sex marriage). In the 1990s, the highly publicized case of Sharon Kowalski who suffered a brain injury in a car accident and whose parents refused to allow her to see her partner, inspired a public education campaign by LGBT advocacy groups to induce same-sex couples to write wills and sign health care powers of attorney. See id. at 111-15 (discussing emphasis on documents and role in forming demand for same-sex marriage).
by standard hospital policies that restrict visitors to “family members” and have been used to bar partners and friends from visiting sick and dying patients. Although it has long been unclear whether these documents carried any legal force, hospital visitation authorization forms clearly serve as indicia of the wishes of the patient. For LGBT older adults and elders, however, visitation documents should be broad enough to cover hospitals and senior living facilities.

After a heart-wrenching case in Florida where hospital workers refused to allow a same-sex partner access to her dying partner despite the fact that she was her partner’s attorney-in-fact, President Obama issued a Presidential Memorandum affirming a patient’s right to visitation. The Memorandum directs that “participating hospitals may not deny visitation privileges on the basis of race, color, national origin, religion, sex, sexual orientation, gender identity, or disability.” In response to a 2010 Presidential Memorandum, HHS issued regulations “to ensure that hospitals that participate in Medicare or Medicaid respect the rights of patients to designate visitors.” It directs that “participating hospitals may not deny visitation privileges on the basis of race, color, national origin, religion, sex, sexual orientation, gender identity, or disability.” The regulations also reasserted the right of patients to designate the person of their choosing to make medical decisions on their behalf.

Hospital visitation policies have obvious relevance to LGBT elders and older adults, who will be more likely to require hospital care than younger healthy individuals. However, for this group, the question of visitation policies extends beyond just hospital stays. With respect to individuals who reside in senior living facilities, the question of visitation impacts their day-to-day lives. In 2013, CMS clarified that the visitation rules apply to long-term care facilities receiving Medicare/Medicaid funds, thereby increasing protections for LGBT elders. The CMS guidance provides that visitors must be given “full and equal visitation privileges, consistent with resident preferences.” For individuals experiencing cognitive decline, it is extremely important to memorialize these “resident preferences.”

Individuals typically use visitation documents to allow visitation by a non-family member. However, it is also possible to use such documents to disallow visitation by family members who would otherwise be authorized under most visitation policies. In some instances, individuals who have strained relationships with their next of kin may wish to restrict or disallow visitation entirely. This negative use of visitation documents may have particular applicability for LGBT elders and older adults given the relatively high level of family estrangement.

339 Id.
341 Id.
342 Final Rule: Changes to the Hospital and Critical Hospital Conditions of Participation to Ensure Visitation Rights for all Patients, 42 CFR § 482; 42 CFR §485 (2014).
343 Id.
344 Id.
345 See supra note 67 (discussing greater incidence of disability).
347 Id.
348 In some instances, it may be desirable to include negative resident preferences that restrict visitation to exclude certain family members who may be hostile or not supportive.
5. Burial and funeral instructions.

After the death of an LGBT elder, disappointed and incredulous heirs may not only challenge wills, but also burial and funeral instructions, leaving a surviving partner and chosen family out in the cold.\footnote{See Starkey, \textit{supra} note 75 (quoting a fifty-nine-year-old lesbian discussing her concern that she could be mistreated by her partner’s family after her partner’s death, who said: “you can’t know how people are”).} Given the importance of this issue and the strong emotions it can trigger, LGBT older adults should execute a separate document that sets forth their directions and not rely on general powers granted to their personal representative.\footnote{Some states include these provisions as part of their Advance Directives.} In the absence of legislation, it may not be clear whether an individual has the authority to direct the terms of his or her funeral and burial arrangements, but the document will serve as indicia of the individual’s wishes.

