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Older Lesbian, Gay, Bisexual, and Transgender Individuals Face Special Challenges in Economic Security and Health Care

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Here we continue our discussion about asserting choice for low-income lesbian, gay, bisexual, and transgender (LGBT) seniors. Our focus is income insecurity for poor LGBT seniors and its relationship to accessing health and long-term care services, pensions, and other retirement income. What we write here applies to the larger population of seniors but is of particular relevance to LGBT seniors who have limited incomes, have disabilities, have some form of pension or retirement benefits, and who do not have the necessary family or community-based supports to facilitate their long-term care needs. Legally mandated discrimination, particularly in the form of the federal Defense of Marriage Act (DOMA), is also a factor.[1] So are the limits of domestic partnerships, and state marriage laws, as well as the terms and conditions of employer-sponsored retirement and health care coverage arrangements. We recommend to plan, prepare, and assert your rights.

Lack of Legal Recognition of Caregiver Supports

The lack of societal support and legal recognition of LGBT elders' caregivers is a major contributor to income insecurity and income inequity. LGBT elders are less likely to rely on a spouse or partner for support and caregiving, less likely to have children, and are less likely to rely on parents, siblings, and in-laws for assistance.[2] Instead "[c]hosen families—single-generation cohorts of intimate friends and loved ones—have long provided LGBT people a foundation for surviving intense societal neglect, stigmatization and abuse…."[3] This is frequently because LGBT elders have received "no support from their biological families" due to anti-LGBT prejudice.[4] And the "[l]ack of acceptance by their biological families has estranged many LGBT elders from their surviving parents, siblings[,]" and other relatives.[5]

[1]Defense of Marriage Act of 1996 (DOMA), 1 U.S.C. § 7. Our discussion of the rights of low-income lesbian, gay, bisexual, and transgender (LGBT) seniors began in Natalie Chin et al, *Asserting Choice: Health Care, Housing, and Property—Planning for Lesbian, Gay, Bisexual, and Transgender Older Adults*, 43 Clearinghouse Review 522 (March–April 2010).

[2]Services and Advocacy for Gay, Lesbian, Bisexual, and Transgender Elders & Movement Advancement Project, Improving the Lives of LGBT Older Adults 6–7 (March 2010), http://bit.ly/edQsq2 [hereinafter Improving the Lives of LGBT Older Adults].

[3]Jaime M. Grant et al., National Gay and Lesbian Task Force Policy Institute, Outing Age 2010: Public Policy Issues Affecting Lesbian, Gay, Bisexual and Transgender Elders 31 (2009), http://bit.ly/gfQxlQ [hereinafter Outing Age 2010].

[4]San Francisco Human Rights Commission & Aging and Adult Services Commission, Aging in the Lesbian Gay Bisexual Transgender Communities 9 (April 2003), http://bit.ly/gEYnV7.

[5]Improving the Lives of LGBT Older Adults, *supra* note 2, at 6.

The myth of gay affluence is widespread. The reality is that "the average lesbian or gay man earns no more than the average heterosexual woman or man, and in some cases, gay people earn less."[6] For LGBT elders, the same holds true. Same-sex elder male couples are more likely to live in poverty than their straight counterparts, and same-sex elder female couples are twice as likely.[7] Services & Advocacy for GLBT Elders (SAGE) states that 35 percent of its clients are Medicaid-eligible and earn less than $10,000 per year.[8] A report out of Chicago estimated that 8.8 percent of LGBT elders in that city are at or below the poverty line.[9] A similar survey in San Diego showed 14 percent of LBGT elders to have an annual income of less than $10,000.[10] For LGBT elders of color and those who live alone, the percentage living in poverty is in most instances higher.[11]

Many LGBT elders rely instead on caregivers and families of choice lacking legal recognition and support. As a recent report states, a "family-first hierarchy is codified and supported by official policies, laws and institutional regulations, which in many instances deny caregivers who do not fall into traditional categories many of the resources afforded to spouses and biological family members."[12] These caregivers provide much of the support that would be given by biological family members to many straight elders. Of straight seniors 90 percent have children, but only 29 percent of LGBT seniors do.[13] One report estimated that "LGBT caregivers of older adults provide on average 48.5 hours of direct care per week and many do not utilize any outside resources for assistance … [because of] fear of anti-LGBT harassment or discrimination by a community provider."[14]

The law does little to protect these nonbiological caregivers. The Family Medical Leave Act, for instance, "does not provide medical leave for a person who wishes to take care of a close friend or unmarried life partner," and "caregiver support programs often do not recognize the families of LGBT elders."[15]

Social Security

Before the establishment of the social security program, old age meant poverty for the majority of older Americans. Today over 87 percent of Americans 65 or over receive social security benefits.[16] Social Security Administration statistics show in January 2011 that 54,194,000 people received social security benefits and that 43,970,000 of them were receiving either Old Age Insurance or Survivors Insurance.[17] For almost two-thirds of all social security beneficiaries 65 or over, social security is a majority of their in-

[6]M.V. Lee Badgett, *The Myth of Gay and Lesbian Affluence*, Gay and Lesbian Review Worldwide, March 22, 2000.

[7]Improving the Lives of LGBT Older Adults, *supra* note 2, at 11.

[8]Outing Age 2010, *supra* note 3, at 27 (citing C. Thurston, *Services and Advocacy for GLBT Elders (SAGE)*, Journal of Long Term Home Health Care (Fall 2009)).

[9]*Id.* at 27. (citing Chicago Task Force on LGBT Aging, LGBT Persons in Chicago: Growing Older: A Survey of Needs and Perceptions (Aug. 20, 2003), http://bit.ly/hlkImf.

