St. Thomas Law Review

Volume 26
Issue 1 *Fall 2013*

Article 3

2013

A Holistic Approach to Planning for the Aging Same-Sex Couple: Special Considerations in Light of the U.S. v. Windsor Decision

Melissa Lader Barnhardt
University of Miami School of Law

Jessica M. Lillesand

Denise A. Lettau

A HOLISTIC APPROACH TO PLANNING FOR THE AGING SAME-SEX COUPLE: SPECIAL CONSIDERATIONS IN LIGHT OF THE *U.S. V. WINDSOR* DECISION

MELISSA LADER BARNHARDT,* JESSICA M. LILLESAND,* & DENISE A. LETTAU*

I. INTRODUCTION

On June 26, 2013, the US Supreme Court found Section 3 of the Federal Defense of Marriage Act[1] ("DOMA") unconstitutional.[2] DOMA was signed into law in 1996 by President Clinton.[3] DOMA came into existence as fears arose that the state of Hawaii would start a trend as the first state to recognize same-sex marriage. DOMA was created to avert "an

* Melissa Lader Barnhardt currently teaches as adjunct faculty for the University of Miami Law School for a course titled "Aging and Special Needs Law" and works for the wealth management services division of a national bank where she also serves on the National Wealth Management Diversity Council. Melissa has her J.D., cum laude, from John Marshall Law School (1991) and her L.L.M. in Health Law from DePaul Law School (1994). She was admitted to the Illinois Bar in 1991 and she was admitted to the Florida Bar in 2003. She is very active in the community and sits on the board of Florida's Children First, Summit Questa PTO, and she is a sustaining member of the Junior League of Greater Ft. Lauderdale, an organizational committee member for the Fort Lauderdale Independence Training and Education Center, and co-chair of a fundraiser that supports the Ventilator Assisted Children's Center Camp affiliated with Miami Children's Hospital. Lastly, Melissa is a member of the Real Property, Probate and Trust Law section and the Elder Law section of the Florida Bar and she is the immediate past co-chair of the guardianship committee for the Elder Law section.

* Jessica M. Lillesand currently works for the wealth management division of a national bank where she specializes in delivering premium life and wealth management solutions for her clients. Jessica earned her B.A., cum laude, from Duke University, and her J.D., magna cum laude, from the University of Florida Levin College of Law. She was admitted to the Florida Bar in 2008, and she was admitted to the Middle District and Southern District of Florida in 2012. She is a member of the Real Property, Probate and Trust Law and the Elder Law sections of the Florida Bar, and she currently serves as the Chair of the Elder Law Section of the Clearwater Bar.

* Denise Lettau graduated from Seattle University School of Law in 1987. She then worked as a research assistant at the University of Kiel's Institute for International Law under Professors Ruediger Wolfram and Jost Delbrueck. Denise later worked as a lecturer at Humboldt University in Berlin, Germany after the fall of The Berlin Wall. Denise returned to the United States in 2000. She is a member of the D.C. Bar and the Florida Bar. Denise is currently employed by a national bank and specializes in premium wealth and life management.

1. Defense of Marriage Act, Pub. L. No. 104-199, 110 Stat. 2419 (1996) (codified as amended at 1 U.S.C. § 7 (2012)).

2. United States v. Windsor, 133 S. Ct. 2675, 2695 (2013).

3. Defense of Marriage Act.

assault against traditional heterosexual marriage laws."[4] Now that this section has been struck down, married members of the Lesbian, Gay, Bisexual, and Transgendered ("LGBT") community will be privy to the same federal benefits that their heterosexual colleagues have historically enjoyed depending on the state they live in. These benefits could provide some additional monies and protections during the golden years.

A. THE EMERGING OLDER LGBT COMMUNITY

Despite the general belief that older LGBT adults are affluent, this population tends to be less affluent and less financially secure than most American seniors. Around half of all lesbians and gay men between the ages of fifty to fifty-nine earn less than $39,000 per year; 20% earn less than $26,000 per year.[5] Many have suffered throughout their working years some form of discrimination if their sexual orientation became known or was suspected, and as a result, many were unable to maintain consistent employment. Around one-half of these seniors have a disability and 13% "have been denied healthcare" or have received poor quality of care.[6] These factors also have an effect on the quality of an elder's older years both financially and psychologically. In 2011, there were roughly 41.4 million Americans age sixty-five and over, and this figure includes 1.5 million LGBT older adults.[7] There are approximately 2.4 million LGBT adults over the age of fifty-five.[8] Of same-sex couples, 11.8% of these couples include a partner fifty-five or older, while 9.4% consist of two seniors.[9] The number of LGBT seniors is expected to double by the year 2030.[10] In fact, it is estimated that older Americans will top 90 million and

4. Nicholas Drew, Comment, *A Rational Basis Review That Warrants Strict Scrutiny: The First Circuit's Equal Protection Analysis in Massachusetts v. U.S. Department of Health and Human Services*, 54 B.C. L. REV. E. SUPP. 43, 43 (2013), *available at* http://lawdigitalcommons.bc.edu/bclr/vol54/iss6/5.

5. Sarah Mashburn, *Special Needs of LGBT Baby Boomers,* LEADING AGE (Mar. 25, 2011), http://www.leadingage.org/Special_Needs_of_LGBT_Baby_Boomers.aspx.

6. *See* KAREN I. FREDRIKSEN-GOLDSEN, ET AL., LGBT NAT'L HEALTH AND AGING CTR., THE AGING AND HEALTH REPORT: DISPARITIES AND RESILIENCE AMONG LESBIAN, GAY, BISEXUAL, AND TRANSGENDER OLDER ADULTS 2 (2011), http://caringandaging.org/wordpress/wp-content/uploads/2011/05/Full-Report-FINAL-11-16-11.pdf.

7. *A Profile of Older Americans: 2012,* ADMINISTRATION ON AGING (last modified Apr. 17, 2013), http://www.aoa.gov/AoARoot/Aging_Statistics/Profile/2012/3.aspx; NAT'L RESOURCE CTR. ON LGBT AGING, INCLUSIVE QUESTIONS FOR OLDER ADULTS: A PRACTICAL GUIDE TO COLLECTING DATA ON SEXUAL ORIENTATION AND GENDER IDENTITY 3 (2013) http://www.sageusa.org/files/InclusiveQuestionsOlder%20Adults_Guidebook.pdf.

8. Mashburn, *supra* note 5.

9. *Id.*

10. NAT'L RESOURCE CTR. ON LGBT AGING, *supra* note 7, at 3.

outnumber children under the age of 18 for the first time in US history by 2056.[11] The creation of the National Resource Center on LGBT Aging ("The Center") in 2010 is an indicator of the necessity of training for providers tailored to the unique needs and challenges of older members of this community. The Center provides a technical resource center to improve the quality of services and support offered to lesbian, gay, bisexual and transgender older adults. The organization is also key to identifying and compiling data on the older population.

However, the statistics for the LGBT community are not entirely reliable, as many older members of the community continue to remain "invisible." Older LGBT adults still have difficulty discussing, or in some cases acknowledging, their sexual orientation. Having suffered stigmatization, various forms of abuse, and allegations of criminality, moral turpitude, and mental illness as a result of their sexual orientation and/or gender identity, many remain reluctant to reveal their sexual orientation. "Coming out" later in life is a scary proposition despite its apparent healing effect. As society's attitudes toward same-sex marriage and marriage in general continue to evolve, so should the willingness of members of this community to stand up and be counted.

B. SOCIETAL SHIFT IN VIEWPOINT AND STATES' REACTIONS

According to Gallup, in 1996, 68% of all Americans were opposed to gay marriage.[12] Polls taken during the week of the DOMA ruling indicated that 53% of all Americans were in favor of same-sex marriage and in the two weeks following the ruling, that data has increased two percentage points.[13] This is a substantial increase in support, even from recent years. In 2009, 30% of Americans favored civil unions but did not support same-sex marriage.[14] This data also reflected an uptick in support, with only 24% responding in a similar fashion in 2003.[15]

11. *U.S. Census Bureau Projections Show a Slower Growing, Older, More Diverse Nation a Half Century from Now*, UNITED STATES CENSUS BUREAU (Dec. 12, 2012), www.census.gov/newsroom/releases/archives/population/cb12-243.html.

12. Frank Newport, *Half of Americans Support Legal Gay Marriage*, GALLUP (May 8, 2012), http://www.gallup.com/poll/154529/half-americans-support-legal-gay-marriage.aspx.

13. Lydia Saad, *In U.S., 52% Back Law to Legalize Gay Marriage in 50 States*, GALLUP (July 29, 2013), http://www.gallup.com/poll/163730/back-law-legalize-gay-marriage-states.aspx.

14. *Majority Continues to Support Civil Unions: Most Still Oppose Same-Sex Marriage*, PEW RESEARCH CTR. FOR THE PEOPLE & THE PRESS (Oct. 9, 2009), http://www.people-press.org/2009/10/09/majority-continues-to-support-civil-unions/.

15. *Id.*

Massachusetts, not Hawaii, (as originally assumed) was the first state to legalize same-sex marriage in 2003. The Massachusetts Supreme Judicial Court ordered it legalized in 2003 and marriages began in 2004.[16] Sixteen other states followed suit together with the District of Columbia. Those states are: California, Connecticut, Delaware, Hawaii, Illinois, Iowa, New Mexico, Maine, Maryland, Minnesota, New Hampshire, New Jersey, New York, Rhode Island, Vermont and Washington.[17] Most states, however, either implemented a state constitutional ban or a state version of DOMA to ban same-sex marriage.[18]

Civil unions were designed by states to confer "marriage-like" rights and responsibilities for same-sex couples. However, civil unions confer only state rights, not federal rights, and are generally not recognized outside the state where the union occurred. Thus, the contention that civil unions are "separate and unequal." Civil unions are legal in the state of Colorado.

Domestic partnerships, on the other hand, were not specifically designed for LGBT individuals only. Domestic partnerships, like civil unions, confer some rights through the state to both same-sex and opposite-sex partners and no federal rights. Because they are creatures of state law, the rights conferred by domestic partnerships vary widely from state to state. The Supreme Court ruling in *United States v. Windsor*[19] does not change the landscape of rights created under domestic partnerships, and

16. Goodridge v. Mass. Dep't of Pub. Health, 798 N.E.2d 941, 969–70 (Mass. 2003).

17. *See also* Tom Watkins, *In Utah, judge's ruling ignites same-sex marriage frenzy*, CNN, http://www.cnn.com/2013/12/20/justice/utah-same-sex-marriage-ruling/ (last updated Dec. 20, 2013, 10:17 PM) (reporting that same-marriages began in Utah after U.S. District Judge Robert J. Shelby found that the state's ban on same-sex marriage was unconstitutional); *cf.* Marissa Lang, *10th Circuit Court denies same-sex marriage stay*, THE SALT LAKE TRIBUNE., http://www.sltrib.com/sltrib/news/57306142-78/court-utah-state-sex.html.csp (last updated Dec. 24, 2013, 3:45 PM) (indicating that the state of Utah's motion to stay same-sex marriages in the state pending appeal was denied by the 10th Circuit Court of Appeals). *But see* David G. Savage, *Supreme Court halts Utah gay marriages, signaling cautious approach*, LOS ANGELES TIMES (Jan. 6. 2014, 9:27 PM), http://www.latimes.com/nation/la-na-court-gay-marriage-20140107,0,1829277.story#axzz2pyt7DZsr (stating that the Supreme Court stayed same-sex marriages in Utah while the state appeals to the 10th Circuit).

