

## **STRANGE BEDFELLOWS: WHY OLDER STRAIGHT COUPLES SHOULD ADVOCATE FOR THE PASSAGE OF THE ILLINOIS CIVIL UNION ACT**

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*In this Article, the author analyzes the many legal issues faced by older couples who are considering remarriage, including the loss of Social Security, Medicare, and Medicaid benefits, as well as private pensions. The author scrutinizes the various civil union and domestic partnership statutes that different states have enacted to see if these nonmarriage relationships could be of use to older people as a substitute for marriage. The author concludes that civil unions, where available, would provide state-law rights to older couples without endangering their federal benefits. Unfortunately, the majority of state civil union statutes do not include heterosexual couples, and the Illinois Religious Freedom Protection and Civil Unions Act, which would include heterosexual couples, may lack the support to become law. Accordingly, the author suggests that elder law practitioners and their clients should advocate for the passage of the Illinois bill and the amendment of other civil union statutes to include heterosexual couples.*

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Imagine a couple that has been together for seven years. Their eyes light up when they talk about one another. They want to spend the rest of their lives together. But their desire to get married is blocked by any number of legal obstacles.

Their names are Bill and Sarah. She is fifty-seven and he is sixty-three.

The difficulties facing individuals who wish to remarry later in their lives have been well documented.<sup>1</sup> Elderly (or near-elderly) people may lose pension, Social Security, or Medicare benefits as the result of remarriage.<sup>2</sup> A remarriage may create complicated issues with regard to testate or intestate succession.<sup>3</sup> And older couples who remarry expose themselves to a risk that their new spouse's medical or other financial obligations will deplete their own personal wealth.<sup>4</sup> In the past, the "solutions" offered to older individuals contemplating remarriage were few and flawed: they were counseled to simply forget about marriage and try just living together<sup>5</sup> or to blanket their union with premarital agreements targeting the ultimate divisions of their estates.<sup>6</sup> In short, later-life romance remained a blessing fraught with a certain amount of peril.

But help for older couples may be on its way, and from an unexpected source. The proposed Illinois Religious Freedom Protection and Civil Unions Act (hereafter the "Illinois Civil Union Act"), which was introduced in the Illinois General Assembly in February 2007, would allow heterosexual couples as well as same-sex couples to enter

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1. See, e.g., Stacy Emerson, *Legal Approaches to Protecting the Rights of Cohabiting Couples*, 1 TEX. F. ON C.L. & C.R. 19, 19 (1993); Margorie Engel, *Pockets of Poverty: The Second Wives Club—Examining the Financial (In)Security of Women in Remarriages*, 5 WM. & MARY J. WOMEN & L. 309, 316–21 (1999); Randall J. Gingiss, *Second Marriage Considerations for the Elderly*, 45 S.D. L. REV. 469, 470–73 (2000); James M. O'Reilly, *The Return of Geriatric Divorces*, 15 NEV. LAW. 16, 16–17 (2007); Joanna Lyn Grama, Note, *The "New" Newlyweds: Marriage Among the Elderly, Suggestions to the Elder Law Practitioner*, 7 ELDER L.J. 379, 382–90 (2000).

2. C.P. Jhong, Annotation, *Effect of Divorce, Remarriage, or Annulment, on Widow's Pension or Bonus Rights or Social Security Benefits*, 85 A.L.R.2D 242 §§ 1–5 (1962 & Supp. 2008).

3. Gingiss, *supra* note 1, at 473–77.

4. Grama, *supra* note 1, at 385–86.

5. *Id.* at 391–93.

6. Gingiss, *supra* note 1, at 473–90.

into civil unions.<sup>7</sup> These unions would have the “same legal obligations, responsibilities, protections, and benefits as are afforded or recognized by the law of Illinois to spouses, whether they derive from statute, administrative rule, policy, common law, or any other source of civil or criminal law.”<sup>8</sup> But at the same time, these civil unions would not be “marriages” and accordingly could not impact the federal rights and benefits that depend on marital status.<sup>9</sup> As a result of entering into an Illinois civil union, older couples could gain many important state marriage-based rights, but would not have to fear losing their Social Security or Medicare benefits.<sup>10</sup>

Part I of this Article outlines the state of contemporary later-life marriage and the dilemmas older couples face as they contemplate remarriage, as well as the status of various state-level efforts to institute civil union or domestic partnership laws across the nation. Part II analyzes the proposed Illinois Civil Union Act and how it could potentially solve some of the problems with which older couples in the state are dealing. Part III then recommends that older individuals and elder law practitioners (as well as those who someday plan on becoming older individuals!) in Illinois lobby for the passage of this important legislation and that similar sexual-orientation-neutral civil union bills be introduced in other states. Part IV briefly summarizes and concludes the Article.

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7. Illinois Religious Freedom Protection and Civil Unions Act, H.B. 1826, 95th Gen. Assem., Reg. Sess. § 201 (Ill. 2007), available at <http://www.ilga.gov/legislation/95/HB/PDF/09500HB18261v.pdf>.

8. *Id.* § 105.

9. See *In re Marriage Cases*, 183 P.3d 384, 417 (Cal. 2008) (“[A]lthough the Domestic Partnership Act generally affords registered domestic partners the same substantive benefits and privileges and imposes on them the same responsibilities that California law affords to and imposes upon married spouses, the act does not purport to (and lawfully could not) modify the applicable provisions of federal law, which currently do not provide for domestic partnerships.”); *People v. Greenleaf*, 780 N.Y.S.2d 899, 893–94 (N.Y. Just. Ct. 2004) (cataloging federal benefits, rights, and privileges—including Social Security—that are not impacted by domestic partnership laws).

10. *Id.* Additionally, a number of cases interpreting the Social Security Act have found that a benefits recipient has not “remarried” under the statute if his or her union is not considered a “marriage” under state law. See, e.g., *Cairns v. Richardson*, 457 F.2d 1145, 1149 (10th Cir. 1972); *Folsom v. Pearsall*, 245 F.2d 562, 567 (9th Cir. 1957).

## I. Background

### A. Remarriage Among Older Individuals: The Potential Pitfalls Are Many

It is well known that the world's population is graying. The U.S. Administration on Aging estimates that as of the year 2000 there were 605 million people worldwide who were sixty or older.<sup>11</sup> The number of Americans sixty-five or older is expected to nearly double by 2030, when almost 20% of the U.S. population will be sixty-five or older.<sup>12</sup> By 2050, the number of adults sixty or older worldwide is expected to grow to two billion and, for the first time in human history, exceed the population that is fourteen and under.<sup>13</sup> There will be 88.5 million people who are sixty-five and older in the United States alone.<sup>14</sup> The nation's, and the world's, elder population is simply ballooning.

With this impressive increase in the elder population, it is perhaps only natural that there will come an increase in dating and marriage among that population. AARP recently began offering dating tips, a matchmaking guide, and a relationship advice message board for singles forty and older at its website.<sup>15</sup> There, older singles discuss

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11. See U.S. DEP'T OF HEALTH & HUMAN SERVS., ADMIN. ON AGING, CHALLENGES OF GLOBAL AGING 1 (2008), available at [http://www.aoa.gov/press/prodsmats/fact/pdf/fs\\_global\\_aging.doc](http://www.aoa.gov/press/prodsmats/fact/pdf/fs_global_aging.doc).

12. See U.S. DEP'T OF HEALTH & HUMAN SERVS., ADMIN. ON AGING, OLDER POPULATION BY AGE: 1900-2050 (2008), available at [http://www.aoa.gov/prof/Statistics/future\\_growth/PopAge1900-2050\\_by\\_decade.xls](http://www.aoa.gov/prof/Statistics/future_growth/PopAge1900-2050_by_decade.xls) (select worksheet tab entitled "Age in numbers with 65+ chart") [hereinafter AOA POPULATION GROWTH].

13. U.S. DEP'T OF HEALTH & HUMAN SERVS., *supra* note 11, at 1.

14. AOA POPULATION GROWTH, *supra* note 12; EPM Commc'ns, *Latest U.S. Census Bureau Data Depicts an Aging, Increasingly Diverse Population in 2050*, RESEARCH ALERT, Sept. 5, 2008, at 1.

15. Kay Harvey, *More Older Americans Looking for Love but Not Marriage*, ST. PAUL PIONEER PRESS, Oct. 14, 2003, at E1. Harvey quotes Steve Slon, the editor of *AARP The Magazine*, as saying that, for older people, "[m]arriage isn't what [dating is] about," because "[t]his is a group that largely has been married once" and "there's not so much stigma about not being married." *Id.* Harvey also cites data from the 2000 U.S. Census that shows an increase in the number of older singles living together. *Id.* Though Harvey attributes this increase to older singles' comfort with being single and desire to have more personal freedom, other evidence suggests that financial and legal considerations may be playing a role in older couples choosing to cohabit rather than marry. See Dianna Marder, *Commitment Ceremonies, Not I Do's, Make Sense to Older Couples: Finances Are No. 1 Reason Why Some 65-and-older Couples Choose Cohabiting over Getting Married*, TIMES LEADER, June 25, 2007, at E1.

topics like whether it is acceptable to have sex on the first date and how to write a good personal ad.<sup>16</sup> An organization called “Flying Solo” operates an internet service that counsels the elderly, divorced, and disabled on romantic as well as legal issues.<sup>17</sup> The trend towards dating and relationships among the elderly is refreshingly gender neutral; the famous *Newsweek* report stating that, at forty, a “woman had a better chance of being killed by a terrorist” than finding Mr. Right has simply not held true.<sup>18</sup> In fact, older couples could teach younger couples a thing or two about making marriages work, because studies have shown that divorce rates decline as the ages of the parties involved in the marriage go up.<sup>19</sup> The unions of older individuals tend to be more flexible and more driven by a desire for intimacy and mutual fulfillment, rather than economic need or a desire to raise children.<sup>20</sup> Of course, older couples are not all seriousness when it comes to relationships; some are even indulging in the over-the-top “dream weddings” more typically associated with younger couples.<sup>21</sup> In short, older Americans are dating and getting married just like the rest of us.

