

## THE PRECARIOUS STATUS OF DOMESTIC PARTNERSHIPS FOR THE ELDERLY IN A POST-*OBERGEFELL* WORLD

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*The Supreme Court's landmark decision in Obergefell v. Hodges gave same-sex couples the right to marry in all fifty states, correcting the injustice that non-marital legal statuses like domestic partnerships were intended to remedy. Now that same-sex couples can marry nationwide, the federal government and states that created domestic partnerships are considering how to treat couples in those statuses—specifically, whether to treat domestic partners like spouses and whether to continue to offer non-marital legal statuses at all. Three states face a particularly thorny question post-Obergefell: what should be done with domestic partnerships made available to elderly same-sex and straight couples at a time when same-sex couples could not marry. This Article examines why California, New Jersey, and Washington opened domestic partnerships to elderly couples. Although domestic partnerships in these states primarily responded to the needs of gay couples who could not marry, legislators also saw the elderly as sympathetic: unfairly prevented from remarrying for fear of losing benefits from a previous marriage. This Article drills down on three specific obligations and benefits tied to marriage—receipt of alimony, Social Security spousal benefits, and duties to support a partner who needs long-term care under the Medicaid program—and shows that entering a domestic partnership rather than*

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*marrying does not benefit all elderly couples; rather, the value of avoiding marriage varies by wealth and benefit. The Article concludes that as pressure mounts to fold domestic partners into marriage after Obergefell, legislators should examine whether domestic partnerships have become a province of the wealthy, undercutting the impetus for maintaining a second, collateral status.*

Long before the U.S. Supreme Court's landmark decision in *Obergefell v. Hodges*,<sup>1</sup> which opened marriage to same-sex couples in all fifty states, many states recognized the deep unfairness of excluding gay people from marriage and its off-the-rack protections and benefits. Some states opened legal statuses outside of marriage only to same-sex couples, affording them marriage-like protections and responsibilities. Colorado, Hawaii, Illinois, and New Jersey dubbed these statuses civil unions, while the District of Columbia and California, Maine, Nevada, Wisconsin, Washington, Oregon, and Hawaii labelled them domestic partnerships.<sup>2</sup> Offering these important protections to gay couples could not siphon couples away from marriage because, by definition, gay couples could not marry.<sup>3</sup>

In some instances, non-marital legal statuses turned out to be a stepping stone to state legislation opening marriage to same-sex couples.<sup>4</sup> The voluntary embrace of same-sex marriage raised in those states the question now facing the nation: what should happen to marriage-like statuses after the animating rationale for them—that gay couples could not marry—no longer holds true? State legislatures almost universally closed off the non-marital statuses after enacting same-sex marriage. Many also converted existing relationships into marriage. By 2014, Connecticut,<sup>5</sup> Delaware,<sup>6</sup> New Hampshire,<sup>7</sup>

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1. *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015).

2. *Civil Unions & Domestic Partnership Statutes*, NAT'L CONF. OF STATE LEGISLATORS, (Nov. 18, 2014), <http://www.ncsl.org/research/human-services/civil-unions-and-domestic-partnership-statutes.aspx> [hereinafter *Civil Unions & Domestic Partnership Statutes*].

3. *E.g.*, *Marvin v. Marvin*, 557 P.2d 106 (Cal. 1976).

4. Robin Fretwell Wilson, *The Politics of Accommodation*, in RELIGIOUS FREEDOM AND GAY RIGHTS: EMERGING CONFLICTS IN THE UNITED STATES AND EUROPE 132, 178 (Timothy Samuel Shah et al. eds., 2016) (showing how different states legalized same-sex marriage and listing Connecticut, Delaware, District of Columbia, Hawaii, Illinois, Maine, Maryland, Minnesota, New Hampshire, New York, Rhode Island, , and Vermont as jurisdictions that voluntarily enacted same-sex marriage); see also Raymond C. O'Brien, *Family Law's Challenge to Religious Liberty*, 35 ARK. L. REV. 3 (2012).