18. *Defining Marriage: Defense of Marriage Acts and Same-Sex Marriage Laws*, NAT'L CONF. OF STATE LEGISLATURES, http://www.ncsl.org/issues-research/human-services/same-sex-marriage-overview.aspx (last updated Dec. 20, 2013) (listing those states that have implemented state law or constitutional provisions limiting marriage as between a man and a woman). Those states are: Alabama, Alaska, Arizona, Arkansas, Colorado, Florida, Georgia, Idaho, Indiana, Kansas, Kentucky, Louisiana, Michigan, Mississippi, Missouri, Montana, Nebraska, Nevada, North Carolina, North Dakota, Ohio, Oklahoma, Oregon, Pennsylvania, South Carolina, South Dakota, Tennessee, Texas, Utah, Virginia, West Virginia, Wisconsin and Wyoming. *Id.*

19. United States v. Windsor, 133 S. Ct. 2675 (2013).

thus it is imperative that those living in a state that recognizes domestic partnerships seek legal counsel prior to making any planning decisions. Both the civil union and the domestic partnership, of which there is little distinction aside from the fact that states tend to allow one or the other, served to create a separate status, an unsatisfactory alternative to the sanctity and status of marriage. In fact, proper planning is imperative regardless of whether one lives in a state that recognizes marriage, civil unions, and/or domestic partnerships.

The purpose of this article is to provide a basis of planning for the LGBT community in light of the opportunities provided by the recent *Windsor* Supreme Court ruling. Indeed, this landmark decision will provide the aging LGBT population with benefits that have been previously denied due to the fact that same-sex marriage was not recognized under DOMA. This article will provide a brief overview of (a) the history of DOMA,[20] (b) a review of *Windsor* and *Hollingsworth v. Perry*[21] as well as the impact of those decisions,[22] (c) the effects of the decision on Supplemental Security Income ("SSI"), Social Security Disability Insurance ("SSDI"), Medicaid and other governmental benefits,[23] and finally, (d) special considerations on Advance Directives and estate planning issues.[24]

II. HISTORY OF THE DEFENSE OF MARRIAGE ACT AND IMPACT OF THE *UNITED STATES V. WINDSOR* DECISION

On September 26, 1996, President Clinton signed DOMA, which amended The Dictionary Act[25] definition of marriage under Section 3 of DOMA:

> 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.[26]

20. *See infra* Part II.
21. Hollingsworth v. Perry, 133 S. Ct. 2652 (2013).
22. *See infra* Part II.A and Part II.B.
23. *See infra* Part III.
24. *See infra* Part IV.
25. Dictionary Act, 1 U.S.C. §§ 1–8, 101–114, 201–213 (2012).
26. Defense of Marriage Act § 3.

Section 2 of DOMA also amended another provision of the United States Code on Judiciary and Judicial Procedure[27] as follows:

> No state, territory or possession of the United States, or Indian Tribe, shall be required to give effect to any public act, record, or judicial proceeding of any other State, territory, possession, or tribe respecting a relationship between persons of the same sex that is treated as a marriage under the laws of such other State, territory, possession, or tribe, or a right or claim arising from such relationship.[28]

The long title of the Act, "An Act to Define and Protect the Institution of Marriage,"[29] coupled with its direct impact on same-sex couples and their children, by its very nature interjects a form of bullying, disrespect, and discrimination. The legislative history, including the Judiciary Committee reports for the 104th Congress House of Representatives, provides the basis for DOMA: the fear of the potential expansion of the definition of marriage in the state of Hawaii[30] and its potential impact on other states due to the Full Faith and Credit Clause.[31] The House of Representatives Report details the lawsuit of *Baehr v. Lewin*.[32] It was the first time that a state was moving forward to allow same-sex couples to obtain a license to get married. Opponents of same-sex marriage were fearful that the sanctity of marriage and the potential enforcement of the marriage outside of Hawaii would have far reaching consequences in other states that may have opposing policies against same-sex marriage.[33] In *Baehr*, three same-sex couples applied for marriage licenses, which were denied, leading the couples to file suit in state court, where the court granted the State's motion for judgment on the pleadings.[34] The couples then filed an appeal to the Hawaii Supreme Court, which reversed the decision stating that the denial of marriage licenses to same-sex couples was presumptively unconstitutional discrimination based on sex. The court remanded the case to the trial court with instructions to apply a strict scrutiny standard compelling the state to show proof that they had a state purpose that was narrowly drawn so as to not abridge constitutional guarantees.[35]

27. 28 U.S.C. § 1738C (2012).
28. *Id.*
29. Defense of Marriage Act.
30. H. R. REP. NO. 104–664, at 2 (1996).
31. *Id.*; *See* U.S. CONST. art. IV, § 1.
32. H.R. REP. NO. 104–664, at 4–6.
33. *See* Baehr v. Lewin, 852 P.2d 44, 74 (Haw. 1993).
34. *Id.* at 48–49.
35. *Id.* at 68.

This case was the impetus for DOMA and the discussion ensued regarding the potential repercussions and necessity for legislative involvement over judicial action prior to Hawaii or any other state allowing marriages for same-sex couples. The House Report goes on to state the reasoning behind DOMA:

> The first [purpose] is to defend the institution of heterosexual marriage. The second [purpose] is to protect the right of States to formulate their own public policy regarding the legal recognition of same-sex unions, free from any federal constitutional implications that might attend the recognition by one State of the right for homosexual couples to acquire marriage licenses.[36]

However, these purposes do not warrant discrimination against same-sex couples and their children. The "institution of heterosexual marriage" or legitimate governmental purpose is further defined with a judgment of immorality of same-sex couples' inability to procreate regardless of the fact that many heterosexual couples either do not want children or cannot have children.[37] This line of thinking condemns and discriminates against unmarried parents that have children, whether through the use of artificial insemination, donor sperm, donor egg (or other forms of assistive reproductive technology), or through surrogacy.

The committee report further alluded to the fact that recognition of same-sex marriages would potentially open the door to allowing same-sex couples to adopt.[38] The number of children in foster care in 1996 was approximately 507,000.[39] Children in foster care are moved around from place to place without a permanent home that most will never see. Is it better to have children linger without permanency or better to have a child adopted into a loving home with stability? This reasoning is contrary to the divorce rate statistics[40] as well, even with the definition of "marriage" being between a man and a woman. Per the United States Census Bureau, the number of unmarried adults nearly doubled between 1970 and 1996, and the number of divorced adults quadrupled between 1970 and 1996 to a staggering 18.3 million.[41] One could argue that same-sex couples who

36. H.R. REP. NO. 104–664, at 2.

37. *See id.* at 13–14.

38. *See id.* at 13, 15, n.53.

39. KATHY BARBELL & MADELYN FREUNDLICH, CASEY FAMILY PROGRAMS, FOSTER CARE TODAY 2 (2001), www.hunter.cuny.edu/socwork/nrcfcpp/downloads/policy-issues/foster_care_today.pdf.

40. ARLENE F. SALUTER & TERRY A. LUGAILA, U.S. CENSUS BUREAU AND DEP'T OF COMMERCE, MARITAL STATUS AND LIVING ARRANGEMENTS 1–2 (1998), http://www.census.gov/prod/3/98pubs/p20-496.pdf.

41. *Id.* at 1.

have been in a committed relationship for an extended period of time and who desire to have a marriage that is legally recognized would bolster the argument of what commitment really means.

Beyond the morality argument, the other claimed legitimate purpose was the cost factor of extension of federal benefits to same-sex couples.[42] Thus, Congress passed DOMA. Following the passage of DOMA, many states passed laws recognizing same-sex marriages, civil unions, or domestic partnerships, and several states passed prohibitions on marriage of same-sex couples. This leads to the discussion of the seminal DOMA case to date, that of *United States v. Windsor.*

A. UNITED STATES V. WINDSOR

On June 26, 2013, the United States Supreme Court held Section 3 of DOMA unconstitutional on the basis of violation of the Due Process Clause of the Fifth Amendment of the United States Constitution, thereby opening the door to federal benefits for same-sex couples who live in a state where same-sex marriage is recognized.[43] The Court did not entertain the question of the Full Faith and Credit Issue of Section 2 of DOMA, as that question was not before the court.

In 2007, the respondent, Edith Windsor ("Windsor"), married her partner of over 40 years, Thea Spyer ("Spyer"), in Ontario, Canada, and prior to that, Windsor and Spyer had registered as domestic partners in New York in 1993.[44] The couple moved back to New York in 2007, and in 2009, Spyer passed away leaving her entire estate to her spouse, Windsor, who paid a substantial tax to the Internal Revenue Service ("IRS") and then filed an estate tax return seeking a refund.[45] Windsor filed for a refund of $363,000 from the IRS based on the marital exemption[46] from federal estate tax that excludes taxation on property that passes from the decedent spouse to the surviving spouse, but her refund was denied based on Section 3 of DOMA that defines marriage as between a man and a woman.

Thereafter, she filed suit in the United States District Court for the Southern District of New York, alleging that Section 3 of DOMA violated Equal Protection as applied to the Federal Government through the Fifth Amendment of the U.S. Constitution and the court ruled in her favor.[47] The

42. H.R. REP. NO. 104–664, at 10–11.
43. *Windsor*, 133 S. Ct. at 2695.
44. *Id.* at 2683.
45. *Id.*
46. *See id.*; *see also* 26 U.S.C. § 2056(a) (2012).
47. *Windsor*, 133 S. Ct. at 2683–84.

district court specifically held that Section 3 was unconstitutional and ordered the United States Treasury to issue Windsor the refund with interest.[48] The Second Circuit Court affirmed.[49] Notably, the U.S. Attorney General, based upon President Obama's conclusion that "a documented history of discrimination, classifications based on sexual orientation should be subject to a more heightened standard of scrutiny," decided not to defend DOMA in this action.[50] Nevertheless, the Attorney General continued to enforce DOMA pending a decision by the United States Supreme Court. Instead, the Bipartisan Legal Advisory Group of the House of Representatives ("BLAG") was permitted to intervene to defend the United States in relation to cases involving DOMA.[51] The Supreme Court granted certiorari and the case was argued on March 27, 2013 and decided on June 26, 2013, where the Court, by a majority vote, affirmed the Second Circuit decision and held Section 3 of DOMA unconstitutional.[52]