But being married, as opposed to just involved in a relationship, may be even more important for older couples than their younger counterparts. Older couples must generally keep consideration of their estate plans in mind, and individuals who are merely dating have no rights to intestate succession.<sup>22</sup> Accordingly, without mar-

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16. Harvey, *supra* note 15.

17. See Flying Solo, Divorce Advice from a Divorce Lawyer, <http://www.flyingsolo.com> (last visited Mar. 12, 2009).

18. *NBC Today Show* (NBC television broadcast May 30, 2006). In fact, NBC reported that a number of the single women interviewed in the 1986 *Newsweek* article containing the “terrorist” quote ended up getting married—and staying married—in their forties. *Id.*

19. Peggy O’Crowley, *The Older the Spouses, the Better the Chances: Education and Good Income Are Also Seen as Factors in Stable Marriages, a Study Says*, STARLEDGER, July 20, 2007, at 24.

20. Abigail Trafford, *Older Couples Vow to Make Late-Life Marriages Fulfilling*, CHI. TRIB., July 26, 2005, at 7.

21. Marybeth Casper, *Mature Marriage*, NEWSDAY, Mar. 26, 2004, at L35. Casper shares the stories of several newly married couples in their forties who struggled to decide what type of wedding would be appropriate for their stage in life. *Id.*

22. See TONI IHARA & RALPH WARNER, *THE LIVING TOGETHER KIT: A DETAILED GUIDE TO HELP UNMARRIED COUPLES DEAL WITH LEGAL REALITIES* 11/2 (8th ed. 1997).

riage or intelligent estate planning, seniors may end up leaving their significant others unprovided for upon their deaths. Similarly, unmarried couples have no legal right to make medical decisions for one another.<sup>23</sup> So older couples who do not marry may find they are unable to direct the course of a loved one's care or even be present in a hospital room with the loved one. Marriage gives older individuals someone to fall back on for financial as well as emotional support when health problems arise and long-term care is needed.<sup>24</sup> So marriage for the aging is in many cases not just a pleasantry but an outright necessity.

#### 1. LOSS OF SOCIAL SECURITY AND MEDICARE BENEFITS

Unfortunately, when contemplating marriage, older Americans also face challenges that the rest of society may not even think about. Perhaps the most significant difficulty older couples can face is the possibility of losing Social Security benefits based on the income of a former spouse.<sup>25</sup> As of December 2008, over fifty-five million individuals in the United States received Social Security benefits.<sup>26</sup> As of December 2007, the average monthly payment was \$468, and more than half of those who received Social Security had no other source of income.<sup>27</sup> But the Social Security statute grants widow's benefits (or divorced spouse's benefits) only to an individual who was previously married to a qualified wage earner and currently "is not married."<sup>28</sup> There are but three exceptions to this rule: (1) when the individual seeking to claim benefits remarried after reaching sixty; (2) when the individual remarried in his or her fifties but is now at least sixty and at the time of the remarriage was entitled to disabled widow's benefits; or (3) when the individual remarried in his or her fifties, is still in

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23. *See id.* at 3/16.

24. *See* FRANK B. HOBBS & BONNIE L. DAMON, U.S. DEP'T OF COMMERCE, 65+ IN THE UNITED STATES 6-1 (1996).

25. *See* Jhong, *supra* note 2, §§ 1-5.

26. U.S. SOC. SEC. ADMIN., OFFICE OF POLICY, MONTHLY STATISTICAL SNAPSHOT 1 (2008), available at [http://www.ssa.gov/policy/docs/quickfacts/stat\\_snapshot](http://www.ssa.gov/policy/docs/quickfacts/stat_snapshot).

27. SOC. SEC. ADMIN., PUBL'N NO. 13-11827, SSI ANNUAL STATISTICAL REPORT, 2007, at 25 tbl.7, 26 tbl.8 (2008), available at [http://www.ssa.gov/policy/docs/statcomps/ssi\\_asr/2007/ssi\\_asr07.pdf](http://www.ssa.gov/policy/docs/statcomps/ssi_asr/2007/ssi_asr07.pdf).

28. 42 U.S.C. §§ 402(e)(1)(A), 402(f)(1)(A) (2000).

his or her fifties, and was disabled at the time of his or her marriage.<sup>29</sup> And the courts that have interpreted this language have been uniform in concluding that, unless the remarried claimant clearly fits into one of the categories described above, his or her Social Security benefits are to be terminated.<sup>30</sup> In fact, the Supreme Court has expressly adopted this interpretation and held that the denial of Social Security benefits based on marital status does not violate the Equal Protection Clause of the U.S. Constitution.<sup>31</sup> So for many later-life couples, the possibility of losing Social Security benefits is very real and very frightening.

Older individuals who remarry also risk losing Medicare benefits, which include basic hospitalization and nursing home care up to a maximum of 100 days per illness.<sup>32</sup> In 2003, about forty million people enrolled in Medicare, and there are expected to be about seventy-seven million enrollees by 2011.<sup>33</sup> But eligibility for Medicare is premised on eligibility for the basic Social Security benefit.<sup>34</sup> So where a remarriage terminates an individual's right to Social Security, it will also terminate his or her right to receive Medicare benefits.<sup>35</sup>

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29. *Id.* §§ 402(e)(3), 402(f)(3); 20 C.F.R. § 404.335(e) (2008). According to the Social Security Administration's Office of Policy, there were nearly seven million recipients who were neither sixty-five years old or older nor disabled in December 2007. See U.S. SOC. SEC. ADMIN., *supra* note 27, at 25 tbl.8.

30. See, e.g., *Heins v. Shalala*, 22 F.3d 157, 161 (7th Cir. 1994); *Austin v. Shalala*, 994 F.2d 1170, 1174 (5th Cir. 1993); *Nott v. Flemming*, 272 F.2d 380, 382 (2d Cir. 1959); *Schroeder v. Celebrezze*, 244 F. Supp. 375, 377-78 (E.D.N.Y. 1965); *Nott v. Folsom*, 161 F. Supp. 905, 909 (S.D.N.Y. 1958).

31. *Bowen v. Owens*, 476 U.S. 340, 350 (1986) ("These views would be consistent with the position Congress has taken throughout the history of the Act that divorced spouses are less dependent on the wage earner than spouses. Because divorced widowed spouses did not enter into marriage with the same level of dependency on the wage earner's account as widows or widowers, it was rational for Congress to treat these groups differently after remarriage.").

32. *CTRS. FOR MEDICARE & MEDICAID SERVS., MEDICARE & YOU 2009*, at 20, available at <http://www.medicare.gov/Publications/Pubs/pdf/10050.pdf> (discussing Medicare benefits); *Gingiss, supra* note 1, at 470-71 (discussing risks of remarriage).

33. Citizens' Council on Health Care, *17 Medicare Facts*, Nov. 7, 2003, <http://www.cchconline.org/17medicarefacts.php>.

34. 42 U.S.C. § 426.

35. *Gingiss, supra* note 1, at 470-71.

## 2. LOSS OF PRIVATE PENSION BENEFITS

Similarly, remarriage can cause a loss of private pension benefits. Pensions are an important source of income for older Americans.<sup>36</sup> As of 2003, the percentage of employed Americans sixteen and older who had some sort of pension coverage was 45.7%.<sup>37</sup> The average monthly pension benefit among those who receive one is currently \$1050.<sup>38</sup> A beneficiary's rights under a pension plan are generally a matter of contract interpretation,<sup>39</sup> although of course the Employee Retirement Income Security Act of 1974 (ERISA) applies to the vesting of pension benefits.<sup>40</sup> ERISA requires that all vested pension plans offer spousal benefits for couples married at least one full year before retirement or death.<sup>41</sup> A widow or widower will generally be entitled to receive pension benefits under a deceased spouse's plan.<sup>42</sup> Even in cases of divorce, a former spouse may retain some rights to pension benefits as part of a child support, alimony, or marital property distribution agreement, provided an appropriate Qualified Domestic Relations Order is presented to the plan administrator.<sup>43</sup> But courts have

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36. HOBBS & DAMON, *supra* note 24, at 4–14.

37. SATYENDRA K. VERMA, AARP PUB. POL'Y INST., RETIREMENT PLAN COVERAGE OF BOOMERS: ANALYSIS OF 2003 SIPP DATA i (2006), available at [http://assets.aarp.org/rgcenter/econ/sipp\\_cb\\_2006.pdf](http://assets.aarp.org/rgcenter/econ/sipp_cb_2006.pdf). Verma found that pre-retirees had the highest rate of pension coverage with 71.5%, followed by older baby boomers with 71.3%. *Id.* at ii. Women and nonwhites were less likely to have pension coverage throughout all age groups. *Id.*

38. SANDY MACKENZIE & KE BIN WU, AARP PUB. POL'Y INST., THE COVERAGE OF EMPLOYER PROVIDED PENSIONS: PARTIAL AND UNCERTAIN 4 (2008), available at [http://assets.aarp.org/rgcenter/econ/d19108\\_pensions.pdf](http://assets.aarp.org/rgcenter/econ/d19108_pensions.pdf).