Although states have recently begun to enact enabling legislation, the approach followed has been far from uniform.\footnote{See generally \textit{Who Has the Right to Make Decisions About Your Funeral}, Funeral Consumers Alliance, \texttt{http://www.funerals.org/forconsumersmenu/your-legal-rights/funeral-decision-rights} (last visited May 12, 2014).} Some states provide that a decedent’s written instructions concerning burial must be honored.\footnote{For example, Alabama generally restricts authority to next of kin with the exception of individuals designated in a “pre-need” funeral contract or the executor of the decedent’s will. CODE OF ALA. § 34-13-11 (2013).} Other states allow the appointment of a funeral-planning agent who has decision making authority, and other states have adopted some combination of the two approaches.\footnote{See \textit{e.g.} CODE OF WASH. 68.50.160 (2013) (personal preference law); N.H. RSA 290:17 (2013) (authorizing designated agent).} In some instances, state law requires individuals to execute a separate document, but other states, such as Vermont, have incorporated the power in their advance directive forms.\footnote{See \textit{e.g.} 18 VT. STAT. § 9700 \textit{et seq.} (2013) (advance directives for health care and disposition of remains).} Even individuals who reside in states that have not yet adopted enabling legislation should execute a generic form expressing their wishes, which can then serve as indicia of their intent in case that intent is later challenged.

When individuals do not have any legally recognized next of kin or are totally estranged from their families of origin, the interest of the state may override that of chosen family. A recent case in Rhode Island provided a stark illustration of what it means to be considered a legal stranger.\footnote{Roger Edgar, \textit{Lack of Funeral Rights Turns Mourner into Gay Activist}, Providence Jour., Nov. 15, 2009, \texttt{available at http://www.projo.com/news/content/GOLDBERG_FUNERAL_RIGHTS_11-15-09_S4GE9HC_v189.3988db7.html}.} The Medical Examiner’s office refused to allow a surviving partner to claim his partner’s remains despite the fact that they had lived together from seventeen years, had legally married in a neighboring state, and had the full complement of traditional estate planning documents.\footnote{Id.} At the time, Rhode Island was a non-recognition state and only certain relatives were authorized to claim remains.\footnote{Id.} It took the surviving partner thirty-two days to convince the authorities to release the body.\footnote{Id.} Rhode Island now has marriage equality.\footnote{See \textit{supra} note 91 (listing states with marriage equality).}
IV. REMAINING AREAS FOR REFORM

Despite the recent gains in the struggle for marriage equality, there remains much to be done to safeguard LGBT elders and their chosen families. Nation-wide marriage equality will provide a much needed level of security for many LGBT individuals, their partners and their children, but marriage equality alone will not resolve many of the disparities facing LGBT individuals. This is especially true in the case of LGBT older adults and elders, who are some of the most vulnerable members of the LGBT community. As explained in Part III, Personal planning documents can provide some protections, but they are not a viable substitute for systemic legal, social, and political change.

This section provides a brief overview of some of the areas where broader reform is needed to address the concerns of LGBT older adults and elders – reform that extends beyond marriage equality. As LGBT elders and older adults grapple with the challenges of aging, they also face widespread financial insecurity, the legal fragility of chosen family, the scarcity of LGBT-friendly senior housing, and the persistence anti-LGBT bias. To address these specific concerns, there must be greater legal recognition of chosen family, widespread cultural competency training, and broader anti-discrimination protections. The following outlines five specific areas for reform: 1) marriage equality, 2) recognition of chosen family, 3) guardianship reform, 4) broad anti-discrimination measures, and 5) cultural competency training.

A. Marriage Equality

As explained in Part II, the current state of marriage equality is a source of confusion and complexity in the lives of LGBT individuals. The continuing lack of uniformity produces gross inequities as couples are married in some states, but not others. The fact that marriages performed in jurisdictions with marriage equality are not portable to other jurisdictions means that a couple’s relationship can change automatically as they cross the state line. A couple may be married in New Jersey, but a quick trip to Pennsylvania will render them unmarried for the duration. Federal marriage recognition is also far from uniform, sometimes following a state of celebration rule and other times following a modified state of domicile rule.

The state-specific nature of marriage recognition, even for federal benefits, arguably infringes on an individual’s constitutional right to travel. Before moving or retiring, LGBT elders and older adults must evaluate the laws and policies of their target state. There is a special concern in the case of Social Security benefits because the operative time frame references the law of the state of domicile that was in effect at the time the application for benefits is made.