There were two jurisdictional hurdles for the Court to decide on prior to addressing the constitutionality of Section 3 of DOMA. The first dealt with a jurisdictional issue as to whether BLAG could intervene on behalf of the United States. The second was whether there was a case or controversy before the Court since President Obama was not going to defend Section 3 of DOMA and in essence agreed with the position taken by Windsor.[53] However, President Obama did state that he would continue to enforce Section 3 of DOMA. The Court determined that a "case and controversy" did exist sufficient to confer Article III jurisdiction; the United States had an injury regarding the tax liability that it is owed, and Windsor was injured as well when the U.S. Treasury failed to abide by the Second District's order to refund the payment to Windsor leaving both parties without recourse.[54]

The court then tackled the constitutionality of Section 3 of DOMA: whether it violated Due Process and Equal Protection extended to the Federal Government through the Fifth Amendment.[55] The Court reviewed *Loving v. Virginia*,[56] where, the Court recognized that while the state has the power to regulate "domestic relations," the state's power does not come

48. *Id.* at 2684.
49. *Id.*
50. *Statement of the Attorney General on Litigation Involving the Defense of Marriage Act*, DEP'T OF JUSTICE (Feb. 23, 2011) http://www.justice.gov/opa/pr/2011/February/11-ag-222.html.
51. *Windsor*, 133 S. Ct. at 2684.
52. *Id.* at 2696.
53. *See id* at 2684.
54. *See id.* at 2686.
55. *Id.* at 2689–96.
56. Loving v. Virginia, 388 U.S. 1 (1967).

at the expense of the guarantee of "respect [of] the constitutional rights of persons."[57] The Court briefly provides dicta on the issue of federalism in the context of the overreaching nature of Section 3 of DOMA. While section 2 of DOMA is not discussed in the opinion, the Court's dicta may be significant as to the constitutionality of Section 2 of DOMA. However, the opinion does not elaborate in great detail as that issue was not before the court.[58] The Court stated the following: "DOMA rejects the long-established precept that the incidents, benefits, and obligations of marriage are uniform for all married couples within each State, though they may vary, subject to constitutional guarantees, from one State to the next."[59] The Court then turned to the fact that New York had already defined marriage to include same-sex couples, and as such "enhanced the recognition, dignity, and protection of the class in their own community."[60]

Rather than the Federal Government giving deference to the state to make the determination on how to recognize marriage and define "domestic relations" issues within its own jurisdiction, the Court concluded that "[t]he Federal Government use[d] the state-defined class for the opposite purpose—to impose restrictions and disabilities."[61] The Court also clearly stated that DOMA's "purpose is to ensure that if any State decides to recognize same-sex marriages, those unions will be treated as second-class marriages for purposes of federal law," which is in essence an imposition of inequality that does not survive the rational basis test.[62] The Court further elaborated by citing to the thousands of federal benefits that would be available but for the non-recognition of marriage of same-sex couples even when a state recognizes the marriage.[63] The Court was troubled by the discriminatory treatment of individuals whose marriages are recognized by the state in which they wed, but not by the federal government.[64] In its analysis, the Court refutes any legitimate purpose of Section 3 of DOMA and cites to examples of the harmful effects on children of same-sex couples, both psychologically and financially, and also cites to the denial of health insurance for spouses, whether through the Veteran's Administration or Social Security.[65] Thus, the court held the federal statute unconstitutional as a deprivation of liberty protected by the

57. *Windsor*, 133 S. Ct. at 2691.
58. *Id.* at 2691–93.
59. *Id.* at 2692.
60. *Id.*
61. *Id.*
62. *Id.* at 2693–94.
63. *Windsor*, 133 S. Ct. at 2694–95.
64. *Id.*
65. *Id.*

Due Process Clause of the Fifth Amendment of the Constitution and affirmed the decision of the Second Circuit.[66]

Although the court set the tone for its overall view of Section 2 of DOMA in its dicta, it did not have the question of the constitutionality of that section before it. BLAG has since come forward and announced that it will not seek to defend DOMA now that the court has ruled and the Justice Department will no longer enforce DOMA either. There are several state challenges arising in various courts regarding the constitutionality of prohibitions on same-sex marriages and until those are resolved and the ultimate question of whether the Full Faith & Credit application will be turned back over to the states, many same-sex couples may continue to suffer disparate treatment.[67] Until such time that there is a global outcome, these decisions will be made at the state level.

B. HOLLINGSWORTH V. PERRY

Hollingsworth v. Perry involved a referendum named Proposition 8 that amended the California state constitution to define marriage as a union between a man and a woman[68] after the State had already recognized same-sex marriages.[69] The Court granted certiorari to determine whether Proposition 8 violated the Due Process and Equal Protection Clauses of the Fourteenth Amendment to the Federal Constitution.[70] The district court found Proposition 8 unconstitutional and placed an injunction on state officials from enforcing the law.[71] The Ninth Circuit then certified the question to the California Supreme Court as to whether the proponents of a ballot initiative can assert the state's interest when the public officials chose not to.[72] The California Supreme Court agreed that the proponents had standing and the Ninth Circuit affirmed the district court's order as a

66. *Id.* at 2695–96.

67. *See,* e.g., Lloyd Dunkelberger, *Impact Ruling Limited in Florida,* THE LEDGER (June 27, 2013 at 8:00), http://capitolcomments.blogs.theledger.com/10675/impact-ruling-limited-in-florida/ (indicating that the *Windsor* case "does nothing to change a constitutional ban that was approved by 62 percent of Florida voters in 2008); David Kemp, *A South Carolina Same-Sex Marriage Challenge, and Predictions as to Future Litigation In This Area,* JUSTIA (Sept. 9, 2013), http://verdict.justia.com/2013/09/09/a-south-carolina-same-sex-marriage-challenge-and-predictions-as-to-the-outcome-of-future-litigation-in-this-area (discussing a South Carolina couple's challenge to the state's same-sex marriage ban).

68. CAL. CONST. art. I, § 7.5 (2008).

69. *See In re* Marriage of Cases, 183 P.3d 384, 497 (Cal. 2008).

70. *Hollingsworth*, 133 S. Ct. at 2659.

71. *Id.* at 2660.

72. *Id.*

result.[73] The United States Supreme Court analyzed the issue of standing and determined that the ballot proponents had no standing pursuant to Article III. The Court then vacated the judgment of the Ninth Circuit and "remanded with instructions to dismiss the appeal for lack of jurisdiction."[74]

Both of these cases have significant impact in states such as California where same-sex marriage is recognized from both a state and federal benefits perspective. However, the determination of what benefits will be available from a federal perspective even where a state does not recognize marriage is an issue that remains to be resolved, although some regulations provide some guidance.[75] For instance, the IRS has issued a revenue ruling that upholds the extension of a full array of federal tax benefits to same-sex couples who are legally married, even if they are not domiciled in that state thereafter.[76] However, the same ruling specifically excludes, for federal tax benefit purposes, any lesser status than marriage.[77] Therefore, the question of the extension of other federal benefits to those with a lesser status in certain states, such as a "civil union," "domestic partnership," or "common law" marriage remains open ended, along with states that specifically prohibit same-sex marriages.[78]

III. FEDERAL BENEFITS LANDSCAPE

Marital status affects 1,138 federal benefits, rights, and obligations.[79] However, the application of the *Windsor* decision to the various regulations, statutes, and agency rules may vary widely, depending on the definition of validity used. For many federal agencies, a marriage is judged to be valid based either upon its lawfulness in the "place of celebration" or in the "place of domicile."[80] The "place of celebration" rule defines marriage as valid if the couple has a legal marriage license from any state, regardless of the law of the state in which they reside. In contrast, the "place of domicile" rule defines a marriage as valid only if it is recognized in the state where a couple lives. Additionally, some federal agencies look

73. *Id.*

74. *Id.* at 2668.

75. *See* REV. RUL. 2013–17, 2013–38 I.R.B. 201, I.R.S. (2013), http://www.irs.gov/pub/irs-irbs/irb13-38.pdf.

76. *Id.*

77. *Id.*

78. *Id.*

79. *An Overview of Federal Rights and Protections Granted to Married Couples*, HUMAN RIGHTS CAMPAIGN, http://www.hrc.org/resources/entry/an-overview-of-federal-rights-and-protections-granted-to-married-couples (last visited Sept. 20, 2013).

80. *See* United States v. Windsor, 133 S. Ct. 2675, 2708 (2013) (Roberts, C. J., dissenting).

to the state "with the most significant interest" in the marriage, while others have no explicit rule at all.[81] This lack of consistency among agency rules may result in a hodgepodge application of and entitlement to various federal benefits for same-sex couples.

President Obama has tasked the Department of Justice with ensuring that the *Windsor* decision is implemented "swiftly and smoothly" with respect to federal benefits.[82] On June 28, 2013, Attorney General Eric Holder issued a statement noting, "initial changes in federal benefits will make a meaningful, positive influence in the lives of many. But this is only the beginning."[83] In this process, the Department of Justice has a significant degree of influence, as once an interpretation has been decided on at an agency level, opponents of same-sex marriage would be hard pressed to show the actual injury necessary to challenge their application.

For most agencies, deciding how marriage will be reinterpreted will be a matter of reviewing (instead of interpreting) and amending agency rules. Federal agencies are generally given latitude to accomplish this internally. However, as we will see, the task is not quite so simple for several agencies, as definitional standards are set by statute and may not be subject to regulatory change.

Thus, it seems likely that it will take some time before universal application for same-sex couples is achieved for the purpose of federal benefits. These decisions could be effectuated on an ad hoc basis, through various amendments to rules or statutes guiding the various agencies, or could be solved holistically through a challenge to the remaining two sections of DOMA. As of the date of publication of this article, The Respect for Marriage Act is currently pending in Congress.[84] President Obama and a group of bipartisan members of Congress support the bill.[85]

---

81. *See* Lisa Rein & Steve Vogel, *Administration says it will press to provide marriage benefits in all states*, THE WASHINGTON POST (June 27, 2013), http://articles.washingtonpost.com/2013-06-27/politics/40233018_1_marriage-benefits-gay-couples-federal-benefits.

82. *Statement by the President on the Supreme Court Ruling on the Defense of Marriage Act*, WHITE HOUSE (June 26, 2013), http://www.whitehouse.gov/doma-statement.

83. *Statement of Attorney General Eric Holder on the Implementation of the Supreme Court's Decision in United States v. Windsor,* DEPT. OF JUSTICE (June 28, 2013), http://www.justice.gov/opa/pr/2013/June/13-ag-740.html.

84. H.R. 2523, 113th Cong. (2013); S.1236, 113th Cong. (2013).

85. *See* Chris Johnson, *No DOMA repeal bill until court decision*, WASHINGTON BLADE (May 1, 2013), http://www.washingtonblade.com/2013/05/01/no-doma-repeal-bill-until-after-court-ruling/; THE WHITE HOUSE BLOG, *President Obama Supports the Respect for Marriage Act*, THE WHITE HOUSE (July 19, 2011), http://www.whitehouse.gov/blog/2011/07/19/president-obama-supports-respect-marriage-act.