39. See *Robinson v. Sheet Metal Workers' Nat'l Pension Fund*, Plan A, 515 F.3d 93, 98 (2d Cir. 2008) (applying contract principles to evaluate ERISA claim); *Blackshare v. Reliance Standard Life Ins. Co.*, 509 F.3d 634, 639 (4th Cir. 2007) ("Broadly speaking, 'ERISA plans are contractual documents which, while regulated, are governed by principles of contract and trust law.'"); *Prater v. Ohio Educ. Ass'n*, 505 F.3d 437, 441 (6th Cir. 2007) ("At the same time that ERISA carefully regulates the vesting of pension benefits, it leaves the decision of whether employers will provide employees with healthcare benefits upon retirement to contract—a contract that may come in the form of a collective bargaining agreement, an at-will employment relationship or something in between.").

40. 29 U.S.C. §§ 1001–1242 (2006). ERISA governs issues like retirement age, membership requirements, and spousal benefits. *Id.*

41. *Id.* § 1055(b)(4).

42. See, e.g., *Pedro Enter. v. Perdue*, 998 F.2d 491, 493–94 (7th Cir. 1993).

43. 29 U.S.C. § 1056(d)(3); *Trs. of the Dirs. Guild of Am.—Producer Pension Benefit Plans v. Tise*, 234 F.3d 415, 420 (9th Cir. 2000); *Samaroo v. Samaroo*, 193 F.3d 185, 191 (3d Cir. 1999).



been fairly uniform in holding that remarriage terminates any pension rights a widowed or divorced spouse may have. For example, in *McCourtney v. Cory*, a California court upheld a statute that terminated pension allowances to widows upon their remarriages against a claim that it was an unconstitutional restraint on marriage.<sup>44</sup> An Alabama court reached a similar result when faced with an equal protection argument in *Board of Trustees of Policeman's & Fireman's Retirement Fund v. Cardwell*, holding that the termination of pension benefits upon remarriage was rationally related to a legitimate state interest, namely the financial health of the state pension system.<sup>45</sup> So this important means of support, too, is threatened for older individuals contemplating a second marriage.

### 3. LOSS OF MEDICAID BENEFITS

Another form of benefit that might be lost if an older person remarries is Medicaid. Medicaid is available to those over sixty-five and the disabled if they meet certain income and resources qualifications.<sup>46</sup> As of January 2008, a noninstitutionalized individual needed a monthly income of \$637 or less and resources of less than \$2000 to be eligible for Medicaid.<sup>47</sup> For a noninstitutionalized couple, those numbers were \$956 and \$3000.<sup>48</sup> The definition of income is essentially anything a person receives that can be used to meet the need for food, clothing, or shelter.<sup>49</sup> The problem for older couples considering re-

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44. *McCourtney v. Cory*, 176 Cal. Rptr. 639 (Ct. App. 1981).

45. *Bd. of Trs. of Policeman's & Fireman's Ret. Fund v. Cardwell*, 400 So. 2d 402 (Ala. 1981). For other cases addressing remarriage provision challenges, see *Russell v. Bd. of Trs. of Firemen, Policemen & Fire Alarm Operators' Pension Fund of Dallas, Tex.*, 968 F.2d 489, 492-94 (5th Cir. 1992); *Schroeder v. Celebrezze*, 244 F. Supp. 375, 377 (E.D.N.Y. 1965); *State ex rel. Williams v. Cone*, 196 So. 820, 821 (Fla. 1940).

46. 42 U.S.C. §§ 1396a(a)(10), 1396a(m) (2000).

47. SOC. SEC. ADMIN., UNDERSTANDING SUPPLEMENTAL SECURITY INCOME (SSI) 8 (2008), available at <http://www.ssa.gov/ssi/USSI2008clean.doc>. The income standards for obtaining Medicaid are generally the same as those for obtaining Supplemental Security Income. *Id.* at 63.

48. *Id.* at 8.

49. 20 C.F.R. § 416.1102 (2008). There are various exclusions from what is considered "income" or "resources" for Supplemental Security Income and Medicaid purposes. For example, medical expenses may be subtracted from an individual's overall income. 42 C.F.R. § 435.831(c), (d) (2008). For a more extensive discussion of income calculation for Medicaid purposes, see <http://www.ssa.gov> or LAWRENCE A. FROLIK & RICHARD L. KAPLAN, ELDER LAW IN A NUTSHELL 114 (2006).

marriage is that all the income of one spouse is deemed to be income of the other.<sup>50</sup> The simple math shows that two individuals, both making the individual income threshold of \$637 monthly, would together be making \$1274 monthly, well over the income threshold for couples of \$956. In this regard, joining households through marriage could well lead to increased rather than decreased expenses, with two Medicaid-eligible individuals becoming one ineligible couple.

#### 4. INCURRING ADDITIONAL LIABILITIES AND EXPENSES

Older individuals who contemplate remarriage may also be justifiably concerned about protecting their individual wealth and avoiding the liabilities of a potential spouse. To some extent, this is a concern that is shared by couples of all ages. Every couple, regardless of age, must consider which assets and liabilities will become part of the union and which will remain outside of it, or later potentially face the consequences of failing to do so.<sup>51</sup> But for older people, the issue can be especially important. As Joanna Grama reports in her note on the legal struggles faced by elderly couples, “stories abound in which a new spouse falls victim to an unscrupulous and financially savvy spouse.”<sup>52</sup> Grama cites as an example a new spouse who coerced his wife into putting his name on the deed to her home and then included the home as an asset in a new will he made out benefiting his children from a previous marriage.<sup>53</sup> There are many other examples out there—financial abuse of the elderly, including the misuse of powers of attorney, illegal transfers of property, consumer fraud, and identity theft, is thought to claim as many as five million victims per year.<sup>54</sup>

Moreover, even assuming that an older person’s new spouse turns out in fact to be scrupulously honest and caring, he or she could still fall victim to illness, and the expenses of that illness could wipe

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50. 42 U.S.C. § 1382c(f)(1); *White v. Shalala*, 7 F.3d 296, 303 (2d Cir. 1993); *Tyrell v. Sullivan*, 972 F.2d 252, 254 (8th Cir. 1992).

51. See Doreen Inkeles, *The Uniform Premarital Agreement Act: Taking Casto to a New Level for Prenuptial Agreements*, 81 FLA. B.J. 32 (2007); Jeffrey G. Sherman, *Prenuptial Agreements: A New Reason to Revive an Old Rule*, 53 CLEV. ST. L. REV. 359 (2006); Donna Beck Weaver, *The Collaborative Law Process for Prenuptial Agreements*, 4 PEPP. DISP. RESOL. L.J. 337 (2004).

52. Grama, *supra* note 1, at 383–84.

53. *Id.*

54. Bennett Blum, *Elder Financial Abuse and Exploitation*, [http://www.bennettblummd.com/elder\\_financial\\_abuse.html](http://www.bennettblummd.com/elder_financial_abuse.html) (last visited Mar. 12, 2009).

both parties out financially.<sup>55</sup> The elderly consume a disproportionate amount of health care resources in the United States.<sup>56</sup> In 2005, the 36.8 million people in the United States who were sixty-five or older made 229.8 million visits to doctors' offices, 16.5 million visits to hospital outpatient departments, and 17.2 million visits to emergency rooms.<sup>57</sup> Many states now have statutes that make married couples jointly and severally responsible for their family expenses, including medical expenses.<sup>58</sup> Even those states without statutes would likely hold spouses liable for each other's medical expenses under the common-law doctrine of necessities.<sup>59</sup> Accordingly, for older couples, the possibility of incurring a spouse's debt through remarriage is significant and may involve significant sums.

##### 5. INHERITANCE ISSUES

Couples considering a second marriage late in life may also face complex inheritance issues. For remarried individuals who die intestate, it is likely that their new spouse will inherit as much as half of their lifetime assets.<sup>60</sup> Because many older individuals who remarry have children from a first marriage they wish to provide for after their deaths, this may not be the desired result.<sup>61</sup> But resolving issues of inheritance by making a new will after a remarriage may well lead to the sort of emotionally charged discussions that many would prefer to avoid. Children from a first marriage may resent testamentary changes made to accommodate a new spouse or step-child with some degree of support, while step-children or spouses may balk at unequal

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55. Marder, *supra* note 15, at E1 (citing "fear of incurring liability for the new partner's medical expenses" as a reason for older couples to avoid marriage); O'Reilly, *supra* note 1, at 16-17 (recommending geriatric divorce as a method of avoiding spousal medical expenses).

56. Lawrence A. Frolick & Alison P. Barnes, *An Aging Population: A Challenge to the Law*, 42 HASTINGS L.J. 683, 713 (1991).

57. Nat'l Ctr. for Health Statistics, Fast Stats A to Z, [http://www.cdc.gov/nchs/fastats/older\\_americans.htm](http://www.cdc.gov/nchs/fastats/older_americans.htm) (last visited Mar. 12, 2009).