360 See supra text accompanying notes 86-153 (describing current state of marriage equality).
361 See supra note 85 (explaining stress created because relationship status is not portable).
362 New Jersey is a marriage equality state. See supra note 91. Pennsylvania does not have a constitutional amendment banning same-sex marriage, but it does have a statutory prohibition. See supra note 121 (listing states with marriage prohibitions).
363 See supra text accompanying notes 165-172 (discussing difference between a state-of-celebration rule and a state-of-domicile rule).
364 The right to travel is guaranteed under the Privileges and Immunities Clause in Article IV of the U.S. Constitution. U.S. Const. Art IV, Sec. 2, cl. 1.
365 See supra text accompanying notes ___-___ (discussing rules for Social Security benefits eligibility)
The disqualification for benefits, the added burden of investigating state law, and the complexity all contribute to what has been referred to as the “high price of being gay.” Given that LGBT elders report high level of insecurity, these extra costs are being imposed on those who are least able to bear them. Obviously, nation-wide marriage equality would eliminate much of the current uncertainty. Until such time, the adoption of a uniform state-of-celebration rule on the federal level would at least eliminate the disparities that currently exist with respect to certain federal benefits. For example, a couple who was legally married in New York, but resides in Florida will be considered married for federal tax purposes, but not for Social Security purposes. The adoption of a uniform federal recognition rule, however, is complicated by the language of the various statutes that govern the different benefits schemes. Although an administrative fix was possible for federal tax purposes, the controlling statutory language for Social Security benefits makes such a solution more challenging.

B. Greater Legal Recognition of Chosen Family

Nation-wide marriage equality will not address the larger issue of protecting chosen family. As explained in Part I, many LGBT individuals rely heavily on chosen family for support. The practice of “friends as family” emerged as a creative way to build relationships in the face of pervasive homophobia and transphobia. LGBT individuals created non-filial families partly out of necessity because so many LGBT individuals were historically estranged from their next of kin and denied the ability to form their own families through marriage and parenting. Remarking on this practice, the anthropologist Kath Weston has described how pre-Stonewall gay men and lesbians were uniquely without family.

Looking backward and forward across the life cycle, people who equated their adoption of a lesbian or gay identity with a renunciation of family did so in the double-sided sense of fearing rejection by the families in which they had grown up, and not expecting to marry or have children as adults.

Although younger generations have had greater access to both marriage and parenting options, chosen family remains a significant component of the lives of LGBT older adults and elders. With the advent of marriage equality, an LGBT individual can now make her partner a member of her family. However, there is no comparable way that individual can make her best friend family and imbue her with the rights and privileges extended to next of kin. The law continues to prioritize the interests of next of kin regardless of the strength or quality of the relationship, whereas chosen family are considered to be legal strangers.

367 For example, the concept of exit would hold that an individual should “vote with her feet” and move to a jurisdiction where there are more favorable laws. As a analytic construct, the myth of exit can be very useful, but when applied to everyday people it becomes immediately apparent that not everyone has the means or the heart to leave their home and relocate to another state.
368 See supra text accompanying notes 173-188 (discussing different recognition rules for federal tax purposes and Social Security).
370 Congressional action is unlikely, although legislation may be proposed that is designed to apply a state-of-celebration rule in the Social Security context.
371 See supra text accompanying notes 44-48 (discussing chosen family).
372 See supra note 46 (“friends like family”).
373 WESTON, supra note 46, at 24.
374 Id.
Prior to the recognition of same-sex marriage, some jurisdictions had begun to respect de facto family structures with respect to both partners and parents. This ad hoc relationship recognition was largely the province of the courts and often the result of protracted litigation. Approaching the question of who counts as family from a functional rather than a definitional stance, the courts disaggregated the characteristics of family and asked whether the parties behaved as if they were a family. These decisions opened new space to recognize chosen family, but they were decided in the shadow of marriage prohibitions at a time when same-sex couples could not legally marry.