A. SOCIAL SECURITY BENEFITS

The Social Security Act of 1935[86] provides for many programs under its various titles. Title II provides for Old Age, Survivors, and Disability Insurance (OASDI) benefits, while Title XVI provides for Supplemental Security Income (SSI) benefits for older individuals and individuals with disabilities who do not have the requisite work credits to qualify for benefits under Title II.[87] Title III covers unemployment insurance, Title IV covers Temporary Assistance for Needy Families, and Titles XVIII and XIX cover Medicare and Medicaid, respectively.[88]

On June 27, 2013, the morning following the *Windsor* decision, the Social Security Administration issued an Emergency Message instructing all field office personnel to suspend any claims involving same-sex married partners and their children.[89] The staff was instructed to "advise callers that we are working with the Department of Justice to review the decision and how it impacts our programs—including benefits administered by this agency—to ensure that we implement the decision swiftly and smoothly."[90] However, it should be noted that the Social Security Administration limited its hold on these claims only to "same-sex married couples," rather than same-sex relationships without the benefit of marriage.[91]

Just before publication of this article, the Social Security Administration issued several updates to its procedural manual, known as the Program Operations Manual System ("POMS"), indicating that eligibility criteria have been established for certain same-sex couples.[92] Currently, eligibility can be established when the marriage is already valid in the state in which the "number holder," or the individual whose number is used for purposes of benefits eligibility, is domiciled as of the date of application.[93] Alternatively, if the individual is not domiciled in the state in which the marriage was validly performed, the couple must be residing in a

86. Social Security Act of 1935, Pub. L. 74-271, 29 Stat. 620 (1935).

87. *See* 42 U.S.C. §§ 202–234, 1382–1385 (2012).

88. *See* 42 U.S.C. §§ 501–505, 601–687, 1395–1395kkk1, 1396 –1396w5 (2012).

89. *Defense of Marriage Act (DOMA) Supreme Court Decision: Hold Claims Involving Same–Sex Married Couples* SOCIAL SECURITY ADMIN. (June 27, 2013), https://secure.ssa.gov/apps10/public/reference.nsf/links/07242013023550PM.

90. *Id.*

91. *Id.*

92. *Program Operations Manual System (POMS): GN 00210.000 Windsor Same-Sex Marriage Claims,* SOCIAL SECURITY ADMIN. (Aug. 9, 2013), http://policy.ssa.gov/poms.nsf/lnx/0200210000.

93. *Program Operations Manual System (POMS): GN 00210.100 Same-Sex Marriage – Benefits for Aged Spouses,* SOCIAL SECURITY ADMIN. (Sept. 17, 2013), http://policy.ssa.gov/poms.nsf/lnx/0200210100.

state that has recognized same-sex marriages that were validly performed in another state.[94] The POMS indicates which states these are, and the dates when each of these states recognized same-sex marriage within their borders, as well as in other states.[95] For all other claims involving same-sex couples that do not meet these two scenarios, however, Social Security personnel are instructed to hold the claims according to the instructions in the emergency memorandum.[96]

B. TITLE II BENEFITS

Benefits conferred under Title II, also known as OASDI benefits, provide monthly payments to elderly individuals and non-elderly individuals with disabilities who have earned enough credits through work to qualify to receive them. Once a person becomes entitled to OASDI benefits, eligibility extends to his or her dependents and survivors, the amount for which is based on the wage-earner's Primary Insurance Amount ("PIA"), or monthly payment amount. The PIA varies widely according to the past contributions paid by the wage earner through Social Security taxes on work activity.[97] The dependents that are authorized to collect on a wage-earner's record range from spouses,[98] dependent children,[99] widows or widowers,[100] to even divorced spouses,[101] and divorced widows,[102] provided they meet certain conditions. The amount these dependents are entitled to receive is an amount up to fifty percent of the wage-earner's benefit, if that amount is greater than the amount the dependent would be entitled to receive based on his or her own work history.[103] However, a

94. *Id.*

95. *Id.*

96. *Program Operations Manual System (POMS): GN 00210.005 Holding Claims, Appeals, and Post-Entitlement Actions Involving Same-Sex Marriages or Legal Same-Sex Relationships Other Than Marriage*, SOCIAL SECURITY ADMIN. (Aug. 23, 2013), http://policy.ssa.gov/poms.nsf/lnx/0200210005; *see also Program Operations Manual System (POMS): GN 00210.001 Windsor Same-Sex Marriage Claims—Introduction*, SOCIAL SECURITY ADMIN. (Sept. 6, 2013), http://policy.ssa.gov/poms.nsf/lnx/0200210001 (directing personnel to "[c]ontinue to hold any same-sex marriage claims for which instructions have not yet been issued, as set out in GN 00210.005").

97. *See* 20 C.F.R. § 404.204 (2013).

98. *See* 20 C.F.R. § 404.330 (2013).

99. *See* 20 C.F.R. § 404.350 (2013).

100. *See* 20 C.F.R. § 404.338 (2013).

101. *See* 20 C.F.R. § 404.331 (2013).

102. *See* 20 C.F.R. § 404.336 (2013).

103. *See, e.g.*, 20 C.F.R. § 404.333 (2013).

Family Maximum Benefit amount provides limits on the maximum amount dependents can receive on one wage-earner's record.[104]

Marital status will affect the eligibility to receive survivors and dependent benefits. For dependent and spousal benefits, Social Security uses a "state of domicile" test to determine eligibility at the time of application.[105] Thus, with a couple who was married validly in New York who applied for benefits while still living in New York, the spouse would be entitled to draw a check based on the primary wage-earner's PIA. Furthermore, the place of domicile is only a factor in the initial determination of eligibility, and not in the continuation of benefits.[106] Thus, if a married couple applied in New York and thereafter moved to Florida, which does not recognize same-sex marriage, those benefits would continue regardless of their new domicile.

Alternatively, eligibility for survivors and dependent benefits is based on either the "state of domicile" at time of death, or, if the marriage was not valid in the domiciliary state, benefits could inure to an individual who would be entitled to a spousal share under the intestacy laws of the state in which the decedent died.[107] Thus, to continue the above example, if the "number holder" thereafter dies in Florida, the spouse who was previously receiving spousal benefits would not be entitled to receive a survivor's benefit, as Florida's Constitution defines marriage as between one man and one woman,[108] and thus precludes spousal inheritance under its intestacy laws. It remains to be seen whether any changes to this policy will be made following the *Windsor* decision.

C. TITLE IV BENEFITS (TEMPORARY ASSISTANCE FOR NEEDY FAMILIES)

In 1996, President Clinton signed the Personal Responsibility and Work Opportunity Reconciliation Act,[109] which significantly altered the eligibility criteria under the previously controversial Aid to Families with Dependent Children program, established under Title IV of the Social Security Act. Temporary Assistance for Needy Families ("TANF") is a federally-funded program administered by the Office of Family Assistance that provides state grants for limited cash assistance for low-income parents

104. 20 C.F.R. § 404.403(a)(2) (2013).
105. *See* 42 U.S.C. § 416(h)(1)(A)(i)–(B)(i) (2012).
106. *Id.*
107. 42 U.S.C. § 416(h)(1)(A)(ii); *see also* 20 C.F.R. § 404.345 (2013).
108. FLA. CONST. art. I, § 27.
109. Personal Responsibility and Work Opportunity Reconciliation Act of 1996, Pub. L. No. 104–193, 110 Stat. 2178 (1996).

and their children.[110] While the federal government funds the program, the state governments are given wide latitude in determining how to implement and administer the program benefits.[111] Thus, each state has different rules for determining eligibility. Under most state laws, TANF can be available to pregnant women and legally-recognized parents and their children. Due to the restrictions imposed by the 1996 Act, these benefits have been limited to a 60-month maximum over a person's lifetime, and new requirements to find a job within 24 months have been placed on recipients.[112]

Marital status will likely have some effect on these benefits. While TANF does not distinguish between married and unmarried couples, there are differences for one-parent or two-parent families.[113] Because the criterion for TANF is set by the individual states, eligibility will generally follow the pattern of a "state of domicile" test. However, unlike other federal benefits, this may have a beneficial effect on same-sex couples who live in states hostile to same-sex marriage, since eligibility is based on the income of the household. Thus, same-sex couples in states that refuse to honor same-sex marriage will enjoy a benefit not conferred upon their heterosexual counterparts.

D. TITLE XVI BENEFITS (SUPPLEMENTAL SECURITY INCOME)

Supplemental Security Income (SSI) is a federal means-tested welfare program that extends benefits to individuals with disabilities and older individuals. Financial eligibility for benefits is contingent on the individual having low income and few resources. An individual's income is divided into the following four groups: Earned, Unearned, In-Kind Support and Maintenance ("ISM"), and Deemed Income.[114] The first three income categories refer to income earned by the individual him or herself.[115] On the other hand, the fourth category of "deemed income" is income that is imputed to the individual by nature of a relationship with another person.[116]

Deemed income will only apply in three such relationships: residential spouses, parents and minor children, and aliens and their

110. 42 U.S.C. § 601(a)(1) (2012).

111. *See, e.g.*, 42 U.S.C. § 604(a) (2012).

112. 42 U.S.C. § 608(a)(7)(A) (2012).

113. *See, e.g.*, 42 U.S.C. § 607(a) (2012) (stating different mandatory work requirements for one versus two-parent families). In states that do not recognize same-sex marriage, individuals will receive the benefit of one-person family requirements. *Id.*

114. *See* 20 C.F.R. § 416.1104 (2013).

115. *See* 20 C.F.R. § 416.1110 (2013); 20 C.F.R. § 416.1120 (2013).

116. *See* 20 C.F.R. § 416.1160(a) (2013).

sponsors.[117] This countable income from all four sources is then added together and measured against the maximum Federal Benefit Rate ($710 for 2013) to determine if the individual is entitled to any benefit under SSI.[118] There is deeming of assets as well as income.[119] The asset limit, with several exceptions, is $2,000 for an individual applying for SSI, or $3,000 for a couple.[120]

The Social Security Act defines a marital relationship for SSI recipients. "Appropriate state law" is applied in determining whether a couple is married, making the determination dependent on "state of domicile."[121] The Act also requires that if a man and woman are found to be "holding out," or presenting themselves in the community as husband and wife, that they will be considered married for the purposes of SSI eligibility.[122]

Clarity must be established as a result of the statutory codification of marriage as between "a man and a woman." However, further complication arises from the definition of "holding out."[123] Prior to *Windsor*, a same-sex couple who was "holding out" as married in the community could not be denied SSI benefits because of this, as the Act specifically limited its application to unrelated persons of the opposite sex.[124] It remains to be seen how this conflict will be resolved in the period post-*Windsor* decision.

Prior to the *Windsor* decision, the refusal of the federal government to honor same-sex marriages actually had a beneficial effect on impoverished same-sex couples applying for SSI benefits, as they were consistently able to avoid the deeming of their partner's income and assets to them for purposes of eligibility. Unlike the application of state laws for the purposes of OASDI benefits, these "state of domicile" rules will work in favor of same-sex couples living in states that are hostile to same-sex marriage. Furthermore, unlike Title II benefits, which only measure eligibility at time of application, SSI eligibility is measured on a month-to-month basis, and

117. *Id.*

118. *See, e.g.*, 20 C.F.R. § 416.1163(d)(1) (2013).