58. See, e.g., HAW. REV. STAT. ANN. § 572-24 (LexisNexis 2005); 750 ILL. COMP. STAT. 65/15(a)(1) (2006); LA. CIV. CODE ANN. art. 2372 (2005); N.D. CENT. CODE § 14-07-10 (2004).

59. See, e.g., Phillips, Nizer, Benjamin, Krim & Ballon v. Rosenstiel, 490 F.2d 509, 515 (2d Cir. 1973).

60. See UNIF. PROBATE CODE § 2-102 (amended 2008), 8 U.L.A. 81 (1998).

61. See Grama, *supra* note 1, at 388.

treatment in a will.<sup>62</sup> In fact, there may be more than just unpleasantness standing in the way of attempts to adjust the inheritance of a new spouse. Some U.S. jurisdictions have laws that bar spouses from being disinherited.<sup>63</sup> In others, a spouse may renounce a will and take his or her intestate share instead.<sup>64</sup> So older couples who remarry must carefully craft new estate plans or otherwise face the potential unexpected consequences of failing to do so.

## B. Civil Union and Domestic Partnership Laws: Variations on a Theme

Civil unions and even gay marriage have been all over the news lately. Connecticut recently made headlines by becoming only the third state in the union to legalize gay marriage.<sup>65</sup> Less than a year after its own historic embrace of gay marriage, California has now passed a controversial constitutional amendment banning it, and the legal battles over that decision continue.<sup>66</sup> States from New Hampshire to Illinois have made news by considering their own civil union legislation.<sup>67</sup> From their prominence in the local and national media, one would think that same-sex unions were a national phenomenon.

Yet the according of rights to same-sex couples remains a relatively rare phenomenon. It was only eight years ago that Vermont passed the nation's very first civil unions law, for the first time granting same-sex couples the very same rights, benefits, and responsibili-

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62. See Jill Insley, *Money Matters: Look Happy Don't They? But If They Hadn't Made New Wills After Their Wedding, the Children of Their First Marriages Could Have Been Left High and Dry*, THE OBSERVER (England), Aug. 23, 1998, at 12.

63. See, e.g., P.R. LAWS ANN. tit. 31, § 2458 (West, Westlaw through 2005).

64. See, e.g., 755 ILL. COMP. STAT. 5/2-8 (2006).

65. Robert D. McFadden, *Gay Marriage Is Ruled Legal in Connecticut*, N.Y. TIMES, Oct. 11, 2008, at A1; Sharon Otterman, *Connecticut High Court Sides with Gay Marriage: Justices Overturn 2005 Decision on Same-Sex Couples*, HOUS. CHRON., Oct. 11, 2008, at A8.

66. Ben Arnoldy, *California Supreme Court to Hear Challenges to Gay Marriage Ban*, CHRISTIAN SCI. MONITOR, Nov. 21, 2008, at 25; Jesse McKinley, *With Same-Sex Marriage, a Court Takes on the People's Voice*, N.Y. TIMES, Nov. 21, 2008, at A18; Mike Swift, *Fight over Prop. 8 Not Over*, SAN JOSE MERCURY NEWS, Nov. 19, 2008, at 1B.

67. Kathleen Haughney, *Civil Union Bill Gains 'Facebook' Support*, ST. LOUIS POST-DISPATCH, Mar. 28, 2008, at C6; Annmarie Timmins, *Civil Unions, Six Months Later: Couples Reflect on Changes in Their Lives*, CONCORD MONITOR, July 1, 2008, at 1.

ties accorded to married couples under state law.<sup>68</sup> That law provided that anyone not a party to another civil union or marriage and “of the same sex and therefore excluded from the marriage laws of this state” could enter into a civil union with a nonrelative.<sup>69</sup> It stated that a party to a civil union should be included in the definitions of *spouse*, *family*, *immediate family*, *dependent*, and *next of kin* under all existing Vermont court rules, statutes, common law, and civil law.<sup>70</sup> It explicitly applied Vermont domestic relations and spousal support laws to those in civil unions.<sup>71</sup> Moreover, it spelled out a detailed list of legal benefits, protections, and responsibilities of spouses that were to be applied equally to individuals in a civil union:

(1) laws relating to title, tenure, descent and distribution, intestate succession, waiver of will, survivorship, or other incidents of the acquisition, ownership, or transfer, inter vivos or at death, of real or personal property, including eligibility to hold real and personal property as tenants by the entirety . . . ; (2) causes of action related to or dependent upon spousal status, including an action for wrongful death, emotional distress, loss of consortium, dramshop, or other torts or actions under contracts reciting, related to, or dependent upon spousal status; (3) probate law and procedure, including nonprobate transfer; (4) adoption law and procedure; (5) group insurance for state employees . . . and continuing care contracts . . . ; (6) spouse abuse programs . . . ; (7) prohibitions against discrimination based upon marital status; (8) victim’s compensation rights . . . ; (9) workers’ compensation benefits; (10) laws relating to emergency and nonemergency medical care and treatment, hospital visitation and notification, including the Patient’s Bill of Rights . . . and the Nursing Home Residents’ Bill of Rights . . . ; (11) advance directives . . . ; (12) family leave benefits . . . ; (13) public assistance benefits . . . ; (14) laws relating to taxes imposed by the state or a municipality; (15) laws relating to immunity from compelled testimony and the marital communication privilege; (16) the homestead rights of a surviving spouse . . . and homestead property tax alliance . . . ; (17) laws relating to loans to veterans . . . ; (18) the definition of family farmer . . . ; (19) laws relating to the making, revoking, and objecting to anatomical gifts by others . . . ; (20) state pay for military service . . . ; (21) application for early voter absentee ballot . . . ; (22) family landowner rights to fish and hunt . . . ; (23) legal requirements for assignment of wages . . . ; and (24) affirmance of relationship . . . .<sup>72</sup>

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68. VT. STAT. ANN. tit. 15, §§ 1201–1207 (2002); Greg Johnson, *Civil Union, A Reappraisal*, 30 VT. L. REV. 891, 891 (2006).

69. VT. STAT. ANN. tit. 15, §§ 1202–1203.

70. *Id.* § 1204.

71. *Id.*

72. *Id.*

In short, the nation's initial foray into same-sex benefits was not a cautious, timid step but a giant leap towards marriage equality.<sup>73</sup>

Vermont's embrace of civil unions set off a cultural firestorm. As some states moved to put similar measures into effect, others mounted efforts to ban gay marriage or civil unions.<sup>74</sup> Vermont itself faced a movement to repeal the law.<sup>75</sup> Politicians who had supported the legislation faced uphill battles in their reelection campaigns, and the Democrats, who had been the driving force behind the bill, lost control of the Vermont House of Representatives.<sup>76</sup> And while gay and lesbian groups were initially thrilled with the move, they eventually found it less than a complete solution to the problems they face.<sup>77</sup> Many LGBT groups have branded civil unions as "inferior" and "stigmatized" and renewed the push for same-sex marriage.<sup>78</sup> As it turned out, the controversy created by the move towards civil unions did not reside solely on one side of the issue.

As some of the heat surrounding the issue died down, however, a number of other states began introducing civil union or domestic partnership bills. For example, Maine passed domestic partnership legislation in July 2004.<sup>79</sup> Maine's legislation provides for two mentally competent individuals who are not married to or partnered with anyone else and have lived together in the state for at least twelve months to become registered as domestic partners with the state.<sup>80</sup> Maine's bill is less broad than Vermont's, however, and does not ac-

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73. Johnson, *supra* note 68, at 895–902. Johnson notes that, although Vermont's move to civil unions was quickly overshadowed by Massachusetts' decision to legalize gay marriage and San Francisco Mayor Gavin Newsom's offer of marriage licenses to same-sex couples on Valentine's Day 2004, it provides same-sex couples with an option that is "legally equal" to marriage. *Id.* at 892–93, 895.

74. David Crary, *Same-Sex Unions Shaping Up as Next Political Battleground*, L.A. TIMES, Jan. 28, 2001, at A9; Ross Sneyd, *Civil Unions for Gays Now Status Quo in Vermont: In 2000, Proposal Deeply Divided the State*, STAR-LEDGER, Jan. 9, 2005, at 37.

75. Ross Sneyd, *Vermont House Votes to Repeal Civil Unions Law*, SEATTLE TIMES, May 24, 2001, at A15.

76. Howard Dean, *The Vermont Experience with Gay Civil Unions*, RECORD (Bergen County, N.J.), July 20, 2004, at L15.

77. Johnson, *supra* note 68, at 892–94.

78. See David S. Buckel, *Government Affixes a Label of Inferiority on Same-Sex Couples When It Imposes Civil Unions & Denies Access to Marriage*, 16 STAN. L. & POL'Y REV. 73 (2005).