5. CONN. GEN. STAT. ANN. § 46b-38rr (2015).

6. DEL. CODE ANN. tit. 13, § 218 (2015).

7. N.H. REV. STAT. ANN. § 457:46 (2016).

Rhode Island,<sup>8</sup> and Vermont<sup>9</sup> had all converted their civil unions into marriages.<sup>10</sup>

Three states followed a different path—opening up domestic partnerships to gay couples *and* one discrete group who *could* marry: heterosexual couples where at least one partner is “elderly,” meaning sixty-two years of age or older.<sup>11</sup> Although states had largely resisted building up remedies outside of marriage for ordinary heterosexual cohabitants, fearing that it would siphon people from marriage,<sup>12</sup> legislators in California, New Jersey, and Washington worried that elderly individuals on the edge of poverty would be deterred from remarriage by the specter of losing benefits tied to earlier marriages.

Now that *Obergefell* has erased the unfairness that civil unions and domestic partnerships were (largely) created to remedy, states and the federal government face the thorny question: what should be done with these non-marital statuses?<sup>13</sup> The question is made harder in California, New Jersey, and Washington, which opened up domes-

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8. 15 R.I. GEN. LAWS ANN. § 15-3.1-12 (2015).

9. VT. STAT. ANN. 18, § 5131 (2016) (repealing VT ST T. 18 § 5160 which resulted in new civil unions not being available after September 1, 2009).

10. *Civil Unions & Domestic Partnership Statutes*, *supra* note 2. Hawaii and Illinois still permit civil unions. HAW. REV. STAT. ANN. § 572B-2 (2015); 750 ILCS 75/25 (2016). Maine and the District of Columbia still permit domestic partnerships. ME. REV. STAT. tit. 22, § 2710 (2015); D.C. CODE ANN. § 32-702 (2015). Maryland, Minnesota, and New York never instituted civil unions or domestic partnerships in statewide law. Maryland did, however, add domestic partners to the list of family members that could be added or removed from a deed to residential property without paying the state either recording or transfer fees. MD. CODE ANN., Tax-Prop. § 12-101 (2015).

11. See CAL. FAM. CODE § 297 (2015); N.J. STAT. ANN. § 26: 8A-4 (2015); WASH. REV. CODE ANN. § 26.60.010 (2015). We adopt the term used by legislators to describe these opposite-sex couples. Notably, people ordinarily become eligible to start receiving Social Security retirement benefits at sixty-two years of age. *Full Retirement Age: If You Were Born Between 1943 And 1954*, SOCIAL SECURITY, <https://www.ssa.gov/planners/retire/1943.html> (last visited Apr. 22, 2016).

By permitting older opposite-sex couples to also receive the benefits of domestic partnership, legislators may have wanted to cast domestic partnerships as responding to the need for legal support generally, rather than only as supporting same-sex unions—making recognition more palatable to citizens who may have objected on religious or moral grounds to same-sex unions.

12. *E.g.*, *Marvin v. Marvin*, 557 P.2d 106 (Cal. 1976).

13. Legislators may also revisit other family law doctrines developed before same-sex marriage recognition that were largely designed to accommodate same-sex couples, such as de facto parent status and various equitable arrangements for giving custodial rights and visitation with children of a same-sex couple. See Raymond O’Brien, “*Obergefell* and Its Challenge to Functional Families,” XX Catholic University L. Rev. XX (forthcoming).

tic partnerships to both gay couples and couples where at least one member is elderly.<sup>14</sup>

The Article asks whether the reasons for opening domestic partnerships to the elderly continue to exist after *Obergefell* rendered mooted the need for non-marital statuses for gay couples. Part I assesses the goods served by opening domestic partnerships up to the elderly across three domains—entitlement to alimony, social security survivor benefits, and Medicaid long-term care benefits. It describes pressures after *Obergefell* to fold domestic partners into the rules for spouses which, if carried to their logical conclusion, would largely obliterate the protection legislators sought to give the elderly poor.