119. *See, e.g.*, 20 C.F.R. § 416.1203 (2013).

120. *See* 20 C.F.R. § 416.1205 (2013).

121. 42 U.S.C. § 1382c(3)(d) (2012).

122. 42 U.S.C. § 1382c(3)(d)(2).

123. *See, e.g., id.*; 20 C.F.R. § 416.1826(c) (2013); *see also Program Operations Manual System (POMS): SI 00501.152 Determining Whether a Man and Woman Are Holding Themselves Out as Husband and Wife,* SOCIAL SECURITY ADMIN. , (May 25, 2012), https://secure.ssa.gov/apps10/poms.nsf/lnx/0500501152 [hereinafter *SSA Definition of "Holding Out"].*

124. *See* 42 U.S.C. § 1382c(3)(d); 20 C.F.R. § 416.1826(c); *see also SSA Definition of "Holding Out," supra* note 123.

will not continue if a couple moves into a state in which eligibility criteria changes.

For example, if a New York man in a same-sex marriage applies for SSI benefits, he will have his partner's income and assets deemed to him, and will likely be denied benefits unless his partner is also impoverished. However, if the couple were to move to Florida and reapply for these benefits, the man would likely be awarded SSI benefits, presuming he met other eligibility criteria, as deeming would not apply in Florida, a state that does not recognize the validity of their marriage.

E. TITLE XVIII BENEFITS (MEDICARE)

Medicare is a federal health insurance program designed to assist the elderly and individuals with disabilities with the costs of health care.[125] Eligibility for these benefits can be affected by age, work history, health status, and income. Medicare is administered by the Centers for Medicare and Medicaid Services ("CMS"). Although no guidance has been issued on the vast majority of spousal benefits available under Medicare, CMS issued its first official guidance regarding the implementation of the *Windsor* decision on August 29, 2013, directed to all Medicare Advantage Organizations.[126] The memorandum indicated that, effective immediately, all Medicare Advantage organizations "must cover services in a skilled nursing facility (SNF) in which a validly married same sex spouse resides to the extent that they would be required to cover the services if an opposite sex spouse resided in the SNF."[127] This was a monumental change for same-sex spouses who were forced to either disenroll from their Medicare Advantage plan and privately pay to remain close to their loved one, or forced to live at a separate facility, often with no means of going to see their spouse.

Medicare has four major components, or parts.[128] Part A includes hospital insurance, which covers inpatient care at hospitals, as well as some home health, hospice, and skilled nursing care.[129] Part B includes medical insurance, and covers outpatient services like doctor's visits medical

125. *See* 42 U.S.C. §§ 1395c–1395k (2012).

126. Letter from Danielle R. Moon, Dir. Medicare Drug & Health Plan Contract Admin. Grp., Ctrs. for Medicare & Medicaid Servs., Dep't. of Health & Human Servs., to All Medicare Advantage Organizations (Aug. 29, 2013), http://www.cms.gov/Medicare/Health-Plans/HealthPlansGenInfo/Downloads/HPMS_Memo_US_vs_Windsor_Aug13.pdf.

127. *Id.*

128. *Id.*

129. 42 U.S.C. §§ 1395c–1395i–5 (2012).

supplies and outpatient care.[130] Part C are the Medicare Advantage Plans, which are private plans that contract with Medicare to provide regular Part A, Part B, and usually Part D benefits.[131] Part D covers prescription drugs.[132]

Although most individuals who qualify for Medicare receive it because they have attained the age of sixty-five, some aspects of program entitlement do hinge on work history, health status, income, and marital status.[133] The definition of spouse for purposes of Medicare benefits is tied to that of OASDI benefits, and thus defined by the "state of domicile" at time of application.[134]

Ordinarily, for a person to receive Part A benefits without paying a premium, he or she must have paid Social Security and Medicare payroll taxes while working for forty quarters, or ten years.[135] However, if a person lacks the requisite credits established by their own work history, he or she may look to those of their spouse to establish eligibility without having to pay a monthly premium.[136] Although it seems clear that, going forward, same-sex couples living in a same-sex marriage state will be entitled to a reduced or eliminated premium for Part A, it is yet to be determined whether those couples will also be entitled to a rebate for any past premiums paid. Social Security law allows equitable relief for individuals whose coverage or enrollment rights have been "prejudiced because of the error, misrepresentation, or inaction of an employee or agent of the Government," which includes special enrollment periods and a refund of improper premiums paid.[137] However, it remains to be seen whether this equitable relief will be applied to spouses who would have been entitled to this benefit but for the existence of DOMA.

There are additional spousal benefits that inure due to marital status under Part B. Under normal circumstances, an individual is required to enroll in Part B as soon as he or she reaches the age of sixty-five.[138] Failure to do so results in a ten percent penalty for each year past the required

130. 42 U.S.C. §§ 1395j–1395w–5 (2012).
131. 42 U.S.C. §§ 1395w–21–1395w–29 (2012).
132. 42 U.S.C. §§ 1395w–101–1395w–154 (2012).
133. 42 U.S.C. § 1395c (2012); *see also* 42 U.S.C §§ 426, 426–1 (2012).
134. *See* 42 U.S.C. § 416 (2013); 42 U.S.C. § 1395c.
135. 42 U.S.C. § 414(a) (2012).
136. 42 U.S.C.§ 402(b)–(c) (2012).
137. *Program Operations Manual System (POMS): HI 00805.170 Conditions for Providing Equitable Relief*, SOCIAL SECURITY ADMIN (Mar. 9, 2011), https://secure.ssa.gov/poms.nsf/lnx/0600805170.
138. 42 U.S.C. §§ 1395o–1395p (2012).

age.[139] There are limited exceptions, however, to the enrollment requirement for individuals who are working and remain on their employers' health plan.[140] Spouses who also remain on an employer-provided health care plan are also eligible to defer the election for Part B without penalty.[141] However, eligibility for Part B deferment is not available for individuals who are receiving employer-provided health coverage as a result of a domestic partnership, as they must be considered "spouses" as defined by the Social Security Act.[142]

Similarly, a spouse who is covered under an employer's plan may also defer enrollment in Part D without penalty, as long as the employer's plan is "creditable," or covers at least as much as the federal plan.[143] Unlike the requirements for Part B deferment, creditable plans can include retirement and COBRA health coverage.[144]

On a final note, there are programs such as the federal Extra Help program, which assists in the payment of Medicare deductibles or premiums.[145] Eligibility for these programs may be affected by marital status. To qualify for Extra Help, the spousal resource limits are lower than if the couple were to apply individually. Additionally, there are a number of state-administered Medicare savings programs, which are too varied in scope and requirements to be completely reviewed for the purposes of this article. Most of these programs also have different income and resource limits for individuals than for spouses, and thus, poor same-sex couples living in same-sex marriage states may be disadvantaged due to the passage of DOMA.

F. TITLE XIX BENEFITS (MEDICAID)

Medicaid is a hybrid program that is supported by both federal and state funds, but solely administered by the states.[146] Each state must follow certain criteria to be eligible for federal funding, but can otherwise

139. 42 U.S.C. § 1395r(b) (2012).
140. 42 U.S.C. § 1395p(i).
141. *Id.*
142. *See id.*
143. *Id.*
144. 42 U.S.C. §1395w–113(b)(4)(2012).
145. *See generally* SOCIAL SECURITY ADMINISTRATION, WHAT YOU NEED TO KNOW ABOUT EXTRA HELP WITH MEDICARE PRESCRIPTION DRUG PLAN COSTS (2013), http://www.socialsecurity.gov/medicareoutreach2/StateManual.pdf (describing the criteria and qualifications of Extra Help).
146. *See Financing & Reimbursement*, MEDICAID, http://www.medicaid.gov/Medicaid-CHIP-Program-Information/By-Topics/Financing-and-Reimbursement/Financing-and-Reimbursement.html (last visited Oct. 2, 2013).

determine their own rules regarding benefit eligibility. Medicaid programs vary widely, but it is this program which generally provides benefits to low-income people for things like long term care in a skilled nursing or assisted living facility, pre-natal care for pregnant women, or basic medical insurance for children, their parents, and older individuals or individuals with disabilities.

In 2014, these categories of eligible individuals may greatly expand in many states due to the Affordable Care Act,[147] which requires states to make available low-cost or free health care for all low-income people, regardless of disability or familial status.[148] Premium support and subsidies, as well as tax credits, will be available for low-income individuals in order to purchase health insurance on the state-run health exchanges. Eligibility for these forms of assistance will use the Modified Adjusted Gross Income (MAGI) reported on an individual's federal tax return, and for which pooling of joint income is unavoidable if a couple marries. Hence, one's marital status will also affect eligibility for these benefits.

Because states administer their own Medicaid programs through a "state of domicile" rule, entitlement to benefits will hinge upon where the couple lives. However, whether this will be an advantage or a disadvantage to those couples depends a great deal on the type of benefits the individual will be applying for.[149]

Individuals applying for regular "community" Medicaid benefits, will likely experience a disadvantage if they are living in a state that recognizes their marriages as valid because their partners' income and resources will determine eligibility.

On the other hand, for older same-sex couples applying for long term or nursing care benefits through Medicaid programs, the result will likely go in their favor. In order to be eligible for long term care coverage through the Medicaid program, individuals are required to meet both the income limit and asset limit tests. For married couples, these tests may include both spouses' income and resources in these determinations. When one spouse must enter a nursing home and the other spouse remains

147. Patient Protection and Affordable Care Act, Pub. L. 111-148, 124 Stat. 119 (2010); *see Nat'l Fed'n of Indep. Bus. v. Sebelius*, 132 S. Ct. 2566, 2575 (2012) (explaining that the original purpose of the Affordable Care Act was intended to cover the medical expenses of vulnerable individuals).

148. *See id.*

149. *See, e.g.*, *Medicaid State Plan Under Title XIX of the Social Security Act Medical Assistance Program*, FLA. AGENCY FOR HEALTH CARE ADMIN., http://ahca.myflorida.com/medicaid/stateplan.shtml (last visited Oct. 2, 2013).

healthy, largely, fear looms of the necessity of the healthy spouse to be impoverished in order for Medicaid to provide assistance with the cost of care for the sick spouse.

Most states have dealt with this issue by creating certain exceptions to the income and asset limitations for spouses that remain in the community, which includes a greater amount that the community spouse is allowed to keep in resources, as well as a portion of the sick spouse's income, which can be diverted to them rather than being required to be paid to the facility.[150] Additionally, many planning techniques traditionally used by Elder Law attorneys assisting clients with obtaining Medicaid benefits, such as unlimited interspousal transfers and spousal refusal, in which the well spouse refuses to pay for any of the sick spouse's care, are only available for validly married couples.[151]

Until the *Windsor* decision, same-sex couples faced a much greater risk of becoming impoverished due to one spouse needing long term care. Additionally, studies have shown that same-sex couples have an increased risk of needing long term care than those living with opposite-sex partners.[152]

Without the benefits of applying for Medicaid as a couple and the ability to transfer funds from the sick spouse to the well spouse without penalty, same-sex couples lived with the fear that their homes and retirement savings would vanish, as well as their ability to live together at a facility, where unmarried couples are generally barred from staying together in the same room. Same-sex couples with a wide disparity in income and resources feel the effects of being denied marital recognition particularly acutely.