79. Stephen F.J. Ornstein et al., *Domestic Partnership and Civil Unions*, 61 CONSUMER FIN. L.Q. REP. 520, 523 (2007).

80. ME. REV. STAT. ANN. tit. 22, § 2710 (2008). Maine does not appear to limit domestic partnerships to same-sex couples. See *id.*

cord domestic partners all the same rights and benefits as married couples.<sup>81</sup> Instead, Maine incorporates domestic partnership rights into its statutes dealing with inheritance, guardianship, and domestic abuse.<sup>82</sup>

New Jersey also passed domestic partnership legislation in July 2004.<sup>83</sup> That law imposed stricter eligibility requirements on civil unions, limiting them to same-sex couples or couples over sixty-two and requiring evidence of joint responsibility for each other's welfare, such as a joint deed, bank account, or motor vehicle registration.<sup>84</sup> It also failed to provide many of the rights enjoyed by married couples, focusing solely on freedom from employment and housing discrimination, hospital visitation rights, medical and legal decision-making rights, and state tax exemptions.<sup>85</sup> In February 2007, however, New Jersey passed new civil union legislation that provided a better legal equivalent to marriage.<sup>86</sup> That new statute provides that "[c]ivil union couples shall have all of the same benefits, protections and responsibilities under law, whether they derive from statute, administrative or court rule, public policy, common law, or any other source of civil law, as are granted to spouses in a marriage."<sup>87</sup> It then provides a nonexclusive list of these benefits, protections, and responsibilities similar to the list included in the Vermont civil union statute.<sup>88</sup> New Jersey also recognizes domestic partnerships, civil unions, and reciprocal beneficiary relationships entered into outside of New Jersey.<sup>89</sup>

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81. See Ornstein et al., *supra* note 79, at 523.

82. ME. REV. STAT. ANN. tit. 18-A, § 1-201 (1998); *id.* tit. 15, § 321 (2003); *id.* tit. 22, §§ 2843-2843.A (2008).

83. N.J. STAT. ANN. § 26:8A-1 (West 2007).

84. See *id.* § 26:8A-4.

85. See Am. B. Ass'n Section of Family Law, *A White Paper: An Analysis of the Law Regarding Same-Sex Marriage, Civil Unions, and Domestic Partnerships*, 38 FAM. L.Q. 339, 389-90 (2004); Ornstein et al., *supra* note 79, at 524.

86. N.J. STAT. ANN. § 26:8A-4.1. Note, however, that New Jersey's domestic partnership law remains the applicable statute for opposite-sex couples who are sixty-two or older. *Id.* New Jersey's civil union legislation is explicitly limited to couples of the same sex. *Id.* § 37:1-30(b).

87. *Id.* § 37:1-31(a).

88. *Id.* § 37:1-32. These benefits include property transfer rights; tort rights (such as wrongful death) related to spousal status; probate rights; adoption rights; rights to health, insurance, and pension benefits; domestic violence protections; workers' compensation rights; hospital visitation rights; family leave benefits; public assistance benefits; tax deductions; testimonial privileges; and homestead rights. *Id.*

89. *Id.* §§ 26-8A-6(c), 37-1-13.1 to -13.2.

The next two states into the fray were Connecticut and California in 2005.<sup>90</sup> Both passed fairly straightforward statutes that simply stated that same-sex couples could enter into an officially recognized relationship (in California, a domestic partnership, and in Connecticut, a civil union) with the same rights, protections, and benefits as marriage.<sup>91</sup> Unlike the Vermont and New Jersey statutes, neither the California nor Connecticut statute has a section attempting to catalogue these rights, protections, and benefits. The Connecticut statute provides that a party to a civil union shall be deemed included within language designating family members in other statutes, such as *spouse, family, or dependent*.<sup>92</sup> It also specifies that, for tax purposes, Connecticut will treat those in civil unions like married couples.<sup>93</sup> The California statute is slightly more detailed, stating that those in domestic partnerships will have the same rights as a widow or widower “following the death of the other partner,” the same rights as spouses with regard to a child of either of them, and the same rights as spouses regarding nondiscrimination.<sup>94</sup> California also explicitly recognizes same-sex unions from other jurisdictions as valid domestic partnerships.<sup>95</sup>

The most recent civil union bills were passed in New Hampshire and Oregon in 2007.<sup>96</sup> The New Hampshire bill is much like the Connecticut and California bills; it states some commonsense requisites—such as being of age, unmarried, and unrelated—and asserts that individuals in civil unions will have the same rights and responsibilities

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90. Ornstein et al., *supra* note 79, at 521–22. Of course, California has subsequently legalized gay marriage and then passed a constitutional amendment banning it. See Arnoldy, *supra* note 66; McKinley, *supra* note 66; Swift, *supra* note 66. So civil unions may be of renewed importance to gay couples in California.

91. CAL. FAMILY CODE § 297.5 (Deering 2009); CONN. GEN. STAT. § 46b-38nn (2008). The California statute also allows for opposite-sex couples with both members older than sixty-two to enter into domestic partnerships. CAL. FAMILY CODE § 297. The Connecticut statute is strictly limited to same-sex couples. CONN. GEN. STAT. § 46b-38bb. Both statutes also include some fairly standard eligibility requirements, such as being of age, not already being married or in another same-sex relationship, and not being related. CAL. FAMILY CODE § 297; CONN. GEN. STAT. § 46b-38bb. California also requires that the applicants share a common residence. CAL. FAMILY CODE § 297.

92. CONN. GEN. STAT. § 46b-38oo.

93. *Id.* § 46b-38pp.

94. CAL. FAMILY CODE § 297.5.

95. *Id.* § 299.2.

96. Ornstein et al., *supra* note 79, at 523–25.



as married individuals.<sup>97</sup> It applies solely to same-sex couples and provides for legal recognition of out-of-state civil unions.<sup>98</sup> The Oregon statute is slightly different. Though the requisites are similar to other states'—and the limitation to same-sex couples is retained—Oregon spells out the rights accorded to members of domestic partnerships more specifically.<sup>99</sup> In addition to the broad language providing “any privilege, immunity, right or benefit” applicable to married couples to those in domestic partnerships, the statute specifies that rights related to children of either partner and to state taxation will be given to domestic partners.<sup>100</sup> The Oregon statute also acknowledges specifically that it cannot modify any rights dependant upon federal law, including those related to pensions and benefits.<sup>101</sup>

A number of other states offer some form of domestic partnership or civil union, but the rights involved are so much more limited that they are not particularly of interest for this Article. For instance, Washington has a domestic partnership statute that really only provides for hospital visitation and community property rights.<sup>102</sup> Hawaii allows for individuals of the same sex (or other individuals who may not marry under Hawaiian law) to become “reciprocal beneficiaries” who have certain property rights.<sup>103</sup> And the District of Columbia provides for domestic partnerships with rights relating primarily to health care benefits.<sup>104</sup> For a more thorough discussion of these and other less comprehensive domestic partnership schemes, the author recommends the American Bar Association's excellent white paper on the topic.<sup>105</sup>

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97. N.H. REV. STAT. ANN. §§ 457-A:1 to A:8 (LexisNexis 2007).

98. *Id.* §§ 457-A:1, 457-A:8.

99. OR. REV. STAT. §§ 106.010–.990 (2007).

100. *Id.*

101. *Id.*

102. WASH. REV. CODE §§ 26.60.010–.901 (Supp. 2009).

103. HAW. REV. STAT. ANN. § 572C (LexisNexis 2005).

104. D.C. CODE § 32-701 (2007).

105. See Am. B. Ass'n Section of Family Law, *supra* note 85, at 389–90. For a discussion of civil unions worldwide, see Leslie J. Harris, *Same-Sex Unions Around the World*, 19 PROB. & PROP. 31 (2005).

## II. Analysis

### A. The Illinois Religious Freedom Protection and Civil Unions Act Closely Resembles Previous Civil Union Bills

The path towards civil unions in Illinois has not been an easy one. Although some voices began calling for civil unions shortly after Vermont's recognition of them in 2000,<sup>106</sup> the law of Illinois made clear that "a marriage between two individuals of the same sex is contrary to the public policy of the state."<sup>107</sup> Then-Illinois Attorney General James E. Ryan relied on this provision in 2001 in concluding that the state had no duty to recognize civil unions entered into by citizens of Vermont.<sup>108</sup> Although Illinois in the 1990s and 2000s had its share of openly gay politicians, including a Chicago City Council member and a Representative in the Illinois House,<sup>109</sup> 49% of Illinois registered voters opposed gay marriage and 36% opposed civil unions in 2005.<sup>110</sup> Illinois did not add LGBT individuals to its antidiscrimination laws until 2006, and then only after a bitter debate in the Illinois legislature.<sup>111</sup> That same year, some Illinois residents sought a ballot initiative to ban gay marriage.<sup>112</sup> The issue has always been contentious.

Illinois's pending civil union legislation was introduced in the Illinois House as H.B. 1826 in early 2007.<sup>113</sup> It passed the Human Services Committee of the Illinois House in March 2007 by a five to four

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106. Editorial, *Vermont's "Civil Unions" Option*, CHI. TRIB., Apr. 26, 2000, at 14 ("Vermont's legislators deserve credit for resisting the political heat and voting for a measure that is as sensible as it is fair. Illinois ought to consider something similar.").

107. 750 ILL. COMP. STAT. 5/213.1 (2006).

108. *State Has No Duty to Accept Civil Unions As Legal, Ryan Finds*, 147 CHI. DAILY L. BULL., Jan. 26, 2001, at 5.

109. Thomas Hargrove, *27% Would Vote Against Gay Candidate; Poll Also Shows More Backing for Civil Unions Than Same-Sex Marriage*, CHI. SUN-TIMES, Dec. 14, 2003, at 32.