Part I of this Article explains why legislators in California, New Jersey, and Washington showed such solicitude for elderly heterosexuals when marriage was available to them. Many elderly couples live on the edge of poverty; many receive governmental benefits or alimony tied to an earlier marriage, important sources of support that may be lost upon remarriage. California, New Jersey, and Washington legislators gave the elderly another vehicle for relationship security because they believed that remarriage exacerbates economic hardships.

Part II shows that the overarching justification for opening non-marital status to the elderly—to avoid forfeiting retirement and other benefits upon remarriage—rests on shifting sands. This Part first shows how remarriage negatively impacts entitlements and receipt of marriage-related benefits while non-marital legal statuses *sometimes* do not. It examines alimony termination rules, Social Security spousal benefit rules, and the duties that spouses have to each other when one receives Medicaid-paid long-term care—and contrasts these results with those for domestic partners.<sup>15</sup> Ironically, this Part demonstrates that entering into a domestic partnership instead of marrying does not benefit all elderly couples; rather, the value of avoiding marriage varies by wealth and the benefit or burden at stake. It also shows that while legislators assumed penalties would not follow if a couple simply avoided marrying, they did not anticipate efforts by the federal government to treat domestic partners like spouses.

Part III considers the future of domestic partnerships in light of this legal landscape and the pressure after *Obergefell* to treat domestic

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14. We recognize that same-sex couples may also be elderly.

15. Naturally, other considerations would be important to any couple's planning, including their projected tax treatment, how military retirements, if any, would be treated, and how their estates would be managed after death.

partners exactly as spouses are treated. Equal treatment erases the possibility that elderly couples can “game” the spousal benefit and burden rules. Because regulators are likely to accelerate efforts to treat all couples in non-marital legal statuses like married couples, the value of maintaining a second, collateral status is waning. Moreover, the complexity of the interaction between domestic partnerships and benefit rules suggests that, far from assisting penniless couples, domestic partnerships are likely the province of the wealthy because only those with the best counsel or information are likely to be able to successfully navigate the thicket of dense benefits rules. Because couples rarely enter domestic partnerships, reliance interests are low, giving legislators the ability to scrap a status that failed to live up to its original billing.

## I. Domestic Partnerships Responded to the Needs of Gay Couples and the Elderly

States enacted non-marital legal statuses primarily to extend the protections of marriage to committed gay couples locked out of marriage, as this Part shows. In New Jersey, Washington, and California, state legislators also allowed elderly couples to become domestic partners<sup>16</sup> for one overarching reason: the effect of remarriage on previously married individuals’ income and retirement benefits. As Part II shows, the elderly are proper subjects of legislative concern because many will face dire economic difficulties in their twilight years.

### A. New Jersey

In 2004, New Jersey passed the Domestic Partnership Act (NJDPA), which offered a subset of marriage rights to eligible “persons of the same sex and . . . [to] two persons who are each 62 years of age or older and not of the same sex.”<sup>17</sup> Explicitly enacted with “same-sex couples in mind,” the NJDPA “formally recognized by statute” the couples’ “mutually supportive relationships.”<sup>18</sup> Couples “who choose

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16. These statuses do vary in notable ways. Most pertinently, New Jersey requires that *each* member of the opposite-sex couple be at least sixty-two years old, while Washington and California require that *one* member be at least sixty-two. CAL. FAM. CODE § 297 (2015); N.J. STAT. ANN. § 37:1-28 (2015); WASH. REV. CODE ANN. § 26.60.030 (2015).