[10]Outing Age 2010, *supra* note 3 (citing L. Cook-Daniels, LGBT Seniors—Proud Pioneers: The San Diego County LGBT Senior Healthcare Needs Assessment (2004)).

[11]U.S. Administration on Aging, A Profile of Older Americans, 2008, at 11 (23.2 percent of African American seniors live below the poverty line; 17.1 percent of Latinos; 11.3 percent of Asians; and 17.8 percent of people who live alone).

[12]Improving the Lives of LGBT Older Adults, *supra* note 2, at 6

[13]*Id.*

[14]San Francisco Human Rights Commission & Aging and Adult Services Commission, *supra* note 4, at 15.

[15]Family and Medical Leave Act of 1993, 29 U.S.C §§ 2601 *et seq.*; Improving the Lives of LGBT Older Adults, *supra* note 2, at 7.

[16]Social Security Administration, SSA Publication No. 13-11727, Income of the Aged Chartbook, 2008, at 8 (April 2010), http://1.usa.gov/hXKCCk.

[17]Social Security Online, Monthly Statistical Snapshot, January 2011, tbl.2, http://1.usa.gov/h4G9t8.

come, even though the average monthly benefit is only $1,072.[18] For nonmarried beneficiaries, social security is a majority of their income for almost three-fourths of them and is 90 percent or more of the income for 43 percent.[19]

One of the most important antipoverty measures in the Social Security Act is the benefit for widows or widowers; the benefit is part of the Survivors Insurance program particularly when the deceased was the higher-earning spouse. The social security program permits the surviving heterosexual spouse to receive benefits under the deceased spouse's earnings record up to the full amount of the deceased spouse's benefit.[20] Divorced widows and widowers are also eligible for the survivors' benefit if they were married to the deceased for at least ten years and are not currently married.[21] These benefits are not available to the surviving lesbian or gay partner or to the surviving lesbian or gay divorced spouse in light of DOMA.[22] Similarly the surviving lesbian or gay partner is not eligible for the onetime death benefit in the amount of $255, which is readily paid to the surviving heterosexual spouse residing with the deceased at the time of death.[23]

The Social Security Act also provides for a spousal benefit of up to 50 percent of the benefit payable to the wage earner and payable while both husband and wife are still alive.[24] This benefit is particularly helpful in retirement when there has been a significant disparity in income between the spouses and has been helpful in partially overcoming the long-term results of gender inequity in the workplace. It is also sometimes used when at least one spouse is still working and thereby adding to the amount of the monthly benefit she will ultimately receive on her earnings record while at the same time she is collecting a spousal benefit on the spouse's earnings record. The spousal benefit is also available to some divorced spouses.[25] There is no such spousal benefit for lesbian or gay partners who have valid state-law marriages.

Social security also provides benefits for the minor child or disabled adult child (if disability commenced before age 22) of a social security beneficiary or deceased wage earner.[26] This benefit is payable if the wage earner is the biological or adoptive parent of the child. Since adoption by same-sex couples is not possible in all jurisdictions, this is another instance in which LGBT individuals may not receive the same level of benefits as heterosexuals.

Supplemental Security Income

The treatment of couples in the Supplemental Security Income (SSI) program may be the one instance in which the effort to discriminate against LGBT individuals has backfired and has, for the most part, resulted in preferential treatment of LGBT elders compared to their heterosexual counterparts. If a person applies for SSI and is married to and living with a person of different gender who is neither aged nor disabled, the income and resources of the ineligible spouse will be deemed to the SSI applicant for

[18]Social Security Administration, *supra* note 16, at 9.

[19]*Id.*

[20]20 C.F.R. § 404.335 (2010).

[21]*Id.* § 404.336).

[22]See DOMA, 1 U.S.C. § 7 ("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 a wife."). It is possible that in some instances these benefits may be payable to a surviving transgender spouse.

[23]20 C.F.R. §§ 404.390–392 (2010).

[24]*Id.* § 404.330.

[25]*Id.* § 404.331.

[26]*Id.* § 404.350.

the purpose of determining eligibility and amount of benefits. By contrast, the income and resources of a categorically ineligible spouse will not be taken into consideration at all in determining the applicant's eligibility.

For purposes of the SSI program, two people of different gender living together are considered to be a couple if they are "holding out" as husband and wife even though they are not considered to be married under applicable state law. By contrast, a lesbian or gay couple, even if they are married under applicable state law, are not considered a couple and are required to apply separately.

The maximum countable income for an individual for SSI in the District of Columbia and in most states must be less than the individual benefit level of $674 per month, whereas the maximum monthly income for a heterosexual couple must be less than the couple's benefit level of $1,011. For lesbian and gay couples, each will have the individual benefit level applied to determine eligibility and amount of benefits. Thus, if Adam has monthly countable income of $1,000 and is married to Dennis, who has no income, Adam is found ineligible while Dennis is determined to be eligible and entitled to a monthly benefit of $674, giving the gay couple a combined income of $1,674. If, however, Adam had the same income and were married to Denise who had no income, they would both be found eligible as a couple and would receive a monthly benefit of $101, giving the couple a combined income of $1,101, which is $573 less than Adam and Dennis would receive.[27] By contrast, Adam and Denise would both be automatically eligible for full Medicaid coverage as an SSI-eligible couple, while if Adam were married to Dennis, only Dennis would receive SSI-linked Medicaid.

The area in which the rules of the SSI program are clearly prejudicial to lesbian and gay couples is in the transfer penalty. Under this penalty, if an individual transfers a resource for less than fair market value, the individual can become ineligible for benefits for a period of up to thirty-six months depending on the value of the uncompensated transfer.[28] While there is an exception to this draconian penalty for a transfer to a spouse or to another person for the sole benefit of the spouse, the exception does not apply to lesbian or gay married partners.