110. Rummana Hussain, *38% in State Poll Support Gay Marriage, Civil Unions*, CHI. SUN-TIMES, June 22, 2005, at 26.

111. Associated Press, *Anti-Discrimination Law to Protect Gays Takes Effect Today*, BELLEVILLE NEWS DEMOCRAT, Jan. 1, 2006, at B4; Erik Potter, *"Civil Unions" Measure Gains Traction*, ST. LOUIS POST-DISPATCH, Mar. 22, 2007, at A1.

112. Amber Ellis, *State to Debate Civil Unions: Same-Sex Legislation Heads to House Floor*, DAILY HERALD, Mar. 22, 2007, at 1.

113. Dana Heupel, *Committee Okays Civil Union Bill: Sponsor Says Full Approval by House Will Be Difficult*, SPRINGFIELD ST. JOURNAL-REGISTER, Mar. 22, 2007, at 9.

vote and headed to the full house for consideration.<sup>114</sup> The bill received strong endorsements from a number of Illinois newspapers, with the *Chicago Tribune* calling it an “apt compromise” between gay rights advocates and defenders of more traditional marriage.<sup>115</sup> But advocates feared that the bill as drafted contained too many comparisons to marriage, which might frighten any legislators who were on the fence about supporting it.<sup>116</sup> Accordingly, it was redrafted to remove those references and resubmitted to the House.<sup>117</sup> As the legislative session came to a close in June 2007, the bill’s sponsor put it on hold, citing other more pressing issues and a possible lack of attention to and support of the bill.<sup>118</sup> Although the bill received an assist from endorsements by the Illinois State Bar Association, the Village of Oak Park, and a number of Facebook groups, it has yet to pass.<sup>119</sup>

As it stood on May 31, 2008, when it was referred back to the House Rules Committee, the bill was rather similar to the civil union laws that already exist in New Hampshire, California, and Connecticut.<sup>120</sup> Like those bills, it sketches the rights afforded to those in civil unions in broad terms, stating that “[a] party to a civil union is entitled to the same legal obligations, responsibilities, protections, and

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114. *Committee Narrowly Approves Civil Union Bill*, CHI. TRIB., Mar. 22, 2007, at 9; Asiana Ponciano, *Civil Union Act Passes in Illinois*, CURVE MAG., June 1, 2007, at 37.

115. Geoffrey R. Stone, *Civil-Union Bill an Apt Compromise*, CHI. TRIB., Mar. 26, 2007, at 17; see also *Civil Union Law Should Get OK*, SPRINGFIELD ST. JOURNAL-REGISTER, Apr. 22, 2007, at 30 (“We hope the General Assembly has the wisdom now to look beyond anti-gay prejudice and see this is an issue of fundamental fairness.”); *It’s Time to Authorize Civil Unions in Illinois*, CHI. SUN TIMES, Mar. 27, 2007, at 29 (“Couples should be allowed to care for each other no matter what their sexual orientation—not in opposition to the law, but with its full support.”).

116. Erik Potter, *“Marriage” Gets Harder to Find in Civil Union Bill*, ST. LOUIS POST-DISPATCH, May 22, 2007, at A1. The original draft contained forty-nine instances of the word *marriage*. *Id.*

117. *Id.*

118. Amber Ellis, *Civil Unions Not On Agenda: Gay-Rights Advocates Fear They Don’t Yet Have the Votes*, DAILY HERALD, June 1, 2007, at 8.

119. Kathleen Haughney, *Civil Union Bill Receives Assist on Facebook*, PANTAGRAPH, Mar. 28, 2008, at A3; *Oak Park Trustees Back Same-Sex Civil Unions*, CHI. TRIB., July 18, 2007, at 6; Stephanie Potter, *State Bar Backs Proposed Legislation Creating Civil Unions*, CHI. DAILY L. BULL., June 25, 2007, at 1.

120. Illinois Religious Freedom Protection and Civil Unions Act, H.B. 1826, 95th Gen. Assem., Reg. Sess. (Ill. 2007), available at <http://www.ilga.gov/legislation/95/HB/PDF/09500HB1826lu.pdf>; see also Joseph F. Emmerth, *Civil Unions in Illinois: A Cautious Gaze into a Possible Future*, 20 DCBA BRIEF 12 (2007).

benefits as are afforded or recognized by the law of Illinois to spouses, whether they derive from statute, administrative rule, policy, common law, or any other source of civil or criminal law.”<sup>121</sup> It sets out some requisites for obtaining a civil union, including that the parties not be related, be at least eighteen years of age, and not be married or in another civil union.<sup>122</sup> It also sets forth the procedures by which civil unions are to be licensed and certified, and explains how they may later be dissolved and what law is to apply.<sup>123</sup> The Illinois act has two distinguishing features, however. First, it explicitly exempts religious organizations from being required to solemnize or officiate over civil unions.<sup>124</sup> Second, it does not limit civil unions to same-sex couples, but rather states that any “2 persons, of either the same or opposite sex,” may form a civil union.<sup>125</sup> It is this latter feature that could prove to be of vital importance to Illinois’s aging population.

**B. The Illinois Religious Freedom Protection and Civil Unions Act May Cure Some Ills Faced by Older Individuals Who Remarry**

Civil unions are not marriages.<sup>126</sup> In fact, federal law now clearly defines marriage so as to exclude civil unions from that category.<sup>127</sup> Although parties to civil unions have many of the same rights as those in marriages, the distinction between the two institutions is more than just one of nomenclature.<sup>128</sup> Courts have recognized that “[t]he dissimilitude between the terms ‘civil marriage’ and ‘civil union’ is not in-

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121. H.B. 1826 § 105.

122. *Id.* § 106.

123. *Id.* §§ 201, 202, 203, 107.

124. *Id.* § 209(b) (“Nothing in this Act shall interfere with or regulate the religious practice of any religious body. Any religious body, Indian Nation or Tribe or Native Group is free to choose whether or not to solemnize or officiate a civil union.”).

125. *Id.* § 201.

126. *Bishop v. Oklahoma ex rel. Edmundson*, 447 F. Supp. 2d 1239, 1250 (N.D. Okla. 2006); *Albright v. Morton*, 321 F. Supp. 2d 130, 138 (D. Mass. 2004); *Rosengarten v. Downes*, 802 A.2d 170, 175 (Conn. App. Ct. 2002); *Lane v. Albanese*, No. FA044002128S, 2005 WL 896129, at \*4 (Conn. Super. Ct. Mar. 18, 2005); *Salucco v. Alldredge*, No. 02E0087GC1, 2004 WL 864459, at \*2 (Mass. Super. Ct. Mar. 19, 2004); *Langan v. State Farm Fire & Cas.*, 849 N.Y.S.2d 105, 107 (App. Div. 2007); *Shields v. Madigan*, 783 N.Y.S. 270, 275 (Sup. Ct. 2004).

127. 1 U.S.C. § 7 (2006) (defining marriage as between one man and one woman).

128. *Kerrigan v. Comm’r of Pub. Health*, 957 A.2d 407, 418 (Conn. 2008).

nocuous; it is a considered choice of language that reflects a demonstrable assigning of same-sex, largely homosexual, couples to second-class status.<sup>129</sup> It has been stated that “the constitutionally based right to marry properly must be understood to encompass the core set of basic substantive legal rights” that may or may not be provided by civil unions.<sup>130</sup> Civil unions may be similar to marriage without providing all the same rights.<sup>131</sup> In fact, many federal benefits, such as those relating to Social Security, Medicare, federal housing, food stamps, federal military and veterans’ programs, federal employment programs, and filing status for federal income tax purposes, are not available to couples in civil unions where they would be to married couples.<sup>132</sup> Civil unions provide many valuable rights, but they are ultimately still inferior to marriage.<sup>133</sup>

#### 1. SOCIAL SECURITY, MEDICARE, AND MEDICAID BENEFITS

It is the very fact that civil unions are not marriages that could make them useful to older couples in Illinois. Civil unions are creatures of state law that cannot alter federal rights.<sup>134</sup> Federal law rather than state law governs a person’s eligibility for Social Security, Medicare, Medicaid, and other federal benefits.<sup>135</sup> So unless federal courts interpreting the statutes governing Social Security, Medicare, and Medicaid determine that a civil union is a “marriage” for purposes of those statutes, older couples who enter into civil unions should not be penalized through the loss of their benefits.

An analysis of previous cases determining what constitutes marriage under the Social Security statute suggests that this would be an

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129. Opinions of the Justices to the Senate, 802 N.E.2d 565, 570 (Mass. 2004).

130. *In re Marriage Cases*, 183 P.3d 384, 399 (Cal. 2008).

131. *Nat’l Pride at Work, Inc. v. Governor of Mich.*, 748 N.W.2d 524, 535 n.7 (Mich. 2008).

132. *In re Marriage Cases*, 183 P.3d at 417; *People v. Greenleaf*, 780 N.Y.S.2d 899, 903–04 (Just. Ct. 2004) (identifying 1049 federal rights dependent on marriage).

133. See David S. Buckel, *Government Affixes a Label of Inferiority on Same-Sex Couples When It Imposes Civil Unions & Denies Access to Marriage*, 16 STAN. L. & POL’Y REV. 73 (2005).

134. *In re Marriage Cases*, 183 P.3d at 417.