17. N.J. STAT. ANN. § 26:8A-4 (2015).

18. *Lewis v. Harris*, 188 N.J. 415, 447–48 (N.J. 2006) (“With same-sex partners in mind, the legislature declared that ‘[t]here are a significant number of individu-

to live together in important personal, emotional, and economic committed relationships . . . assist the State by [assuring] support for the financial, physical, and emotional health of their participants;" recognizing this reality, New Jersey gave domestic partners important legal protections, albeit a smaller number of rights, benefits, and obligations than those enjoyed by married couples.<sup>19</sup>

An amendment to the draft law added elderly heterosexuals into the protections of domestic partnerships because, similar to same-sex couples, they were effectively locked out of marriage, albeit for financial reasons. "[O]lder persons often refrain from entering into marriage because remarriage could jeopardize their status as . . . [a] . . . surviving spouse with regard to retirement income and benefits."<sup>20</sup>

The fate of same-sex and elderly domestic partners was bound up from the beginning. Same-sex couples soon sued for access to marriage itself. In 2006, the New Jersey Supreme Court held that the legislature must either permit same-sex couples to marry or create a separate statutory scheme that provided same-sex couples with all of the rights, benefits, burdens, and obligations of married couples; "the un-

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als in this State who choose to live together in important personal, emotional and economic committed relationships,' *N.J.S.A.* 26:8A-2(a), and that those 'mutually supportive relationships should be formally recognized by statute,' *N.J.S.A.* 26:8A-2(c). The legislature also acknowledged that such relationships 'assist the State by their establishment of a private network of support for the financial, physical and emotional health of their participants.' *N.J.S.A.* 26:8A-2(b)."

19. *Lewis*, 188 N.J. at 447-48 ("For those same-sex couples who enter into a domestic partnership, the Act provides a limited number of rights and benefits possessed by married couples, including 'statutory protection against various forms of discrimination against domestic partners; certain visitation and decision-making rights in a health care setting; certain tax-related benefits; and, in some cases, health and pension benefits that are provided in the same manner as for spouses.' *N.J.S.A.* 26:8A-2(c). Later amendments to other statutes have provided domestic partners with additional rights pertaining to funeral arrangements and disposition of the remains of a deceased partner, *L. 2005, c. 331*, inheritance privileges when the deceased partner dies without a will, *L. 2005, c. 331*, and guardianship rights in the event of a partner's incapacitation, *L. 2005, c. 304*."). For additional benefits of domestic partnership, see N. J. CIVIL UNION REVIEW COMM'N, FINAL REPORT: THE LEGAL, MEDICAL, ECONOMIC & SOCIAL CONSEQUENCES OF NEW JERSEY'S CIVIL UNION LAW 42-43 (Dec. 10, 2008), <http://www.nj.gov/lps/dcr/downloads/CURC-Final-Report-.pdf>. For an extensive listing of the rights that married couples have that domestic partners are denied and the lessened burdens and obligations on domestic partners when the domestic partnership terminates, see *Lewis*, 188 N.J. at 447-48.

20. N.J. ASSEMBLY COMM. STATEMENT, A.B. 3743, 210th Leg. (2003); Erin Cleary, *New Jersey Domestic Partnership Act in the Aftermath of Lewis v. Harris: Should New Jersey Expand the Act to Include All Unmarried Cohabitants?*, 60 RUTGERS L. REV. 519, 532 (2008) (citing Report to Senate Committee Substitute, No. 2820 § 4 (N.J. Dec. 15, 2003)).

equal dispensation of rights and benefits to committed same-sex partners” violated the equal protection guarantee in New Jersey’s Constitution.<sup>21</sup>

Availing itself of the second option, the legislature enacted the Civil Union Act (the Act) in late 2006, giving “*same-sex* couples . . . the same rights and benefits as heterosexual couples who choose to marry.”<sup>22</sup> The Act also amended the NJDPA so that *only* couples, who are “each 62 years of age or older,” gay and straight, could become domestic partners.<sup>23</sup> Finally, the legislature established the New Jersey Civil Union Review Commission (the Commission) and tasked it with recommending whether the NJDPA should be repealed.<sup>24</sup>