Medicare for Persons Who Qualify for Title II Disability

Here we focus on accessing the Medicare benefit to help LGBT people under 65. The LGBT community needs to know about Medicare and how it might help ensure a measure of health care coverage for persons under 65 who might qualify on the basis of disability either on the person's own record, or as a widow, or widower, or as a disabled child, or as a disabled adult child. The Medicare rules discussed below are not unique to LGBT persons. Spousal definitions, however, are a problem for LGBT persons, particularly as they relate to defining a widow or a widower and the application of DOMA to federal programs. But note that on February 23, 2011, President Obama announced that his administration would no longer defend the constitutionality of DOMA.[29]

An individual under 65 can qualify for Medicare if the individual is entitled for twenty-four months to benefits under Title II of the Social Security Act (or would have been entitled if certain government employment were covered employment under Title II) or under the Railroad Retirement system on the basis of a disability.[30] Sometimes the younger

[27]The downside of this for Adam is that if he is married to Dennis, in some states he would not receive the Medicaid benefits that he would receive automatically if he were a Supplemental Security Income recipient.

[28]42 U.S.C. § 383b(c).

[29]See Charlie Savage & Sheryl Gay Stolberg, *In Shift, U.S. Says Marriage Act Blocks Gay Rights*, New York Times, Feb. 23, 2011, http://nyti.ms/hWlzcb.

[30]42 C.F.R. § 406.12 (2010).

disabled person qualifies on the basis of the person's own record or on that of a parent or as a widow or widower.[31] Persons who become eligible for Medicare based on disability do not have to pay the premium for Medicare Part A but will have to pay the monthly Part B premium.[32] Benefits start in the thirtieth month after disability is established under Title II—this period includes the five-month disability waiting period and the twenty-four-month Medicare waiting period, with benefits beginning the month after the twenty-ninth month is completed.[33]

Certain individuals who do not meet the Title II requirements but have been medically determined to have end-stage renal disease are eligible for Medicare after a three-month waiting period.[34] In addition, an individual found to be disabled by amyotrophic lateral sclerosis is eligible for Medicare after a one-month waiting period.[35]

When Eligibility Begins. Eligibility for Medicare begins the first month in which an individual meets all the requirements—including application and enrollment—for benefits.[36] The first month of entitlement is the first month in which the individual meets all the requirements for entitlement to Part A benefits.[37]

Inequities in income earnings, as well as work history, may have a negative impact on meeting the requirements for Medicare Part A benefits. To be insured, an individual has to have the number of quarters of coverage required for monthly social security benefits.[38] An individual is currently insured if the individual has at least six quarters of coverage during the thirteen-quarter period ending with the quarter in which the individual (1) dies, (2) most recently became entitled to disability insurance benefits, or (3) became entitled to old-age insurance benefits.[39] Social security does not count as part of the thirteen-quarter period any quarter, all or part of which, is included in a period of disability established for an individual.[40] The exception is that the first and last quarters of the period of disability may be counted if the quarter is the first or the last quarter of the disability period or the period of disability is not taken into consideration.[41]

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[31] *Id.* § 406.12(c)–(d).

[32] *Id.* § 406.20(a), (c); *id.* § 408.4 (Supplemental Medical Insurance payment obligations). As with social security benefits, Medicare benefits for LGBT people on the record of a spouse is complicated by DOMA (see *supra* note 22). In the Social Security Handbook, for inheritance purposes, an individual's claims for benefits based on a state-recognized same-sex marriage does not meet the statutory gender-based definition of husband or wife of a worker (see Online Social Security Handbook §§ 306.1 n.1, 306.2 (Sept. 1, 2009), http://1.usa.gov/fY6RCf). In its Program Operations Manual System (POMS), however, for purposes of entitlement to a special enrollment period—to avoid a late enrollment penalty—the Social Security Administration includes a "domestic partner" in its definition of a "spouse," provided the domestic partner is an individual 65 or older (see POMS § HI 00805.266 (description of terms used in the special enrollment period and premium surcharge rollback provisions). Moreover, recent federal district court decisions have held DOMA to be in violation of the equal protection clause of the U.S. Constitution (see *Gill v. Office of Personnel Management*, 699 F. Supp. 2d 374 (D. Mass. 2010)). The *Gill* case is not a class action and is on appeal to the First Circuit. The notice of appeal was filed by the U.S. Department of Justice on October 12, 2010 (see also the companion case to *Gill*, *Massachusetts v. HHS*, 698 F. Supp. 2d 234 (D. Mass. 2010)). For now, the major national strategy is to continue to chip away at DOMA and its progeny through legal challenges and through advocacy efforts toward legislative change.

[33] 20 C.F.R § 404.315(a)(4) (2010) (five-month disability waiting period); 42 C.F.R § 406.12(a)–(b) (2010).

[34] 42 U.S.C. § 1395c; 42 C.F.R. § 406.13(2010) (individual who has end-stage renal disease); a three-month waiting period applies (see 42 C.F.R. § 406.13(e) (2010)).

[35] 42 U.S.C. §426(h), providing that a waiting period of no longer than a month after disability has been established and that entitlement to benefits will begin with the first month (rather than the twenty-fifth month) of entitlement (effective July 1, 2001).

[36] 42 C.F.R. § 406.3 (2010).

[37] *Id.*

[38] *Id.* A quarter of coverage is a calendar quarter that is counted toward the number of covered quarters required for eligibility for monthly social security benefits. A quarter is counted if during that quarter (or that calendar year) the individual has earned a required minimum amount of money (*id.*; see also 20 C.F.R. pt. 404 (July 1997), subpart B (determining quarters of coverage and minimum amounts necessary)).