135. See *Randall v. Luckhard*, 709 F.2d 257, 263–65 (4th Cir. 1983); *Caldwell v. Astrue*, No. 3:07-cv-222, 2008 WL 2713714, at \*3 (E.D. Tenn. July 10, 2008); *Planned Parenthood Ass’n of Utah v. Dandoy*, 635 F. Supp. 184, 189–90 (D. Utah 1986); *Md. Dep’t of Health & Mental Hygiene v. Brown*, 935 A.2d 1128, 1132 (Md. 2007); *Kegel v. State*, 830 P.2d 563, 566 (N.M. Ct. App. 1992); *Geriatric & Med. Servs., Inc. v. Dep’t of Pub. Welfare*, 616 A.2d 746, 747–48 (Pa. Commw. Ct. 1992).

unlikely result. For example, as early as 1957, the Ninth Circuit ruled that a marriage that had been annulled under state law did not constitute a remarriage that should result in the denial of Social Security benefits to a widow.<sup>136</sup> The court concluded that while the scope of this federal right was a federal question, it should be resolved by reference to how the state viewed the union in question.<sup>137</sup> Because the subsequent annulment of the marriage in the state in which it was formed rendered it “null and void from the beginning,” there was no remarriage for the purpose of the Social Security statute.<sup>138</sup> That same year, a federal court in Vermont echoed this conclusion, concluding that a widow had not remarried within the meaning of the Social Security Act because the marriage in question had been annulled.<sup>139</sup> The court found it significant that she “could secure no support order since [the spouse of her annulled marriage] had no legal duty cast upon him to support her.”<sup>140</sup> Similarly, the U.S. District Court for the District of Oregon held in 1962 that an annulled marriage did not constitute a remarriage under the Social Security Act because the state in which that union occurred would not view it as a marriage.<sup>141</sup> Rather, the court concluded that the alleged remarriage was “void from the beginning” and would not impact the Social Security benefits to be received.<sup>142</sup> There is a long string of cases holding that a marriage that has been annulled does not constitute a remarriage that would terminate benefits under the Social Security Act because the state that formed the union would not view it as a marriage.<sup>143</sup>

Federal courts have every incentive to rely on these cases to conclude that a civil union is not a marriage (or, more properly, a remar-

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136. *Folsom v. Pearsall*, 245 F.2d 562, 565–67 (9th Cir. 1957).

137. *Id.* at 565.

138. *Id.* at 567.

139. *Sparks v. United States*, 153 F. Supp. 909 (D. Vt. 1957).

140. *Id.* at 911. The same would also likely be true of a couple involved in a civil union.

141. *Holland v. Ribicoff*, 219 F. Supp. 274, 277 (D. Or. 1962).

142. *Id.* at 276.

143. See, e.g., *Yaeger v. Flemming*, 282 F.2d 779, 782 (5th Cir. 1960); *Starace v. Celebrezze*, 233 F. Supp. 452, 454 (W.D. Penn. 1964); *Holland*, 219 F. Supp. at 274; *Santuelli v. Folsom*, 165 F. Supp. 224, 225 (N.D. Cal. 1958). There are also cases that have held the opposite. *Sadowitz v. Celebrezze*, 226 F. Supp. 430, 432 (E.D.N.Y. 1964); *Nott v. Folsom*, 161 F. Supp. 905, 909 (S.D.N.Y. 1958). These cases can be distinguished because they relied on a quirk of New York law by which an annulled marriage was *not* considered void from its beginning. *Sadowitz*, 226 F. Supp. at 432; *Nott*, 161 F. Supp. at 909.

riage) under the federal statutes that govern Social Security, Medicare, and Medicaid. The United States has evinced a strong federal policy separating civil unions from traditional marriages.<sup>144</sup> Federal courts have cautioned that civil unions and marriages are not one and the same.<sup>145</sup> The Seventh Circuit has even done so when analyzing the question of what constitutes remarriage under the Social Security Act.<sup>146</sup> Couples in civil unions do not have the federal rights that would be accorded to them by a marriage and therefore would likely not share in the federal responsibilities.<sup>147</sup> Accordingly, it seems quite likely that, as in cases of annulment, courts interpreting the Social Security Act would not deem a remarriage to have occurred. The Illinois Civil Partnership Act would therefore provide a safe haven for older couples who wish to have their union recognized by the state without sacrificing their federal benefits.

## 2. PRIVATE PENSION BENEFITS

Entering into Illinois civil unions, as opposed to marriages, would also appear to shelter older couples from changes to their private pension benefits. The question is whether, as a matter of interpretation of the contract or statute creating the pension rights, a widow or widower receiving benefits under a deceased spouse's pension plan would be deemed to have remarried by entering into a civil union.<sup>148</sup> Again, courts examine whether the union would be deemed a marriage under the law of the place where it was per-

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144. 1 U.S.C. § 7 (2006) (defining marriage as between one man and one woman).

145. *Bishop v. Oklahoma ex rel. Edmundson*, 447 F. Supp. 2d 1239, 1250 (N.D. Okla. 2006); *Albright v. Morton*, 321 F. Supp. 2d 130, 138 (D. Mass. 2004).

146. *Barron v. Apfel*, 209 F.3d 984, 985 (7th Cir. 2000) (noting that "common law marriage is not a synonym for cohabitation, 'domestic partnership,' or contract").

147. *In re Marriage Cases*, 183 P.3d 384, 417 (Cal. 2008).

148. See *Robinson v. Sheet Metal Workers' Nat'l Pension Fund, Plan A*, 515 F.3d 93, 98 (2d Cir. 2008); *Blackshare v. Reliance Standard Life Ins. Co.*, 509 F.3d 634, 639 (4th Cir. 2007) ("Broadly speaking, ERISA plans are contractual documents which, while regulated, are governed by established principles of contract and trust law."); *Prater v. Ohio Educ. Ass'n*, 505 F.3d 437, 441 (6th Cir. 2007) ("At the same time that ERISA carefully regulates the vesting of pension benefits, it leaves the decision of whether employers will provide employees with healthcare benefits upon retirement to contract—a contract that may come in the form of a collective bargaining agreement, an at-will employment relationship or something in between.").

formed.<sup>149</sup> For example, in *Harris v. Railroad Retirement Board*, the Fifth Circuit examined whether a widow should permanently lose pension benefits based on the earnings of her late husband where she entered into a second marriage that was annulled less than two months later.<sup>150</sup> The court concluded that she should not, because that second marriage was voidable due to mental incapacity in Texas, where it was formed, and she had been “restored to her previous status as widow” upon its annulment.<sup>151</sup> Because the union was not viewed as a marriage under the state law that created it, there was no remarriage under the meaning of the pension statute.<sup>152</sup> Similarly, the Supreme Court of Appeals of West Virginia recently held that:

when the right of a surviving spouse to pension benefits has been terminated by a remarriage pursuant to [the relevant pension statute], but the remarriage is subsequently annulled, the surviving spouse’s pension rights held prior to the remarriage should be restored. The second marriage is deemed erased as if it never took place, and the surviving spouse should be restored to the position held prior to remarriage.<sup>153</sup>

And in another similar case, an Illinois court held that a widow whose pension was based on the income of her deceased husband was not married within the meaning of the statute creating her pension rights because her second husband was also deceased.<sup>154</sup> State law did not deem marriage to persist beyond the grave, and accordingly she could be restored to her status as an unmarried widow entitled to benefits.<sup>155</sup> Cases along these lines are numerous.<sup>156</sup> Overall, it is clear that an individual may enter into a union—like a civil union—that is not

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149. See *Sinlao v. United States*, 271 F.2d 846, 848 (D.C. Cir. 1959) (widow not remarried within meaning of pension statute because union had not been memorialized with a ceremony as required by law of Philippines, where it was formed).

150. *Harriss v. R.R. Ret. Bd.*, 3 F.3d 131, 133 (5th Cir. 1993).

151. *Id.* at 133–34.

152. *Id.* at 133.

153. *Bd. of Trs. of the Firemen’s Pension & Relief Fund of the City of St. Albans v. Davis*, 600 S.E.2d 251, 256 (W. Va. 2004).

154. *Siciliano v. Vill. of Westchester Firefighters’ Pension Fund*, 560 N.E.2d 885, 887 (Ill. App. Ct. 1990).

155. *Id.*

156. *Id.*; see also *Bd. of Trs. of the Policemen’s & Fireman’s Ret. Fund of the City of Gadsden v. Kennedy*, 547 So. 2d 886, 888 (Ala. Civ. App. 1989); *Cottam v. City of L.A.*, 184 Cal. App. 2d 523, 526 (1960); *Byrnes v. Ret. Bd. of the Firemen’s Annuity & Benefit Fund of Chi.*, 272 Ill. App. 59 (1933); *Skagen v. New York City Employees’ Ret. Sys.*, 437 N.Y.S.2d 497, 502 (Sup. Ct. 1981).



deemed a marriage where performed without endangering his or her rights to private pension benefits.