The increasing availability of same-sex marriage may now raise questions as to whether the failure of a same-sex couple to marry should be interpreted as a negative reflection on the relationship. It is possible that the availability of marriage will put pressure on some LGBT individuals to marry and, therefore, further marginalize chosen family. It is also unclear whether states with marriage equivalents will dissolve those relationships when the state finally embraces marriage equality or whether the state will maintain the alternate status or whether the state will transform the alternative status to marriage. A similar issue arises at the employer-employee level whether the question is whether employers will continue to extend domestic partnership benefits to employees with same-sex partners or whether they will require employees with same-sex partners to marry in order to receive the benefits.

Colorado has taken an innovative and creative approach to this question of who counts as family. In 2009, Colorado passed the Designated Beneficiary Act, a unique statutory scheme that grants individuals the legal autonomy to choose who is entitled to certain property rights and who is granted certain decision making authority, including making funeral arrangements, receiving death benefits, and inheriting property without a will. The recognition need not be reciprocal and seems to offer the potential for greater legal recognition for chosen family and a unique menu approach to designating beneficiaries and substituted decision makers. The Colorado statute provides a way to protect and safeguard the interests of chosen family.

376 It would make sense that this innovation occurred in the courts where equity and a focus on the facts of the individual case could lead to highly particularized outcomes. It is also possible that such outcomes occurred where there was individual discretion in the application of laws and regulations, although this could also lead to an opportunity for anti-LGBT bias.
378 With the advent of marriage equality, many employers are discontinuing their domestic partner benefits because same-sex couples can now marry. Joanne Sammer and Stephen Miller, The Future of Domestic Partner Benefits: If same-sex couples can wed, should employers provide benefits to unmarried partners? (Oct. 8, 2013) available at http://www.shrm.org/hrdisciplines/benefits/articles/pages/domestic-partner-benefits.aspx
380 Joanne Sammer and Stephen Miller, supra note 378.
381 In 2009, Colorado enacted the Designated Beneficiary Agreement Act that grants limited rights to “designated beneficiaries.” Colo. Stat. 2009. § 15-22-101 (2013). It is similar to the “reciprocal beneficiary” status that is still offered in Hawaii. See supra note 94 (describing the reciprocal beneficiary status under Hawaii law).
383 Id.
C. Guardianship Reform

As explained in Section C of Part III, LGBT elders and older adults may be at an increased risk of having a guardian appointed. Although the last several decades have seen tremendous progress in the area of guardianship reform, these reform efforts have been silent with respect to the needs of LGBT individuals. There are numerous places within the guardianship system where otherwise facially neutral guardianship provisions can operate to erase LGBT identity, deny autonomy, and ignore partners and chosen family. These areas include capacity standards, preferences for next of kin, decision-making standards, and alternatives to guardianship.

In order to protect the interests of LGBT individuals and their families, respect for a ward’s sexual orientation and gender identity must be recognized as an essential element of dignity and self-determination – the core principals that undergird guardianship policies and reform. The pervasive silence with respect to LGBT identities leaves guardianship law open to the influences of anti-LGBT bias that can range from cultural insensitivity to outright hostility. For example, the continued preference for family has led to instances where partners were denied access to the ward by disapproving family members. Even where there is no overt anti-LGBT bias, the seemingly neutral capacity standards can greatly disadvantages individuals with non-normative sexual orientations, family relationships, and gender identity or expression. Choices that may be perfectly normal for an LGBT individual may appear, incorrectly, to be outside the norm. Moreover, in the absence of cultural competency training, guardians may not be sensitive to the needs of their LGBT wards and, in fact, may not even recognize that their ward is LGBT.

D. Broad Anti-Discrimination Protections in Senior-Specific Venues

After marriage equality, the second biggest priority for the LGBT rights movement has been securing workplace non-discrimination protections. At the federal level, the most widely discussed LGBT anti-discrimination measure is the Employment Non-Discrimination Act (ENDA), which has been pending before Congress in one form or another since 1994. For