[39] 20 C.F.R. § 404.120 (2010).

[40] *Id.* § 404.120(b).

[41] See *id.* § 404.320(a).

An individual must also be fully insured as defined under social security law.[42] The Social Security Administration uses four rules for determining if an individual is insured for purposes of establishing a period of disability or becoming entitled to disability insurance benefits, one of which an individual must meet: (1) be fully insured and have at least twenty quarters of coverage in the last forty-quarter period; (2) become disabled before age 31; (3) have a period of disability before age 31; or (d) be statutorily blind.[43]

Filing Requirements. Medicare beneficiaries who are eligible for Medicare Part A because they are 65 or older and entitled to monthly social security or Railroad Retirement cash benefits, as well as those who are eligible based on disability, do not need to file an application for hospital insurance (Medicare Part A).[44] An individual must file an application for Medicare Part A if the individual is seeking entitlement on the basis of

- transition benefits;[45]
- deemed entitlement to disabled widow's or widower's benefits;[46]
- a diagnosis of end-stage renal disease;[47]
- eligibility for social security cash benefits if the individual has reached age 65 without applying for these benefits;[48] and
- special provisions applicable to government employment.[49]

An application is deemed filed, based on the transition periods or on end-stage renal disease as described above, in the first month of eligibility if it is filed not more than three months before the first month of eligibility and is retroactive to the first month of eligibility if filed within twelve months after the first month of eligibility.[50] Similarly an application filed more than twelve months after the first month of eligibility is retroactive to the twelfth month before the month when it is filed.[51]

A valid application based on entitlement to widow's or widower's benefits is deemed filed if, before the first month in which the individual meets the conditions of eligibility, the conditions of eligibility are met before an initial determination, reconsideration, or hearing decision is made on the application.[52] An application, if validly filed within twelve months after the first month of eligibility, is deemed retroactive to that first month. If the application is filed more than twelve months after the first month of eligibility, it is retroactive to the twelfth month before the month of filing.[53] For an individual 65 or older, a similar rule applies.[54]

Forms for applying for Medicare Part A benefits may be obtained by mail, free of charge, from the Centers for Medicare and Medicaid Services (CMS) or at any social security branch or district office.[55] In the alternative an individual may use

[42]See *id.* §§ 404.130, 404.132.

[43]See *id.* § 404.130 (determining insured status, including the four applicable rules).

[44]42 C.F.R. § 406.6(b) (2010).

[45]*Id.* § 406.6(c)(1); see *id.* § 406.11 for discussion of transition benefits.

[46]*Id.* § 406.6(c)(2); see *id.* § 406.12 for discussion of widow's and widower's benefits.

[47]*Id.* § 406.6(c)(30); see *id.* § 406.13 for discussion of end-stage renal disease.

[48]*Id.* § 406.6(c)(4); see *id.* § 406.10(a)(3) for discussion of eligibility based on this status.

[49]*Id.* § 406.6(c)(5); see *id.* § 406.15 for discussion of eligibility based on government employment.

[50]*Id.* § 406.6(d)(1); see *id.* §§ 406.21(individual enrollment), 406.22 (effect of month of enrollment on entitlement); see also *id.* § 406.24 for a discussion of special enrollment periods applicable to individuals under a group health plan and a large group health plan; and see *id.* § 406.26 (enrollment under state buy-in).

[51]*Id.* § 406.6(d)(1).

[52]*Id.* § 406.6(d)(2).

[53]*Id.*

[54]*Id.* § 406.6(d)(3).

[55]*Id.* § 406.7.

the application for monthly social security benefits to apply for Medicare entitlement if the individual is eligible for Medicare Part A at that time.[56]

Medicare and Trial Work Periods. An individual who is receiving social security disability benefits is entitled to continue receiving Medicare as well as social security income during a maximum nine-month "trial work" period.[57] An individual is entitled to a trial work period if the individual is entitled to disability insurance benefits, child's benefits based on disability, or widow's or widower's or surviving divorced spouse's benefits based on disability.[58] The *trial work period* last for nine months in which the individual earns an amount that exceeds $720 a month in 2010 and 2011.[59] The nine months of the trial work period do not necessarily have to be consecutive.[60] The trial work period is designed to allow an individual to test the individual's ability to work without interfering with one's disability status and access to Medicare benefits.[61] When the trial work period ends, the work performed during the trial work period may be considered in determining whether the individual continues to be disabled and eligible for social security income and Medicare benefits.[62]

Individuals who have a disabling impairment but earn income that meets the "substantial gainful activity" level may continue to receive Medicare health insurance after successfully completing a trial work period.[63] This new period of eligibility may continue for as long as ninety-three months after the trial work period ends for a total of eight-and-one-half years including the nine-month trial work period.[64] During this time the beneficiary pays no premium for the hospital insurance portion of Medicare (Part A) but is responsible for premiums for the supplemental medical insurance program (Medicare (Part B)).[65] After the period of extended Medicare coverage, working individuals with disabilities may continue to receive benefits but will be responsible for paying the Parts A and B premiums.[66]

Medicaid Eligibility

Medicaid, a joint federal- and state-funded program, provides medical assistance to qualified low-income individuals. The largest payer of long-term care in the United States, Medicaid covers 49 percent of long-term care spending, which totaled $206.6 billion in 2005.[67] Home health care and nursing facility care constitute the bulk of such services, including nonskilled services that facilitate activities of daily living such as bathing, dressing, feeding, and ambulation.

According to a recent study, "[t]he majority of individuals who receive long-term services are age 65 and above while

[56] *Id.*

[57] See 42 U.S.C. § 422(c), 20 C.F.R. § 404.1592 (2010).