On June 10, 2011, the Centers for Medicare and Medicaid Services ("CMS") sent a letter to State Medicaid Directors directing the use of hardship waivers to keep the well spouse in the home and prevent a forced sale of the property.[153] The letter also encouraged broad use of the hardship waiver to protect the house from estate recovery claims and transfer penalties.[154] Unfortunately, most states have still not decided whether to afford those benefits to domestic partners. However, following the

150. *See* 42 U.S.C. § 1396r–5 (2012).

151. *See* Scott M. Solkoff, *Spousal Refusal: Preserving Family Savings by "Just Saying No" to Long-Term Care Impoverishment*, 2 MARQ. ELDER'S ADVISOR 25, 25–27 (2001).

152. Bridget Hiedemann & Lisa Brodoff, *Increased Risks of Needing Long-Term Care Among Older Adults Living With Same-Sex Partners*, 103 AM. J. PUB. HEALTH 27, 30 (2013).

153. *See* Letter from Cindy Mann, Dir., Ctrs. for Medicare & Medicaid Servs., to State Medicaid Dirs. (June 10, 2011), http://www.cms.gov/smdl/downloads/SMD11-006.pdf.

154. *Id.*

Windsor decision, further guidance from CMS is expected in reference to spousal protections for Medicaid benefits.

G. MILITARY BENEFITS

Spouses of active duty servicemen and women, as well as retired veterans, are entitled to receive certain benefits as a result of their status. For active duty service members, a large portion of their total compensation comes in the form of allowances and in-kind benefits, which are increased if the service member is married.[155] However, benefits for veterans and active duty service members are administered by different agencies. Generally, the rules and regulations governing active duty service members (as well as government civilians) are administered by the Department of Defense ("DOD"), whereas those governing veterans' benefits are administered by the Department of Veterans Affairs ("VA").

H. ACTIVE DUTY BENEFITS

Prior to the *Windsor* decision, on February 11, 2013, former Secretary of Defense Leon Panetta issued a Memorandum extending some twenty member-designated benefits and twenty-two additional benefits to same-sex domestic partners, provided that they sign a Declaration of Domestic Partnership.[156] The Memorandum highlighted the DOD's desire to have these benefits implemented no later than October 1, 2013, and expressed disappointment that DOMA prohibited the Department from extending the highly valuable spousal health care and housing benefits to same-sex couples as well.[157] The Memorandum stated that, should DOMA be found unconstitutional, "it will be the policy of the Department to construe the words 'spouse' and 'marriage' without regard to sexual orientation, and married couples, irrespective of sexual orientation, and their dependents, will be granted full military benefits."[158] This presents the clearest directive received from any agency to date.

Accordingly, the repeal of Section 3 of DOMA opened the door for the Department to offer now those benefits to its same-sex couples as well. On June 26, 2013, current Secretary of Defense, Chuck Hagel, announced

155. *See, e.g.*, *Military Benefits At a Glance*, MILITARY.COM, http://www.military.com/join-armed-forces/military-benefits-overview.html (last visited Dec. 11, 2013).

156. Memorandum from Leon Panetta, U.S. Sec'y of Def., on Extending Benefits to Same-Sex Domestic Partners of Military Members (Feb. 11, 2013), http://www.defense.gov/news/Same-SexBenefitsMemo.pdf.

157. *Id.*

158. *Id.*

that the DOD "will immediately begin the process of implementing the Supreme Court's decision . . . ."[159] On August 14, 2013, the Department of Defense issued a press release stating that benefits for same-sex military couples and Department of Defense civilian employees would begin by September 3, 2013.[160] Furthermore, entitlements such as health care, basic housing, and family separation allowances would be retroactive to the date of the *Windsor* decision.[161]

Active duty service men and women generally do not have to produce anything other than a valid marriage certificate in order to access spousal benefits, and thus benefits mirror a "state of celebration" rule.[162] There are close to one hundred spousal benefits available to active duty service members, including Tricare medical insurance coverage, dependent housing allowances, access to military installations and facilities, command-sponsored visas, as well as in-state tuition rate guarantees, education benefits and a family separation allowance.[163] Notably, active duty service members who are married to each other enjoy the ability to be assigned to the same military institution.[164] This crucial benefit will now be available to same-sex couples. Additionally, same-sex couples with children may now also take advantage of the rule that only one spouse will be deployed at a time in a family with children.[165] Arguably, it is these non-monetary benefits that mean the most to our service members.

I. VETERAN'S BENEFITS

Benefits available to veterans are varied and many. Veterans' spouses are potentially eligible for benefits, such as death indemnity compensation for survivors, medical care through Tricare, military base privileges, post-9/11 educational benefits, as well as increased pay for

159. Amanda Terkelaterkel, *U.S. vs. Windsor: Chuck Hagel Says Same-Sex Military Spouses Will Now Get Equal Benefits*, THE HUFFINGTON POST (June 26, 2013, 2:33 PM), http://www.huffingtonpost.com/2013/06/26/us-vs-windsor_n_3454908.html.

160. *DOD Announces Same Sex Spouse Benefits,* UNITED STATES DEP'T OF DEF., (Aug. 14, 2013) http://www.defense.gov/releases/release.aspx?releaseid=16203.

161. *Id.*

162. *See Application for Identification Card/DEERS Enrollment DD Form 1172-2*, UNITED STATES DEP'T OF DEF. (Apr. 2012), http://www.cac.mil/docs/dd1172-2.pdf.

163. *List of Statutory Sections that Provide a Benefit or Support to Military Spouses in the United States*, OUTSERVE–SLDN, http://sldn.3cdn.net/e880f0688a6116ca66_0wm6bna2a.pdf (last updated Feb. 11, 2013) (listing benefits compiled by OutServe–SLDN, a national organization devoted to LGBTQ individuals in the military).

164. *Id.*

165. *Id.*

married veterans collecting service-connected disability compensation and non-service connected pensions.[166]

Unfortunately, the landscape for veteran's benefits is less clear than it is for active duty benefits. Veteran's benefits are governed by federal law codified in Title 38 of the United States Code, which defines a spouse as "a person of the opposite sex who is a wife or husband."[167] A similar definition exists for "surviving spouse."[168] On August 14, 2013 the Secretary of Veterans Affairs Eric Shinseki, wrote a letter to Senator Jeanne Shaheen, D-N.H., who is co-sponsoring the Charlie Morgan Military Spouses Equal Treatment Act, which proposes an amendment to these definitions under the code.[169] In his letter, Shinseki confirms that the code does not currently authorize benefits to extend to same-sex couples, and that should the spousal definitions be revised or determined to be unconstitutional, the VA is "prepared to update its policies and systems in a timely manner . . . ."[170]

On August 29, 2013, a district court in California granted summary judgment to a plaintiff who brought suit against the Department of Veterans Affairs as a result of the denial of spousal health benefits for her same-sex spouse. The federal judge held that the offending sections of Title 38 were unconstitutional and enjoined the VA from refusing benefits on the basis of Title 38.[171] Following this decision, the Department of Justice, at the request of the Obama Administration, wrote a letter to Congress informing the Speaker that President Obama had directed the

166. *See generally* 38 C.F.R. §§ 1.9–1.1000 (2013) (listing the administrative rules governing veterans' benefits).

167. 38 U.S.C. § 101(31) (2012).

168. 38 U.S.C. § 101(3).

> The term "surviving spouse" means (except for purposes of chapter 19 of this title) a person of the opposite sex who was the spouse of a veteran at the time of the veteran's death, and who lived with the veteran continuously from the date of marriage to the date of the veteran's death (except where there was a separation which was due to the misconduct of, or procured by, the veteran without the fault of the spouse) and who has not remarried or (in cases not involving remarriage) has not since the death of the veteran, and after September 19, 1962, lived with another person and held himself or herself out openly to the public to be the spouse of such other person.

Id.

169. *See* Charlie Morgan Military Spouses Equal Treatment Act of 2013, S. 373, 113th Cong. (2013) (enacted), *available at* http://beta.congress.gov/bill/113th/senate-bill/373/titles; Letter from Eric K. Shinseki, Sec'y, Veteran Affairs, to Sen. Jeanne Shaheen (Aug. 14, 2013), *available at* http://www.shaheen.senate.gov/download/?id=0C96ABCE-657F-4056-A3E0-E61867F4D857.

170. Letter from Eric Shineseki to Sen. Jeanne Shaheen, *supra* note 169.

171. *See* Chris Johnson, *Court rules against law barring gay couples from veterans benefits*, WASHINGTON BLADE (Aug. 30, 2013), http://www.washingtonblade.com/2013/08/30/court-rules-law-barring-veterans-gay-couples/.

Executive Branch to cease enforcement of Sections 101(3) and 101(31) of Title 38.[172]

More problematic for the application of veteran's benefits to same-sex couples is the definition of marriage validity, which states that a marriage is "valid under the law of the place where the parties resided at the time of the marriage, or the law of the place where the parties resided when the right to benefits accrued."[173] Therefore, if a same-sex couple is married in New York but resided in Florida at the time of the union, then under the first prong test the marriage would not confer any additional benefits. However, if that same couple later retired to New York and applied for veteran's non-service connected pension benefits, it would stand to reason that the second prong test could apply, and the couple would be eligible to receive the pension benefits. It remains to be seen whether the VA will interpret application of its benefits afforded to same-sex couples to cross state lines, even when the states themselves do not recognize the marriage.

J. FEDERAL AND NON-FEDERAL EMPLOYEES' BENEFITS

Perhaps one of the more clear-cut changes in the benefits landscape following the *Windsor* decision will be to the benefits available to federal employees and their spouses. On June 28, 2013, the Federal Office of Personnel Management ("OPM"), which administers the benefit programs for federal employees, released a Memorandum for Heads of Executive Departments and Agencies.[174] The memorandum outlined information concerning timing and deadlines to apply for certain spousal benefits conferred under the Federal Employee Health Benefits ("FEHB") package.[175] These included benefits previously reserved for opposite-sex partners only, such as life insurance, health insurance, dental and vision insurance, and long term care insurance. However, in a later memorandum, OPM clarified that these benefits would only be available to same-sex partners in a valid marriage, and not to those in a domestic partnership.[176]

---

172. Letter from Eric H. Holder, Att'y Gen. to John. A. Boehner, Speaker, United States House of Representatives (Sept. 4, 2013), http://www.justice.gov/iso/opa/resources/55720139415 1530910116.pdf.

173. 38 C.F.R. § 3.1(j) (2013).

174. *See* Memorandum from Elaine Kaplan, Acting Dir., U.S. Office of Personnel Mgmt., to Heads of Exec. Dep'ts and Agencies (June 28, 2013), *available at* http://www.chcoc.gov/transmittals/TransmittalDetails.aspx?TransmittalID=5700.