### 3. INCURRING ADDITIONAL LIABILITIES

Unfortunately, it does not appear that a civil union provides a viable method for an older couple to avoid liability for each other's necessary expenses. As mentioned above, Illinois has a statute that makes married couples jointly and severally responsible for their family expenses, including medical expenses.<sup>157</sup> Illinois courts have construed the statute broadly to apply even beyond the bounds of marriage.<sup>158</sup> Thus, family expenses have been charged to a former spouse even after divorce.<sup>159</sup> Even if there is no valid, subsisting marriage, one individual may be found liable for the expenses of another if a "family in fact" existed at the time of the expenditures.<sup>160</sup> Given this broad view of when expenses of one spouse may be attributed to the other under the Illinois family expense provision, it is likely that Illinois courts would hold parties to civil unions responsible for one another's expenses. Moreover, Illinois's proposed civil unions statute states that "[p]artners joined in a civil union shall have all the same legal protections, benefits, and *responsibilities* under law, whether they derive from statute, administrative or court rule, policy, common law, or any other source of civil or criminal law, as are granted to spouses in a marriage."<sup>161</sup> From the discussions surrounding the bill it appears that it is genuinely intended to place civil unions on the same footing as marriage with regard to all manner of state-law rights and responsibilities.<sup>162</sup> Accordingly, it would seem that liability for a partner's necessary expenses would be one of the state-law obligations and re-

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157. See, e.g., 750 ILL. COMP. STAT. 65/15(a)(1) (2006).

158. See *Phillips v. Dodds*, 867 N.E.2d 1122, 1125 (Ill. App. Ct. 2007) ("The record contains no evidence that Travell is married. Courts, however, interpret the family expense statute as requiring parents to pay their children's medical and educational expenses regardless of whether the parents are married . . . Thus, being unmarried would not remove Travell from the purview of the family expense statute.").

159. *Proctor Hosp. v. Taylor*, 665 N.E.2d 872, 875 (Ill. App. Ct. 1996).

160. *People's Gas Light & Coke Co. v. Ill. Commerce Comm'n*, 584 N.E.2d 341, 344 (Ill. App. Ct. 1991) (citing *Schlesing v. Keifer*, 30 Ill. App. 253, 257 (1889)).

161. Illinois Religious Freedom Protection and Civil Unions Act, H.B. 1826, 95th Gen. Assem. Reg. Sess. § 105(c) (Ill. 2007) (emphasis added), available at <http://www.ilga.gov/legislation/95/HB/PDF/09500HB182610.pdf>.

162. *Ellis*, *supra* note 112.

sponsibilities the statute is intended to impose on those in civil unions.

#### 4. INHERITANCE ISSUES

Civil unions would also not help older couples with their inheritance issues. Because the Civil Union Act provides that parties to civil unions are to have the same state-law rights as spouses,<sup>163</sup> it likely would provide surviving members of civil unions the right to inherit as much as half of their partner's lifetime assets in the event that partner should die intestate.<sup>164</sup> A surviving member of a civil union would probably also have the right accorded to spouses to renounce a will and take his or her intestate share instead.<sup>165</sup> If an older individual did not want his or her new partner to have this large (or this small) of a share in his or her estate, a civil union would likely be every bit as problematic as a marriage. The answer to the inheritance conundrum for Illinois's older couples remains sensible estate planning.<sup>166</sup>

### III. Recommendations

#### A. Older Illinois Residents and Elder Law Practitioners Should Advocate for the Passage of the Illinois Civil Union Act

In the end, it seems clear that the passage of the Illinois Religious Freedom Protection and Civil Unions Act would be a boon for Illinois's aging population. It would give older people the chance to be in a legally recognized union and obtain state benefits equal to those given married couples without sacrificing the federal benefits on which they frequently depend.<sup>167</sup> Although civil unions would not necessarily solve all the problems older couples face when contemplating remarriage, their power to protect access to Social Security, Medicaid, Medicare, and private pensions would be of vital importance to many seniors.<sup>168</sup>

Despite the potential assistance it could offer them, however, older people are one of the groups most likely to oppose the Illinois

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163. *Id.*

164. See UNIF. PROBATE CODE § 2-102 (amended 2008), 8 U.L.A. 81 (1998).

165. See, e.g., 755 ILL. COMP. STAT. 5/2-8 (2006).

166. See Grama, *supra* note 1, at 398-99.

167. See *supra* Part II.

168. See *supra* Part I.A.

Civil Union Act. Seniors have long opposed gay marriage, and a 2004 report showed that 45% of those sixty-five and older would not vote for a candidate who supported it.<sup>169</sup> President Bush's opposition to gay marriage may have helped build support for his reelection among senior voters in 2004.<sup>170</sup> And opposition to the Massachusetts Supreme Judicial Court's recognition of same sex marriage ran high among this demographic group.<sup>171</sup>

Supporters of the Illinois Civil Union Act are making efforts to educate seniors about how the bill could help them. In the spring of 2008, the bill's sponsor emphasized in media reports that this legislation would help heterosexual couples have rights like hospital visitation and health care decision making for their partners without entering into a marriage.<sup>172</sup> He also noted the problem that older couples face with potentially losing Social Security benefits as the result of a remarriage.<sup>173</sup> A group of seniors even traveled to Springfield in May 2008 to argue their need for the bill.<sup>174</sup> But their efforts have not paid off yet, as the bill is presently stuck in the Rules Committee of the Illinois General Assembly.<sup>175</sup>

It is incumbent upon every senior or near-senior resident of Illinois and every elder law practitioner in the state to advocate on behalf of this bill's passage. To fail to do so would be to allow prejudice and suspicion to win out over the legitimate self-interest of this critically underserved population.

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169. Mark Stricherz, *Gay Marriage and the Election*, WKLY. STANDARD, Apr. 5, 2004, at 15.

170. *Countdown with Keith Olbermann* (NBC television broadcast Feb. 24, 2004), available at <http://www.msnbc.msn.com/id/4371973>.

171. Scott S. Greenberger, *One Year Later, Nation Divided on Gay Marriage*, BOSTON GLOBE, May 15, 2005, at A1.

172. Kathleen Haughney, *Civil Unions Bill Tied to Straight Seniors with Unmarried Partners*, ST. LOUIS POST-DISPATCH, May 15, 2008, at D4.

173. Adriana Colindres, *Sponsor: Civil Union Bill Would Help Seniors*, SPRINGFIELD ST. JOURNAL-REGISTER, May 15, 2008, at 11.

174. Kathleen Haughney, *Lawmaker Looks to Seniors in Bid for Civil Unions Bill*, PANTAGRAPH, May 16, 2008, at A5.

175. See Ill. Gen. Assem., Bill Status of HB1826, <http://www.ilga.gov/legislation/default.asp> (last visited Mar. 12, 2009).

## B. Civil Union and Domestic Partnership Acts Everywhere Should Be Amended to Include Heterosexual Couples

There is nothing about the problems faced by older couples contemplating remarriage that is unique to Illinois. But Illinois's proposed civil unions bill is nearly unique in offering a solution to these problems. Of the existing civil unions bills, the Vermont, Connecticut, New Hampshire, and Oregon bills are expressly limited to same-sex couples.<sup>176</sup> Maine's statute is silent as to whether heterosexual couples are eligible.<sup>177</sup> California and New Jersey allow opposite-sex couples to form civil unions, but only if both members are sixty-two or older.<sup>178</sup> This age limitation is of some significance, as it is primarily older couples with a member under sixty who face concerns about losing Social Security benefits based on a former spouse's income by remarrying.<sup>179</sup> Illinois's proposed statute is the only one that would open up civil unions to all couples of all sexual orientations, regardless of their age.<sup>180</sup>

Clearly other legislatures should follow Illinois's lead on this issue. Though civil union bills in and of themselves may be controversial, it is doubtful that expanding them to include these protections for another underserved group would be. In fact, these provisions might be an aid to consensus on an otherwise "hot" topic. Those states that already have civil union or domestic partnership laws should amend them to include heterosexual couples of all ages. Those that do not should consider introducing bills of the type pending in Illinois.

## IV. Conclusion

The problems faced by older Americans considering remarriage are many and varied. The potential loss of federal benefits or private pensions based on the income of a prior spouse may prevent older couples from even considering marriage. But the proposed Illinois

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176. CONN. GEN. STAT. § 46b-38bb (2008); N.H. REV. STAT. ANN. §§ 457-A:1, -A:8 (2008); OR. REV. STAT. §§ 106.010-990 (2007); VT. STAT. ANN. tit. 15, §§ 1202-1203 (2007).

177. ME. REV. STAT. ANN. tit. 22, § 2710 (2008).

178. CAL. FAMILY CODE § 297 (Deering 2008); N.J. REV. STAT. § 26:8A-4 (2009).

179. 42 U.S.C. §§ 402(e)(3), 402(f)(3) (2000); 20 C.F.R. § 404.335(e) (2008).

180. Illinois Religious Freedom Protection and Civil Unions Act, H.B. 1826, 95th Gen. Assem., Reg. Sess. (Ill. 2007), available at <http://www.ilga.gov/legislation/95/HB/pdf/0950HB1826lv.pdf>.

Religious Freedom and Civil Unions Act would provide Illinois residents with a solution to this problem by allowing couples of any age and sexual orientation to enter into civil unions that would have the same state law rights as marriage but would not be federally recognized. Accordingly, Illinois seniors and near-seniors could obtain important rights like inheritance and hospital visitation rights without sacrificing their pensions. Unfortunately, the Illinois Civil Union Act may not currently have the support it needs to pass into law, and the civil union bills of other states do not always allow heterosexual couples to enter into these relationships. Older people and elder law practitioners alike should advocate for the passage of the Illinois act and the reform of other similar acts nationwide. Civil unions can be made a wonderful, empowering tool not just for couples like Ellen and Portia, but also couples like Bill and Sarah.