[58] 20 C.F.R. § 1592(d) (2010).

[59] See Social Security Online, Automatic Increases (Oct. 29, 2010), http://1.usa.gov/euT0gs ("Monthly Earnings that Trigger a Trial Work Period"). For more detail, see *id.*, Frequently Asked Questions: Social Security Disability Benefit Earnings Limit (Feb. 25, 2011), http://1.usa.gov/gJxgjH.

[60] 20 C.F.R. § 404.1592(a) (2010).

[61] *Id.* § 404.1592(a).

[62] *Id.*

[63] 42 U.S.C. §§ 426(b), 1395i-2A; 42 C.F.R. § 406.12(e) (2010).

[64] 20 C.F.R. § 404.1592(e) (2010).

[65] 42 C.F.R § 406.20(a), (c) (2010); *id.* § 408.4 (2010) (Supplemental Medical Insurance payment obligations).

[66] *Id.*

[67] National Clearinghouse for Long-Term Care Information, U.S. Department of Health and Human Services, Paying for Long-Term Care, http://bit.ly/dVzkZC.

42 percent are under age 65."[68] Due to their high costs, long-term care services are generally not affordable for seniors who live on fixed and limited incomes.[69] A 2005 policy brief commissioned by the U.S. Department of Health and Human Services (HHS) noted that "over half of all Medicaid spending today is for recipients who are not poor enough to qualify for welfare but who lack the means to pay for health care."[70]

Congress recognized the extreme costs of long-term care and enacted provisions designed to balance the competing goals of ensuring that low-income individuals have access to needed care and maximizing the need for states to recoup costs and reimburse federal Medicaid funds.[71] Congress specifically enacted laws protecting long-term care beneficiaries with a different-sex spouse to ensure that the spouse who is still living in the home is not left homeless and with little or no income or resources. In particular, a state may not render a long-term care beneficiary ineligible for Medicaid if the beneficiary transfers the beneficiary's home or other assets to her different-sex spouse for less than fair market value.[72] Or the beneficiary may seek an adjustment of recovery.[73] The beneficiary would seek the adjustment of recovery from the estate of a deceased long-term care beneficiary during the lifetime of the beneficiary's surviving different-sex spouse.[74]

These protections, however, do not apply to same-sex partners. Under DOMA the federal government does not recognize the marriages of same-sex couples.[75] The federal government nonetheless allows considerable flexibility to states to individualize their Medicaid programs through the "undue hardship" provisions incorporated in Medicaid laws for transfer of assets and estate recovery.[76] These provisions are especially important to LGBT same-sex partners.

Transfer of Assets. A Medicaid beneficiary is often unable to transfer a home and other assets to a same-sex partner for fair market value—a requirement for nonspouses under the transfer-of-assets provision of the Medicaid statute.[77] Under this provision a different-sex spouse of a Medicaid recipient may keep a minimum of $21,912 of the couple's joint assets. If the couple's total assets are between $21,912 and twice that amount ($43,824), the spouse may retain $21,912. For assets over $43,824, the at-home spouse may keep 50 percent of the assets up to $109,560.[78] This can create an unworkable situation for a Medicaid applicant. The applicant is faced with either forfeiting much-needed long-term care services for a period to protect her same-sex partner from loss of

[68]Kaiser Commission on Medicaid and the Uninsured, Henry J. Kaiser Family Foundation, Medicaid and Long-Term Care Services and Supports (Oct. 2010), http://bit.ly/hQ7rcj.

[69]A recent study reported that "[n]ursing home care averages $72,000 per year, assisted living facilities average $38,000 and home health services average $21 per hour" (*id.*).

[70]Office of the Assistant Secretary for Planning and Evaluation, U.S. Department of Health and Human Services, Policy Brief No. 4, Medicaid Liens 1 (April 2005), http://1.usa.gov/fzeHL0.

[71]See Julie Stone, Congressional Research Service, Order Code RL33593, Medicaid Coverage for Long-Term Care: Eligibility, Asset Transfers, and Estate Recovery (Jan. 31, 2008), http://1.usa.gov/dQ4lZK.

[72]42 U.S.C. §§ 1396p(c)(2)(A)(i), 1396p(c)(2)(B)(i).

[73]An adjustment of recovery is when a state recoups the expenditures paid on behalf of a long-term care Medicaid beneficiary.

[74]42 U.S.C. §1396p(b)(2).

[75]DOMA, 1 U.S.C. §7.

[76]Several Medicaid laws are designed to protect different-sex spouses, but here we focus on the undue hardship provisions for transfer-of-assets penalties and estate recovery. For more on preventing spousal impoverishment when one spouse applies for Medicaid long-term care services, see, e.g., Center for Medicaid and State Operations, Centers for Medicare and Medicaid Services, U.S. Department of Health and Human Services, Spousal Impoverishment.

[77]42 U.S.C. § 1396p(c)(2)(A)(i).