The Commission recognized that very few opposite-sex couples became domestic partners.<sup>25</sup> Nevertheless, it recommended against repeal of the NJDPA because “domestic partnerships offer another option to couples age 62 or older that provides them with some of the rights of marriage but does not interfere with certain benefits they may receive. . . .”<sup>26</sup> As witnesses testified, “domestic partnerships provide ‘important advantages to [the elderly] related to medical treatment, State taxes and public employee benefits’”—benefits that more of the elderly would take advantage of if they knew that a domestic partnership was an option.<sup>27</sup> Specifically,

domestic partners can make medical decisions and have visitation rights as if they were spouses. One partner can claim the other as a dependent on state tax returns, and in cases where one partner transfers property to the other as a gift or as part of an estate, the domestic partnership qualifies them to receive beneficial tax treatment. For many public employees, a domestic partnership entitles partners to pension and retirement benefits. Moreover,

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21. *Lewis*, 188 N.J. at 423.

22. N.J. STAT. ANN. § 37:1-28 *et seq.* (2015) (emphasis added).

23. N.J. STAT. ANN. § 26:8A-4.1 (2015).

24. Cleary, *supra* note 20, at 522.

25. N.J. CIVIL UNION REVIEW COMM’N, *supra* note 19, at 43 (noting that only one hundred opposite-sex couples had registered prior to the effective date of civil unions (February 19, 2007), and only fifty-two additional couples had registered as of December 2008).

26. *Id.* at 42.

27. *Id.* at 43–44. (“While acknowledging that ‘there have not been overwhelming numbers of seniors registering as domestic partners’ to date . . . the number will increase over time as more seniors become aware of the availability of the option. An elder law practitioner . . . acknowledged tax and estate benefits and healthcare rights enjoyed by domestic partners, as well as the protection of certain social security benefits that would be eliminated if a senior remarried. She echoed the comment of the Public Advocate suggesting that more seniors would opt for domestic partnerships if they knew it was an alternative.”).

domestic partners do not risk losing social security benefits as they would under some circumstances if they were to marry.<sup>28</sup>

The legislature accepted the Commission's recommendation.

As the revamping of domestic partnerships and civil unions unfolded, gay couples continued to press for full access to marriage in the courts. In 2013, they realized that goal when Governor Chris Christie ordered state officials to drop the state's appeal of *Garden State Equality v. Dow*, which held that equal protection required New Jersey to give same-sex couples access to marriage.<sup>29</sup>

In short, after 2013, the one non-marital status that New Jersey couples could enter into was domestic partnership, and it was restricted to elderly couples, regardless of their sexual orientation.

## B. Washington

Washington followed a less tortured path. In 2007, it offered domestic partnerships to otherwise eligible couples if both persons are of the same sex or at least one is sixty-two years of age or older.<sup>30</sup> The legislature primarily intended to, in the words of Governor Chris Gregoire, treat same-sex couples with "dignity and respect by clarifying that they have some of the same rights and responsibilities as married couples on issues relating to the health care, incapacity and death of their loved one."<sup>31</sup>

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28. *Id.*

29. *Garden State Equal. v. Dow*, 216 N.J. 314, 326, (N.J. 2013); Maureen McCarty, *New Jersey Becomes 14th State with Marriage Equality*, HUMAN RIGHTS CAMPAIGN (Oct. 21, 2013), <http://www.hrc.org/blog/marriage-equality-law-of-the-land-in-new-jersey>.

30. WASH. REV. CODE ANN. § 26.60.030 (2015).

31. Press Release, Office of the Governor, Governor Gregoire Signs Legislation Giving Legal Rights to Domestic Partners (Apr. 21, 2007), <http://www.digitalarchives.wa.gov/GovernorGregoire/news/news-view.asp?pressRelease=551&newsType=1> ("Governor Chris Gregoire today signed into law a measure to treat domestic partners with dignity and respect by clarifying that they have some of the same rights and responsibilities as married couples on issues relating to the health care, incapacity and death of their loved one. . . . Under the bill, registered domestic partners have the same rights as married couples in visiting health care facilities, providing informed consent for health care when the patient is not competent, title and rights to cemetery plots, authorization of an autopsy, disposition of remains, ability to make organ donation decisions, inheritance and administration of the estate if the partner dies without a will and the right to bring a wrongful death action.").