175. *Id.*

176. *See* Letter from John O'Brien, Dir. for Healthcare and Ins., Office of Personnel Mgmt., (July 17, 2013), http://www.opm.gov/retirement-services/publications-forms/benefits-administrat

Federal employees in a same-sex marriage are now also entitled under the Federal Family and Medical Leave Act of 1993 (FMLA) to take up to twelve weeks of unpaid leave in a twelve-month period to care for a spouse or arrange a spouse's funeral. [177] They are also entitled to up to twenty-six weeks of unpaid leave to care for a spouse who has been injured in the line of duty while on active duty.[178]

For private employers governed by the Employee Retirement Income Security Act of 1974[179] ("ERISA"), certain benefits for same-sex spouses of employees will be mandated regardless of state of residency. The Employee Benefits Security Administration ("EBSA") released guidance indicating that the terms "spouse" and "marriage" in Title I of ERISA and related regulations should be read to include same-sex couples validly married in any state, regardless of whether their residential state recognizes their marriage.[180] The only exception to the application of benefits regardless of state of residence concerns benefits under the Family and Medical Leave Act ("FMLA"). The U.S. Department of Labor recently clarified that same-sex spouses are covered by the FMLA only to the extent that an employee's marriage is valid in the state in which the employee resides.[181] This is consistent with existing statutory language which defines "spouse" according to the laws of the state in which the employee resides.[182] However, a recent statement by Labor Secretary Tom Perez to the staff of the Department of Labor ("DOL") hints at the possibility that the DOL will take additional steps to implement the Windsor decision "in a way that provides the maximum protection for workers and their

---

ion-letters/2013/13-203.pdf.

177. *See* The Family and Medical Leave Act of 1993, Pub. L. 103-3, 107 Stat. 6 (1993); Memorandum from Elaine Kaplan, Acting Dir., U.S. Office of Personnel Mgmt., to Heads of Exec. Dep'ts and Agencies (Oct. 21, 2013), *available at* http://cpol.army.mil/library/benefits/ssmc/20131021-OPM-FMLA.pdf (directing OPM departments and agencies to discontinue use of the definition of spouse which ties recognition to the employee's state of residency, and implementing FMLA benefits for all employees in valid marriages regardless of residency).

178. *See* 29 U.S.C. § 2612(a) (2012).

179. Employee Retirement Income Security Act, Pub. L. 93-406, 88 Stat. 829 (codified at 29 U.S.C. §§ 1001–1461).

180. *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*, UNITED STATES DEP'T OF LABOR (Sept. 18, 2013), http://www.dol.gov/ebsa/newsroom/tr13-04.html

181. U.S. DEP'T OF LABOR, WAGE & HOUR DIV., FACT SHEET # 28F: QUALIFYING REASONS FOR LEAVE UNDER THE FAMILY AND MEDICAL LEAVE ACT (2013), http://www.dol.gov/whd/regs/compliance/whdfs28f.pdf.

182. 29 C.F.R. §§ 825.102, 825.122(a) (2013); *see also* U.S. DEP'T OF LABOR, FIELD OPERATIONS HANDBOOK 39d03-2 (2013), http://www.dol.gov/whd/FOH/FOH_Ch39.pdf.

families."[183] However, care should be taken to remember that for purposes of non-mandated spousal benefits not covered by ERISA, private employers may still refuse to extend benefits to same-sex spouses.

Additionally, there are several benefits that are available to spouses of retired federal employees through either the Civil Service Retirement System ("CSRS") or the Federal Employees Retirement System ("FERS"). These benefits include a death benefit, survivor annuity, and lump sum payment. According to the OPM memorandum released on June 28, 2013, federal employees and retirees will now have a sixty day open period of enrollment to add their spouse to their health insurance, dental and vision insurance, long term care insurance, and life insurance coverage.[184] This includes coverage for children of same-sex spouses as well as step-children.[185] Additionally, federal retirees will have two years, or until June 26, 2015, to add their same-sex spouse's name to their federal pension, while those who have not yet retired would be eligible for survivor annuities.[186]

However, some uncertainty surrounds the availability of these benefits for spouses of same-sex couples who live in states that do not recognize their marriage. This is because existing federal regulations applying to both FERS and CSRS define marriage as a "marriage recognized in law or equity under the whole law of the jurisdiction with the most significant interest in the marital status of the employee . . . or retiree . . . ."[187]

Precedent from OPM and courts have generally considered the state with the most significant interest to be the state where (1) the couple either spent most of their time while the employee was working; (2) the couple retired; and/or (3) the couple resided at the time of the employee's death. This could result in employees who may have been validly married in one state, but who spent most of their time in another state that did not recognize their marriage, as being disqualified from receiving the protections offered spouses under these regulations. However, because these definitions are codified in regulations rather than statues, the federal government may choose to simply amend the regulations to clarify that

183. Pamela Wolf, *Labor Secretary tells staff to implement Supreme Court's DOMA decision*, EMPLOYMENTLAWDAILY.COM, http://www.employmentlawdaily.com/index.php/news/labor-secretary-tells-staff-to-implement-supreme-court-doma-decision/ (last visited Dec. 11, 2013).

184. Memorandum from Elaine Kaplan to Heads of Exec. Dep'ts and Agencies, *supra* note 174.

185. *Id.*

186. *Id.*

187. 5 C.F.R. § 831.603 (2013); 5 C.F.R. § 843.102 (2013).

same-sex couples who entered into valid marriages would be entitled to benefit from the presumption of marriage, even if they spent the majority of time in a non-marriage state.

IV. SPECIAL ESTATE AND TAX PLANNING CONSIDERATIONS FOR THE AGING LGBT POPULATION

The *Windsor* decision will have a far-reaching impact on federal benefits, federal income, and estate and gift tax planning. In addition, there are potential planning issues from a state perspective, depending on the recognition of marriage in a given state. These issues include, but are not limited to, advance directives, domestic partnership agreements, state income tax planning, retirement planning and more. The practitioner, however, must first understand the client and his or her needs.

Therapeutic Jurisprudence and Preventative Law begins by first looking at the characteristics of the clients.[188] With aging LGBT clients, particular issues are brought to the forefront because they encompass two groups of individuals where discrimination is rampant: the aging population and the LGBT community. This article will focus on couples who are in committed relationships, some married and others contemplating marriage based upon a myriad of factors. In general, older individuals face different health, hearing, and visual issues, or have physical impairments, along with higher instances of disease. Recently, a comprehensive study was performed on the Aging and Health related issues of the LGBT community.[189] This study clearly shows that there is a higher incidence of disability and depression[190] in the aging LGBT population, along with a higher incidence of living alone and a fear of discrimination.[191] Learning how to approach these clients and making them feel comfortable sharing their personal life circumstances is a major factor in preventing future issues from a planning perspective.

A. FEDERAL V. STATE LEGAL ASPECTS TO CONSIDER AFTER *WINDSOR*

In order to understand the ramifications of planning that is dependent upon federal or state application based on state "marriage" recognition it is important that the applicable rules are reviewed:

188. *See* Cidney E. Faulkner, *Therapeutic Jurisprudence and Preventative Law in the Thomas M. Cooley Sixty Plus, Inc., Elder Law Clinic*, 17 ST. THOMAS L. REV. 685, 685 (2005).

189. *See* FREDRIKSEN-GOLDSEN, *supra*, note 6, at 2.

190. *See id.* at 9.

191. *Id.* at 53–53.

1. Federal Taxation[192]

(a) Unlimited Marital Deduction[193] - amounts transferred from one spouse to another spouse, whether during lifetime or at death, are exempt from gift tax and/or estate tax;

(b) Federal Estate Tax Exemption (exclusion amount)[194] - currently the amount that one can pass estate tax free is $5,250,000;[195] and,

(c) Portability[196] - if the deceased spouse does not use his or her full federal estate tax exclusion, the surviving spouse can elect to preserve the unused exclusion amount upon his or her death.[197] This election must be made by the executor of the deceased spouse on the estate tax return.[198]

2. State Considerations (New York v. Florida)

(a) State Estate Tax - New York has a state estate tax[199] with a current amount of $1,000,000; whereas FL does not have a state estate tax;

(b) Elective Share Statutes[200] - New York[201] and Florida[202] have similar elective share statutes that provide the surviving spouse a right to elect against the deceased spouse's estate. In New York, a surviving spouse has the right to one-third of the deceased spouse's estate. In Florida, the surviving spouse has a right to 30 percent of the deceased spouse's estate;

(c) Tenancy by the Entirety[203] - special titling of personal and real property for spouses that has some creditor protection benefits available in by New York[204] and Florida;[205]

---

192. *See* REV. RUL. 2013–17, 2013–38 I.R.B. 201, I.R.S. (2013), http://www.irs.gov/pub/irs-irbs/irb13-38.pdf. Ruling 2013-17 has extended these benefits to lawfully married same-sex couples no matter the domicile. *Id.* The same cannot be said for a lesser status of "civil union," "domestic partnership," or "common law marriage." *Id.*

193. *See* 26 U.S.C. § 2010(c) (2012); 26 U.S.C. § 2523(f)(5) (2012).

194. *See* 26 U.S.C. § 2010(c)(3)(A); REV. PROC. 2013–15, 2013–5 I.R.B. 444 (2013).

195. REV. PROC. 2013–15, 2013–5 I.R.B. 444.

196. 26 U.S.C. § 2010(c)(4)–(5).

197. *Id.*

198. *Id.*

199. N.Y. TAX LAW § 952 (McKinney 2013).

200. FLA. STAT. § 732.201 (2013); N.Y. EST. POWERS & TRUSTS LAW § 5–1.1–A (McKinney 2013).

201. N.Y. EST. POWERS & TRUSTS LAW § 5–1.1–A (McKinney 2013).

202. FLA. STAT. §§ 732.201–732.2135 (2013); *See* FLA. STAT. § 732.2065 (2013) ("The elective share is an amount equal to 30 percent of the elective estate.").

203. FLA. STAT. § 689.15 (2013); N.Y. EST. POWERS & TRUSTS LAW § 6–2.2 (McKinney 2013).

204. EST. POWERS & TRUSTS § 6–2.2.

205. § 689.15.

> **(d) Intestate Succession**[206] - legal determination of distribution of estate assets when no testamentary distribution has been provided either in a trust or will. Both New York[207] and Florida[208] have intestate succession laws that are favorable to spouses, and all intestate laws relate to relatives by marriage, blood, or adoption.

B. A TALE OF TWO STATES: NEW YORK V. FLORIDA

Assume an individual named John, age 70, discloses to his attorney that he was married to a woman, has been divorced for several years, and is now in a committed same-sex relationship with Eric. The couple lives in Florida but may move to New York to get married because of the *Windsor* decision. John has two adult children but they do not know about his relationship with Eric or their possible plan to move to New York. John has a good relationship with his children, but is fearful of how they might react to his lifestyle and possible marriage. John has significant wealth (over $10 million, with the majority in real estate holdings and 20% in liquid assets), but Eric does not. Currently, neither John nor Eric have planning documents, as neither one of them expected the *Windsor* decision to be favorable to their circumstances. John wants to provide for Eric, but also wants to provide for his children and grandchildren. John also wants Eric to make health care decisions for him should the need arise as he and his children do not see eye to eye on end-of-life decision making.