[78]These numbers reflect the 2010 federal guidelines; the asset limits may vary state-by-state (see Sandra L. Smith, *2010 Elder Law Numbers,* Estate Practice and Elder Law Community (March 13, 2010, 2:39 p.m. EST), http://bit.ly/hwsxrr.

assets or accessing Medicaid long-term care services even as the applicant knows that doing so will leave her partner impoverished.[79]

The law, however, expressly contemplates undue hardship waivers in the transfer-of-assets context. In 2006 the Deficit Reduction Act codified the definition of undue hardship established by the secretary of HHS under 42 U.S.C. § 1396p(c)(2)(D): an undue hardship exists when application of the transfer-of-assets provision would deprive the individual of medical care—such that the individual's health or life would be endangered—or of food, clothing, shelter, or other necessities of life.[80]

Prior to the enactment of the Deficit Reduction Act, the secretary of HHS emphasized the flexibility states enjoy in implementing the definition of undue hardship, noting that states have flexibility in deciding the circumstances under which to impose penalties under the transfer-of-assets provisions.[81] Since its enactment, "they continue to have "considerable flexibility in deciding the circumstances under which they will not impose penalties under the transfer-of-assets provisions because of undue hardship"[82]

DOMA does not affect a state's ability to exercise its discretion to grant undue hardship waivers. This waiver is not contingent on spousal status; it does not call for the federal government to recognize the marriages of same-sex couples. Moreover, the undue hardship provision should not be construed to apply in a vacuum without considering family circumstances. To require a Medicaid applicant to endanger the applicant's health and forgo obtaining critical long-term care services to ensure that the applicant's same-sex partner is not deprived of food, clothing, or shelter squarely falls within the Deficit Reduction Act's definition of undue hardship.

The public policy behind protecting the different-sex spouse living at home from poverty and homelessness is equally relevant to same-sex partners. Moreover, states where the marriages of same-sex couples are either legal or recognized as valid, and the numerous other ones with civil unions, domestic partnerships and other state-recognized same-sex relationship designations, have the obligation to ensure that same-sex partners living at home are "able to live out their lives with independence and dignity."[83] Given their discretion to exercise the undue hardship waiver, states should apply the waiver in instances where Medicaid applicants are at risk of leaving their same-sex partners impoverished or without a home or both in order to access long-term care services.

Estate Recovery. The federal Medicaid Estate Recovery Program requires states to recover the costs of Medicaid long-term care services from the estates of recipients after their death when (1) the individual, of any age, was an "inpatient in a nursing facility" and not reasonably expected to return home or (2) when an individual, 55 and older, received Medicaid assistance for "nursing facility services, home and community-based services and related hospital and prescription drug services…."[84]

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[79]Under the transfer-of-assets eligibility requirements, "[s]tates can 'look back' to find transfers of assets for 36 months prior to the date the individual is institutionalized or, if later, the date he or she applies for Medicaid. For certain trusts, this look-back period extends to 60 months. If a transfer of assets for less than fair market value is found, the state must withhold payment for nursing facility care (and certain other long-term care services) for a period of time referred to as the penalty period" (Centers for Medicare and Medicaid Services, U.S. Department of Health and Human Services, Transfer of Assets (Dec. 23, 2010), http://www.cms./MedicaidEligibility/10_sets.asp.

[80]Deficit Reduction Act of 2005, Pub. L. No. 109-171, § 6011, 120 Stat. 4, 62.

[81]The State Medicaid Manual is being updated and the paper-based manual is available online (Centers for Medicare and Medicaid Services, U.S. Department of Health and Human Services, State Medicaid Manual § 3258.10(C)(5) (Sept. 8, 2005), http://1.usa.gov/fPUTdm).

[82]Center for Medicaid and State Operations, Centers for Medicare and Medicaid Services, U.S. Department of Health and Human Services, State Medicaid Director Letter No. 06-018 (July 27, 2006) (Sections 6011 and 6016: New Medicaid Transfer of Asset Rules Under the Deficit Reduction Act of 2005 § V(A)).

[83]See Center for Medicaid and State Operations, *supra* note 76.

[84]42 U.S.C. § 1917(b)(1)(A)–(B).

The purpose of the Medicaid Estate Recovery Program is to enable states to recoup the expenditures paid on behalf of a long-term care Medicaid beneficiary. States are prohibited from initiating claims for estate recovery under certain circumstances, including when the surviving different-sex spouse resides in the home.[85] But states have wide discretion in exercising this power under the Medicaid law's undue hardship provision.[86]

Similar to the undue hardship waiver for transfer-of-assets penalties, the law expressly contemplates undue hardship waivers in the estate recovery context.[87] Unlike the undue hardship provision codified by the Deficit Reduction Act, the statute governing estate recovery does not provide a definition of undue hardship, thus giving states great latitude to establish the parameters for granting undue hardship waivers.[88]

As guidance to states, HHS secretary clarified that "special consideration" for undue hardship waivers should be given in cases where the estate subject to recovery is "the sole income-producing asset of survivors (where such income is limited), such as a family farm or other family business" or "a homestead of modest value" or if there are "other compelling circumstances." [89] These examples, the HHS secretary confirmed, are not exhaustive and "do [not] require [states] to incorporate these examples once [they] have considered whether they are appropriate for determining the existence of an undue hardship."[90]

The public policy behind protecting the surviving different-sex spouse from homelessness is equally critical to same-sex partners. Because the estate recovery protection extends only to different-sex spouses, a surviving same-sex partner is at the mercy of the state and its discretion to exercise the undue hardship waiver. A surviving same-sex partner of a long-term care beneficiary not only is faced with the loss of the survivor's life partner with whom the survivor had a lifelong relationship of mutual and financial support but also is confronted with the imminent threat that the state will seize the survivor's home.

The social and economic costs of state recovery of homes of surviving same-sex partners far outweigh the benefits of such recovery. To force a surviving same-sex partner of a deceased long-term care Medicaid beneficiary to live out the survivor's years in a shelter or on the streets does not carry out the purpose of the Medicaid Estate Recovery Program. HHS has confirmed the high cost to the government of supporting the elderly homeless due to problems such as special health care and service needs.[91] Exercising discretion under the Medicaid law, states should forbear on seizing the home of a deceased long-term care beneficiary during the lifetime of the deceased's surviving same-sex partner where that partner is residing in the home.