For a detailed explanation of the rights extended to domestic partners and the lesser exit requirements compared to marriage, see Wash. H. B. Analysis, 2007 Reg. Sess. S.B. 5336 and Wash. Final B. R., 2007 Reg. Sess. S.B. 5336.



After extensive hearings, the legislature concluded that “the public interest would [also] be served by extending rights and benefits to couples in which either or both of the partners are” sixty-two, the age at which “many people choose to retire and are eligible to begin collecting social security and pension benefits.”<sup>32</sup> While elderly couples “are entitled to marry . . ., some social security and pension laws nevertheless make it impractical for these couples to marry.”<sup>33</sup>

The effort to respond to the realities facing “[s]ingle, elderly individuals who find the love of their life” encountered significant resistance.<sup>34</sup> Opponents cautioned against a “new category of relationships which water down the commitment to marriage,” if not “rival marriage.”<sup>35</sup> Others hammered the unfairness of not including “siblings and other blood relations that could benefit from the caretaking provisions in the bill.”<sup>36</sup> Indeed, a “great variety of bonded relationships exist outside marriage, [which] face the same emotionally challenging issues.”<sup>37</sup>

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32. WASH. REV. CODE ANN. § 26.60.010 (2015).

Supporters explained that “[t]here are many older couples in situations where if they marry they put themselves in financial difficulties” and “[s]ingle, elderly individuals who find the love of their life struggle about their options to be together but not lose their benefits.” Wash. H. B. Report, 2007 Reg. Sess. S.B. 5336.

The legislature decided that: “the public interest would be served by extending rights and benefits to couples in which either or both of the partners are at least sixty-two years of age. While these couples are entitled to marry under the state’s marriage statutes, some social security and pension laws nevertheless make it impractical for these couples to marry. For this reason, chapter 156, Laws of 2007 specifically allows couples to enter into a state registered domestic partnership if one of the persons is at least sixty-two years of age, the age at which many people choose to retire and are eligible to begin collecting social security and pension benefits.” § 26.60.010 (2015).

33. *Id.*

34. Wash. H. B. Report, 2007 Reg. Sess. S.B. 5336.

35. *Id.* (“This bill unjustly discriminates against people in the state. Many other kinds of relationships don’t get the same benefits as domestic partners. . . . The bill should apply to all adults who cannot marry. Many rights in this bill can be obtained in an easy and uncomplicated manner. . . . This bill establishes a new category of relationships which water down the commitment to marriage.”).

36. *Id.* (“The bill discriminates against other citizens who are not able to marry, and should be amended to include siblings and other blood relations that could benefit from the caretaking provisions in the bill. It is reasonable and fair to extend protections to other people and it will help multi-generational families and immigrant families who care for each other. . . . The bill creates a civil arrangement that is an alternative to marriage for heterosexual seniors. It undermines and will eventually rival marriage as the rights under the bill are expanded.”).

37. *Id.*

The legislature narrowly enacted the bill.<sup>38</sup> As Governor Chris Gregoire explained when signing the bill, the elderly “were included . . . because many [of them] live on low or fixed incomes and cannot remarry without losing their former spouse’s pension or social security benefits.”<sup>39</sup>

Like New Jersey, Washington originally gave domestic partners only some of the legal rights and responsibilities of spouses—principally in health care decision making, hospital visitation, inheritance, and estate administration, as well as the right to “bring a wrongful death action.”<sup>40</sup> The Washington legislature progressively amended the statute. By 2009, “for all purposes under state law, state registered domestic partners [were] treated the same as married spouses.”<sup>41</sup>

In 2012, Washington voluntarily enacted same-sex marriage, “preserv[ing] domestic partnerships only for [the elderly].”<sup>42</sup> The measure survived a referendum and became law.<sup>43</sup>

Consequently, today the only individuals permitted to become domestic partners in Washington are opposite-sex and same-sex couples where “[b]oth persons are at least eighteen years of age and at least one of the persons is sixty-two years of age or older.”<sup>44</sup> All other domestic partnerships were “automatically merged into marriage.”<sup>45</sup>

38. See WASH. ST. LEG., HISTORY OF THE BILL (Mar. 12, 2016), <http://apps.leg.wa.gov/BillInfo/summary.aspx?bill=5336&year=2008>.