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384 See supra text accompanying notes 27-78 (describing LGBT elders and older adults).
389 Knauer, supra note 398.
390 Id.
391 This was the case with Harold Scull and Clay Greene, the Sonoma County couple that authorities separated. See supra note 308 (explaining the case settled before trial).
392 As its name suggests, ENDA is limited to employment and is less expansive than many of the anti-discrimination measures enacted at the state level. ENDA would provide non-discrimination protection on the federal level for sexual orientation and gender identity, but only in the workplace. H.R. 1755, 113th Cong. (2013); S. 815, 113th Cong. (2013). National Gay & Lesbian Task Force, History of Non-Discrimination Bills in Congress, available at http://www.thetaskforce.org/issues/nondiscrimination/timeline.
LGBT older adults, however, the importance of employment as a venue for discrimination diminishes as they retire or prepare to leave the workforce. Instead, LGBT older adults and elders need anti-discrimination protections that extend far beyond the workplace and reach the provision of health care, senior services, and housing. Protection in these areas requires comprehensive legislative and administrative reforms that are not covered by ENDA.

At the federal level, one obvious example of necessary legislative reform is amending the Older Americans Act to ensure LGBT older adults and elders equal access to senior services and resources. In addition to prohibiting discrimination, the amendment could mandate LGBT-specific services, training, and research. At state and local level, there are many opportunities on the state level to address the concerns of LGBT elders and older adults with regard to health care, senior services, and housing in terms of licensing and regulations. Currently, California is the only state with special legislation designed to protect LGBT elders and older adults.

E. Cultural Competency and Market-Based Solutions

In addition to the enactment of greater anti-discrimination protections, it is possible to pursue market-based solutions. From the beginning of the struggle for marriage equality, private employers have been in the vanguard. The term “domestic partner” was a human relations construct – an invented term to describe same-sex partners who would qualify for spousal health insurance coverage. Today, the overwhelming majority of Fortune 500 companies not only offer domestic partner benefits, but also have anti-discrimination policies that include sexual

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393 These protections exist in some states and local municipalities, but enactment on the federal level remains unlikely given the inability to pass ENDA, which currently has 193 co-sponsors. Id.


395 Id.


399 The first private employer to offer domestic partner benefits was the alternative weekly, The Village Voice. James Angeli, The Federal and State Taxation of Domestic Partner Benefits, TAX ANALYSTS (Nov. 8, 2011) http://www.taxanalysts.com/www/features.nsf/Articles/03CEC7C26C62E94A852579420059DC81?OpenDocument. Two years later, Berkeley became the first municipal employer to offer the benefits. Id. Domestic partner benefits have now been accepted as part of the corporate mainstream. Id.
orientation and gender identity. HRC rates companies based on a Corporate Equality Index that measures how welcoming the company is toward its LGBT employees. As discussed in Section C, Part III, HRC also maintains a similar rating index in the health context. Both are designed to provide useful information to consumers and employers, as well as creating new industry norms.

As industry norms regarding LGBT issues continue to evolve, senior living facilities and service providers will have an increased incentive to adopt anti-discrimination policies and LGBT-inclusive policies. Cultural competency training can be an effective way to educate service providers about the needs and concerns of LGBT older adults and elders. Even where there is no direct abuse or discrimination, common policies in place at senior living facilities can greatly disadvantage and silence LGBT elders. For example, some nursing homes have policies against same-sex partners living together in the same room and will separate partners. This policy is also true in the case of many retirement communities that will not allow two unrelated individuals to buy into the community. The restriction that the individuals must be “related” continues to impacts same-sex couples living in non-recognition states. However, it also adversely affects LGBT elders and their chosen family members. Whereas two siblings could live together, two lifelong friends who consider each other “family” would not be able to live together even in a state with marriage equality.

V. CONCLUSION

See supra note 398 (listing number of states with anti-discrimination protections).

See supra note 329 (discussing the Healthcare Equality Index).

See supra note 400 (discussing the percentage of Fortune 500 companies with LGBT-friendly employment policies).


See DARLENE YEE-MELICHAR, ANDREAN RENWANZ BOYLE, AND CRISTINA FLORES, ASSISTED LIVING ADMINISTRATION MANAGEMENT: EFFECTIVE PRACTICES AND MODEL PROGRAMS IN ELDER CARE 350 (2011) (noting that the “inequities” LGBT elders face include discriminatory policies).


See supra note 120 (listing states with prohibitions against same-sex marriage).