States can go one step further to mitigate the disparities in transfer-of-assets penalties and estate recovery against surviving same-sex partners of deceased Medicaid beneficiaries by enacting legislation to protect LGBT seniors specifically. Washington State, for example, has recognized the harm of such an inequity and exercised its discretion to extend estate recovery protections to domestic partners.[92] Washington State has not,

[85] *Id.* §§ 1396p(b)(2)–(3)(A).

[86] *Id.* § 1396p(b)(3)(A).

[87] *Id.*

[88] *Id.*

[89] Centers for Medicare and Medicaid Services, U.S. Department of Health and Human Services, State Medicaid Manual § 3810(C)(1) (2005).

[90] *Id.*

[91] See Health Resources and Services Administration, U.S. Department of Health and Human Services, Program Assistance Letter No. 03-03, Homeless and Elderly: Understanding the Special Health Care Needs (2003).

[92] Wash. Rev. Code § 43.20B.080(5)(a); see also Wash. Admin. Code 388-527-2750(1)(c).

however, extended this protection to shield domestic partners from transfer-of-assets penalties if such penalties would cause undue hardship on the Medicaid recipient. But it has taken a step in the right direction and other states should follow suit to ensure that the partners of LGBT seniors are protected from poverty and homelessness and are able to live out their years with dignity and respect when their life partners are in need of long-term care services.[93]

Financial Security in Retirement

Income from retirement accounts [401(k)s], employer-sponsored pensions, and tax-preferred savings such as individual retirement accounts (IRAs) are an important component of retirement security for many Americans.[94] An LGBT individual who has participated in a pension plan or saved for retirement is, of course, personally entitled to the benefits. Unfortunately LGBT couples do not usually enjoy the same protections afforded married couples with regard to these income sources. They also have many barriers to overcome in obtaining such resources.

Employer-Sponsored Plans. Employer-based pension plans are generally of two types: defined benefit plans and defined contribution plans. The terms of these types of plans are generally governed by the Employment Retirement Security Act (ERISA).[95]

Defined benefit plans are retirement plans that provide a guaranteed monthly or annual benefit, usually paid through an annuity purchased for the worker by the plan at the worker's retirement. Public employee retirement systems, union-sponsored pension plans, and pension plans sponsored by large manufacturing companies have historically followed the defined benefit model. The employer is usually the sole or principal contributor to the plan on the employee's behalf and bears the investment risk that the plan will not perform well enough to meet its obligations—the employee will receive (at least theoretically) the promised defined benefit irrespective of the fiscal health of the plan.[96]

In general, the partner of an LGBT worker eligible for a defined-benefit pension is not entitled to a share of the pension. Under federal law a married worker's annuity-based pension must be paid over the expected annual lifetimes of the worker and the worker's spouse under the so-called Qualified Joint and Survivor Annuity option; this option is waivable only if the spouse consents.[97]

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[93]For additional recommendations, see, e.g., Movement Advancement Project et al., LGBT Older Adults and Long-Term Care Under Medicaid (Sept. 2010), http://bit.ly/hToawz.

[94]At present about 55 percent of all workers participate in some kind of employer-sponsored retirement plan; participation is highest in the public and manufacturing sectors and lowest in the service sector and for part-time workers (see generally U.S. Department of Labor, Bureau of Labor Statistics, Employee Benefits in the United States, tbl.1 (July 7, 2010). About 41 percent of current retirees receive at least some income from pensions (Virginia P. Reno and Joni Lavery, National Academy of Social Insurance, Social Security Brief No. 25, Social Security and Retirement Income Adequacy (May 2007), http://bit.ly/fkadYm).

[95]Employee Retirement Income Security Act of 1974 (ERISA), Pub. L. No. 93-406, 88 Stat. 829 (codified as amended in scattered sections of 5 U.S.C., 18 U.S.C., 26 U.S.C., 29 U.S.C., and 42 U.S.C.).

[96]The Pension Benefit Guaranty Corporation, a quasi-public entity created by ERISA insures defined benefit pension plans and in appropriate cases assumes responsibility for underfunded plans that are unable to pay promised pension benefits (see generally Pension Benefit Guaranty Corporation, Annual Report 2009, http://1.usa.gov/gDhQcg).

[97]Determining the pension benefits available to LGBT persons who worked in the public sector, or whose partners or former spouses did, can be challenging. Historically, state and local public employees such as teachers, police and firefighters, civil servants, and similar workers have not been part of the federal social security system. Instead they have participated in public pension systems such as the California Public Employer Retirement System or the Pennsylvania Municipal Retirement System. Some state and local public employees do receive social security benefits either through opt-ins or as a result of second jobs. Federal employees did not participate in social security until 1987; they are now covered by the Federal Employees Retirement System, which comprises a defined pension benefit, a social security benefit, and a thrift savings plan. For such workers, any social security benefits that they are otherwise entitled to receive may be offset by payments from the public employee pension plan (see generally Social Security Online, State and Local Employers, Frequently Asked Questions (Feb. 9, 2011), http://1.usa.gov/e3dl7A). Domestic partners of public employees have only those rights that are contractually available to them under the plan or as provided by general legal principles applicable to defined benefit plans (see generally, e.g., Employee Benefit Research Institute, Domestic Partner Benefits: Facts and Background (Feb. 2009), http://bit.ly/hOBXAO). For a relatively recent survey of state employees' retirement plans that offer domestic partner benefits, see National Conference of State Legislatures, Domestic Partner Retirement Benefits (March, 2006), http://bit.ly/fRmHOz.

Similarly, under the default Qualified Preretirement Survivor Annuity option, if a worker dies before the worker retires, the surviving spouse is entitled to at least 50 percent, and up to 100 percent, of the pension that the worker would have received. The Qualified Joint and Survivor Annuity and Qualified Preretirement Survivor Annuity options ensure that both worker and spouse will benefit from the worker's pension even if the spouse outlives the worker.