39. Press Release, *supra* note 31.

40. *E.g., id.*; see Wash. H. B. Analysis, 2007 Reg. Sess. S.B. 5336 and Wash. Final B. Rep., 2007 Reg. Sess. S.B. 5336.

41. Press Release, *supra* note 31; WASH. REV. CODE ANN. § 26.60.015 (2015) (“Any privilege, immunity, right, benefit, or responsibility granted or imposed by statute, administrative or court rule, policy, common law or any other law to an individual because the individual is or was a spouse, or because the individual is or was an in-law in a specified way to another individual, is granted on equivalent terms, substantive and procedural, to an individual because the individual is or was in a state registered domestic partnership or because the individual is or was, based on a state registered domestic partnership, related in a specified way to another individual. The provisions of chapter 521, Laws of 2009 shall be liberally construed to achieve equal treatment, to the extent not in conflict with federal law, of state registered domestic partners and married spouses.”).

42. *Same-Sex Marriage Laws*, NAT’L CONF. OF STATE LEGISLATURES (June 26, 2015), <http://www.ncsl.org/research/human-services/same-sex-marriage-laws.aspx>; *Proposed Referendum Measures—2012*, WASH. SEC’Y OF ST., <http://www.sos.wa.gov/elections/initiatives/referendum.aspx?y=2012> (last visited Apr. 22, 2016).

43. *Id.*

44. WASH. REV. CODE ANN. § 26.60.030 (2015).

45. WASH. REV. CODE ANN. § 26.60.100(3)(a) (2015) (“[A]ny state registered domestic partnership in which the parties are the same sex, and neither party is

### C. California

In 1999, California enacted its first domestic partnership statute. It permitted same-sex couples over eighteen, and opposite-sex couples where both were over sixty-two and met specific other criteria under the Social Security Act, to enter into domestic partnerships.<sup>46</sup>

As introduced, the bill would have allowed all opposite-sex and same-sex couples over eighteen to become domestic partners.<sup>47</sup> Under an onslaught of criticism that if heterosexual couples “are not willing to commit to each other in a real marriage, the taxpayer-supported state government should not commit to their relationship either,”<sup>48</sup> legislators carved the proposal back to encompass only elderly opposite-sex couples.<sup>49</sup> Elderly heterosexuals stayed in because California was home to at least “35,000 . . . [elderly] couples [in California] who [were] not married because of social security or other pension restrictions.”<sup>50</sup> Moreover, “[e]lderly couples who form committed and exclusive relationships share a similar problem” with gay couples—the lack of health plan coverage for partners<sup>51</sup>—and “many would not,

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sixty-two years of age or older, that has not been dissolved or converted into a marriage by the parties by June 30, 2014, is automatically merged into a marriage and is deemed a marriage as of June 30, 2014.”)

46. *Burnham v. Cal. Pub. Empl. Ret. Sys.*, 146 Cal. Rptr. 3d 607, 610–11 (Cal. Ct. App. 2012).

47. *Id.*

48. Opponents stated that other “heterosexual couples could use this benefit as well and that if those couples are not willing to commit to each other in a real marriage, the taxpayer-supported state government should not commit to their relationship either. The historical family arrangement works best for society, struggling families do not need their tax burden increased to recognize and support non-dependent adult friendships, which is all domestic partnerships really are.” ASSEMB. COMM. ON HEALTH, CAL. B. ANALYSIS, A.B. 26, (Apr. 13, 1999); see also ASSEMB. COMM. ON HEALTH, CAL. B. ANALYSIS, A.B. 26 (Apr. 8, 1999).