C. A TALE OF TWO STATES: ANALYSIS - FLORIDA V. NEW YORK

In 2008, Florida passed a constitutional amendment that banned same-sex marriages.[209] This amendment complicates matters on several levels for John and Eric if they choose to stay in Florida, especially with respect to tax planning. If John and Eric remain in Florida, John must put certain plans in place if he wants to carry out his intentions. Therefore, it may be prudent to counsel John that he should disclose his lifestyle to his family as it will give John peace of mind, but also promote future family harmony amongst his children and Eric.

First and foremost, John should execute advance directive documents to protect him during periods of incapacity. Advance directive documents

206. FLA. STAT. § 732.102 (2013); N.Y. EST. POWERS & TRUSTS LAW § 4–1.1 (McKinney 2013).
207. EST. POWERS & TRUSTS § 4–1.1.
208. § 732.102.
209. FLA. CONST. art. I, § 27.

include Revocable Trusts,[210] and documents that identify a person or persons to serve as a Health Care Surrogate,[211] Pre-Need Guardian,[212] and Power of Attorney for Property.[213] It is important for a client to share the information with his family in the health care decision arena as it will alleviate a problem between the children and John ahead of time rather than in an emergency situation where the children may not want to recognize their father's wishes, or may want to follow a different course of action than Eric. Under these circumstances, John would designate Eric as the Health Care Surrogate. In this role, Eric would be the individual to make these decisions based upon John's directives regarding end-of-life decision making. The Health Care Surrogate document should have John's wishes spelled out so there is no question as to his intentions; in other words, more than a form due to the circumstances.

All of these documents plan for incapacity from both a property perspective and from a personal/medical perspective. Notably, John and Eric do not have to be married to act in the role of a surrogate, guardian (if designated in a pre-need, a preference will likely go to the designated party rather than other lines of preference),[214] power of attorney, or trustee. If John and Eric move to New York and get legally married, John would still want to have advance directives and a revocable trust, but Eric would also have a preference as the spouse to act in those capacities although the same would not be true in Florida.

Since John and Eric are not lawfully married, their relationship is not recognized in Florida, so if John were to die in 2013,[215] his taxable estate (assuming he did not make any lifetime gifts) would be $4,750,000. Forty percent of his estate would go to estate taxes, and the remaining $5,250,000 would pass estate tax free, gift tax free, and generation skipping transfer tax free and can be divided as he thinks is appropriate with a portion to Eric, his children, and grandchildren, as long as John created a will or trust. In order for John to reduce his estate tax to zero in Florida, he could use various techniques, but one of the easier plans would be to leave a portion of his real estate interest to charity.

---

210. *See* FLA. STAT. §§ 736.0101–736.1303 (2013).

211. FLA. STAT. §§ 765.101–765.205 (2013).

212. FLA. STAT. § 744.3045 (2013).

213. FLA. STAT. §§ 709.02–709.2402 (2013).

214. *See* FLA. STAT. § 744.312 (2013) (listing possible persons the court could appoint as a guardian, unless a person is designated by the ward and is qualified to be a standby guardian or a pre-need guardian).

215. *See* American Taxpayer Relief Act of 2012, H.R. 8, 112th Cong. (2nd Sess. 2012); REV. RUL. 2013–15, 2013–5 I.R.B. 444, I.R.S. (2013).

If John and Eric were to go to New York to get married they would have the opportunity to take advantage of the unlimited marital deduction,[216] portability,[217] or other planning techniques used by married couples. Based upon the recent ruling of the IRS, even if they moved back to Florida after getting married, they would still have the same federal tax benefits as any other married couple.[218] Federal tax law allows spouses to pass estate and gift tax free from one spouse to another. Therefore, if John wanted to pass everything to Eric after getting married in New York, there would be no federal estate tax due at John's death. However, since John wanted to leave some support to Eric and some to his family, he could leave a portion to Eric outright or in a marital trust and then the estate tax exemption amount[219] in a family or credit shelter trust for his benefit and the benefit of his children and/or grandchildren. The family trust would then pass on to the next generation estate-tax free after Eric's passing and the portion in the marital trust would then be part of Eric's estate upon his death.[220] Eric will then have his exemption to use and it is unlikely to cause an estate tax upon his death as a result. A Technical Memorandum[221] from the New York State Department of Taxation and Finance was issued on July 18, 2013, that states the following:

> For New York estate tax purposes, equal treatment has been given to estates of individuals legally married to different-sex spouses and same-sex spouses since the enactment of the Marriage Equality Act, applicable to estates of individuals dying on or after July 24, 2011. As a result of the Supreme Court's decision, this treatment now also applies to estates of individuals legally married to same-sex spouses who died prior to July 24, 2011.[222]

---

216. *See* 26 U.S.C. § 2010(c)(3) (2012) (showing the amount transferred between spouses on the death of John in this scenario is completely exempt from estate tax).

217. *See* § 2010(c)(3)–(4). Portability allows the surviving spouse to elect to preserve part of the unused exemption (must make an election on the 706 even if filing of 706 is not necessary due to the size of the estate) for later use with some exceptions, such as a subsequent marriage. *Id.*

218. *See* REV. RUL. 2013–17, 2013–38 I.R.B. 201, I.R.S. (2013), http://www.irs.gov/pub/irs-irbs/irb13-38.pdf.

219. *See* § 2010(c)(3)(B) (illustrating how the amount change is indexed for inflation).

220. *See* Internal Revenue Code, 26 U.S.C. § 2523(f) (2006). The amount would not be included in Eric's estate if the Marital Trust was treated as a Qualified Terminable Interest in Property. *Id.*

221. *See* N.Y. STATE DEP'T. OF TAXATION AND FIN., TECHNICAL MEMORANDUM TSB-M-13(9)M, NEW YORK ESTATE TAX INFORMATION FOR ESTATES OF INDIVIDUALS MARRIED TO SAME-SEX SPOUSES (2013), http://www.tax.ny.gov/pdf/memos/estate_&_gift/m13_9m.pdf. Individuals affected by the *Windsor* decision may obtain a credit or a refund of an overpayment on an estate tax return filed within the last three years or estate taxes paid within the last two years, whichever occurred later. *Id.*

222. *Id.*

There are several techniques that can be utilized by married couples where John and Eric would both benefit whether in New York or Florida, but only if their marriage is recognized. There are additional techniques that are also available that are beyond the scope of this article. The example provided illustrates the benefits of marriage from the standpoint of estate tax planning. There are also some income tax potential benefits or drawbacks depending on the income level that John receives from the real estate. As a married couple, they would now need to file joint married or joint separate tax returns and depending upon income levels, they may be hit with the .9% surtax[223] and/or the 3.8% tax[224] if over a certain level of income. Finally, if any portion of John's assets were left in an IRA for the benefit of Eric, then upon John's death, IRA assets could now pass to Eric's own retirement account with continued deferral of income tax until Eric must take required minimum distributions on an annual basis.[225]

There are great benefits to having the flexibility for both lifetime and after death planning if taken into consideration and explained to the client from the start. There is still a lot of uncertainty in many states, including Florida, as to the application of the *Windsor* decision and the pending state challenges against marriage bans in several states. At least it appears that there is a choice for same-sex couples to go elsewhere, but the lack of certainty surrounding application of state tax laws and benefits, coupled with the fact there are other health and psychological components at issue, creates additional concern. Elder law attorneys, must consider all of those factors in appropriately advising clients who are same-sex couples.

V. CONCLUSION

The demise of DOMA eliminated the "restrictions and restraints . . . to those joined in same-sex marriages made lawful by the State."[226] States have traditionally had the power and authority over marriage.[227] The Supreme Court recognized that this federal statute served simply to burden the lives of same-sex couples in "visible and public ways."[228] Now those

223. *See* Internal Revenue Code, 26 U.S.C. § 3101(b) (2006), *amended by* Patient Protection and Affordable Care Act, Pub. L. No. 111-148, sec. 9015(a)(1)(A), 10906(a), 124 Stat. 870–71, 1020 (2010), *amended by* Health Care and Education Reconciliation Act of 2010, Pub. L. No. 111-152, sec. 1402(b)(1)(A), 124 Stat. 1063 (2010).

224. Internal Revenue Code, 26 U.S.C. § 1411(a)(1) (2006).

225. *See* Julie Garber, *What Happens to a Retirement Account When the Owner Dies? Tax Consequences if You're a Surviving Spouse*, ABOUT.COM, http://wills.about.com/od/howtoavoidprobate/a/deathandretire.htm (last visited July 29, 2013).

226. United States v. Windsor, 133 S. Ct. 2675, 2695 (2013).

227. *See* United States v. Windsor, 133 S. Ct. 2675, 2705 (2013) (Roberts, C. J., dissenting).

228. *Windsor*, 133 S. Ct. at 2694.

legally married in states allowing same-sex marriage will enjoy the privileges and responsibilities that come with the institution of marriage. Unfortunately, the U.S. Supreme Court left the issue of same-sex marriage to be decided on a state-by-state basis.

It remains to be seen whether those states that ban same-sex marriage either via state constitution or State DOMA laws will follow the lead of the Supreme Court and allow individuals in same-sex relationships to enjoy the status of marriage within those borders.[229] The Aging LGBT population, which ever-increasingly consists of Baby Boomers, who lived through the Stonewall Inn riots and the removal of homosexuality from a list of personality disorders by two major professional associations,[230] is a force to be reckoned with. *Windsor* has broken considerable ground and the marches will continue until the LGBT community receives the status of marriage with the protection and privileges that it brings in all states of the union. Same-sex couples are seeking the equality of rights enjoyed by heterosexual couples in all aspects of the law. If they succeed in this effort, planning for the golden years, while not entirely uniform due to varying state laws, would become far less complicated and expensive for the community.

229. *See 16 States with Legal Gay Marriage and 33 States with Same-Sex Bans*, PROS & CONS OF CONTROVERSIAL ISSUES, http://gaymarriage.procon.org/view.resource.php?resourceID=004857 (last visited Nov. 24, 2013). Those states are: Alabama, Alaska, Arizona, Arkansas, Colorado, Florida, Georgia, Idaho, Indiana, Kansas, Kentucky, Louisiana, Michigan, Mississippi, Missouri, Montana, Nebraska, Nevada, North Carolina, North Dakota, Ohio, Oklahoma, Oregon, Pennsylvania, South Carolina, South Dakota, Tennessee, Texas, Utah, Virginia, West Virginia, Wisconsin, and Wyoming. *Id.*

230. *See Facts about Homosexuality and Mental Health*, SEXUAL ORIENTATION: SCIENCE, EDUCATION, AND POLICY, http://psychology.ucdavis.edu/rainbow/html/facts_mental_health.html (last visited Oct. 2, 2013). In 1973, the Board of Directors for the American Psychiatric Association removed homosexuality from *Diagnostic and Statistical Manual of Mental Disorders* (DSM). *Id.* The American Psychological Association followed suit shortly thereafter. *Id.*