Because of DOMA, a domestic partner may not be designated as "spouse" for purposes of the default option to pay pension benefits under a Qualified Joint and Survivor Annuity or Qualified Preretirement Survivor Annuity.[98] Employers may offer the equivalents of these payment options to employees in domestic partnerships, but they are not required to do so and most do not.[99] If the plan does not offer the Qualified Joint and Survivor Annuity or Qualified Preretirement Survivor Annuity option, a beneficiary's domestic partner will not be entitled to receive any income after the death of the beneficiary; the couple should therefore plan accordingly.

The other kind of employer pension plan is the defined contribution plan, such as 401(k) and 403(b) retirement accounts established by and fully or partially funded through pretax "defined" contributions to such plans (usually a percentage of the employee's wages contributed by the employer).[100] Employees generally make mandatory or voluntary contributions to the plan as well. The employee controls the employee's account within the plan, chooses how contributions will be invested from among the plan's options, and bears all investment risks associated with these choices. Most newly created employer-sponsored pension plans are defined contribution plans.

Under 401(k) plans and similar retirement accounts, the employee-beneficiary actually owns the funds in the account and, once employer contributions have vested, may control the allocation and distribution of the funds both before and after retirement. A will or beneficiary designation can be used to specify that funds remaining in the account at the death of the beneficiary go to a domestic partner or to a trust for the partner's benefit.[101] Under the Pension Protection Act of 2006, a nonspouse beneficiary of a deceased worker's devised 401(k) may withdraw funds from the inherited plan over the recipient's lifetime, reducing the nonspouse's tax liability.[102] The Worker, Retiree and Employer Recovery Act of 2008 made it mandatory for employers offering tax-qualified retirement plans to offer "designated beneficiary" plans also.[103] These changes were significant steps toward full protection of LGBT couples in the pension realm.

Qualified Domestic Relations Orders. LGBT persons who were once married may be able to access a share of the former spouse's pension or tax-qualified retirement account through a qualified domestic relations order (QDRO). A QDRO, usually entered in a divorce proceeding, "creates or recognizes the existence of an alternate payee's right to receive, or assigns to an alternate payee the right to receive, all or a portion of the benefits payable with respect to a participant under a retirement plan...."[104] If the former spouse of a pension or retirement

[98]See IRS.gov, Retirement Topics—Qualified Joint and Survivor Annuity (Aug. 5, 2010), http://1.usa.gov/gcM03B.

[99]*Id.* If the plan offers such an option to name a nonspouse as the beneficiary of a survivor benefit, special distribution rules apply.

[100]See generally U.S. Department of Labor, Retirement Plans, Benefits and Savings: Types of Retirement Plans (n.d.), http://1.usa.gov/hTTOwX .

[101]See generally U.S. Department of Labor, FAQs About Qualified Domestic Relations Orders (n.d.), http://1.usa.gov/flJAlY.

[102]Pension and Protection Act of 2006, Pub. L. No. 109-280, 120 Stat. 780 (codified as amended in scattered sections of 26 and 29 U.S.C.). See generally U.S. Department of Labor, *supra* note 100.

[103]Worker, Retiree and Employer Recovery Act of 2008, Pub. L. No. 110-458, 122 Stat. 3765 (codified at 29 U.S.C. §§ 1056, 1083, 623 and 45 U.S.C. §§ 231d, 231m).

[104]See generally U.S. Department of Labor, *supra* note 101.

account beneficiary has negotiated for and obtained a QDRO naming the former spouse as an alternate payee as part of the property settlement, for example, the plan or account must recognize this document and pay the former spouse a share of the pension benefit accordingly. An attorney's failure to obtain a QDRO as part of a property settlement in a divorce may be malpractice.

Individual Retirement Accounts and Other Tax-Preferred Savings. Tax preferred savings accounts, such as IRAs, allow workers to direct a portion of their pretax income into accounts established solely for the purpose of saving money for retirement.[105] No taxes are paid on the contributed income or the earnings on such accounts until distributions begin. Distributions may begin as early as age 59½ and not later than age 70½. Taxes on distributions are paid as the funds are withdrawn.

The owner of an IRA may designate the owner's partner as the contingent beneficiary of the account. Whereas a spouse named through a beneficiary designation may roll over the IRA proceeds into the spouse's own IRA, a nonspouse partner-beneficiary must begin withdrawing and paying taxes immediately, whether or not the partner has reached retirement age. This can result in payment of significantly more taxes on the IRA than would result if the LGBT partner is treated the same as a spouse.

Although IRAs are not subject to ERISA and hence the rules regarding QDROs, an IRA may be divided between two former spouses as part of the property settlement in a divorce decree, in which case each party to the divorce will own a part of the account funds and subject individually to all laws and regulations governing distributions of each party's portion of the funds.[106]

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In their quest for income and retirement security, LGBT seniors must overcome many obstacles. We are not without resources, even though the route to securing the necessary protections is circuitous. As advocates and practitioners, we are tasked with assuring that LGBT persons have good information about their rights and that they assert those rights forcefully and strategically.

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[105]Pub. L. No. 109-280, 120 Stat. 780 (2006) (codified in scattered sections of 26 U.S.C. and 29 U.S.C.). For a detailed discussion of individual retirement accounts, see IRS.gov, Publication 590 (2010), Individual Retirement Arrangements (IRAs) (n.d.), http://1.usa.gov/iaJr8S.

[106]ERISA § 206(d)(3)(B)(i); I.R.C. § 414(p)(1)(A). See generally John C. Zimmerman, *The Tax Consequences of Dividing Retirement Assets at Divorce*, CPA Journal (2009), http://bit.ly/gaNZYA.

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