49. Governor Gray Davis insisted that the original bill had to be amended to limit domestic partnerships to only same-sex couples because opposite-sex couples had the option of marrying. Paul R. Lynd, *Domestic Partner Benefits Limited to Same-Sex Couples: Sex Discrimination Under Title VII*, 6 WM. & MARY J. WOMEN & L. 561, 572 n.41 (2000); see also Robert Salladay, *Governor Forces Weaker Bill on Domestic Partners*, SF GATE (July 8, 1999, 4:00 AM), <http://www.sfgate.com/news/article/Governor-forces-weaker-bill-on-domestic-partners-3076122.php>. While Governor Davis signed off on the final bill that limited opposite-sex couples who could be in domestic relationships to the elderly, he vetoed as “overly broad” a second bill that would have opened up domestic partnerships to all heterosexuals. Lynd, *supra*.

50. S. JUDICIARY COMM., CAL. B. ANALYSIS, A.B. 26 (July 7, 1999).

51. ASSEMB. COMM. ON HEALTH, CAL. B. ANALYSIS, A.B. 26 (Apr. 8, 1999); see also S. RULES COMM., CAL. B. ANALYSIS, A.B. 26 (Sept. 3, 1999); S. JUDICIARY COMM., CAL. B. ANALYSIS, A.B. 26 (July 7, 1999) (“Especially to senior citizens, cohabitation with a trusted friend, male or female, could give them companionship, security and independence they so need at this time of their lives. Yet, many would not, or

or could not, marry due to restrictions on social security or other pension benefits that would affect their incomes.”<sup>52</sup>

In 2001, the legislature expanded the class of couples who could become domestic partners to its current state: couples who are either “[b]oth . . . of the same sex” or “one or both of the persons are over 62 years of age . . . and [o]ne or both . . . meet the eligibility criteria” for old age, survivor or disability benefits under the Social Security Act.<sup>53</sup> As California courts later explained, this expansion was intended to “authorize[] domestic partnerships on the part of couples whose Social Security or Supplemental Security Income benefits might be reduced or eliminated if they were to marry.”<sup>54</sup>

Domestic partners were originally given specifically enumerated, limited rights and responsibilities, such as “mak[ing] medical decisions for each other, adopt[ing] their partner’s child, [and] us[ing] sick leave to care for an ailing partner and participate in their partner’s conservatorship.”<sup>55</sup> The California legislature, however, later amended its domestic partnership statutes to gradually equalize “domestic partners’ and married couples’ statuses, both during and at the termination of their relationships . . . as much as possible.”<sup>56</sup> By 2003,

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could not, marry due to restrictions on social security or other pension benefits that would affect their incomes. . . . Some health plans currently offer benefits to spouses that are not available to a subscriber’s partner because the subscriber and partner are not married. The problem is the same for heterosexual couples, same-sex couples, and elderly couples who form committed and exclusive relationships . . . .”); ASSEMB. COMM. ON HEALTH, CAL. B. ANALYSIS, A.B. 26 (Apr. 13, 1999).

52. *Burnham v. Cal. Pub. Empl. Ret. Sys.*, 146 Cal. Rptr. 3d 607, 610–11 (Cal. Ct. App. 2012).

53. CAL. FAM. CODE § 297 (2015) (emphasis added); *Burnham*, 146 Cal. Rptr. 3d at 610–11.

To receive disability benefits, recipients must be financially needy, introducing a means-test for some domestic partnerships. See Part III *infra*.

54. *Holguin v. Flores*, 18 Cal. Rptr. 3d 749, 751 (Cal. Ct. App. 2004).

55. *Id.* at 752.

56. *E.g.*, CAL. FAM. CODE § 297.5 (2015) (stating that domestic partners shall have “the same rights, protections, and benefits, and shall be subject to the same responsibilities, obligations, and duties under law, whether they derive from statutes, administrative regulations, court rules, government policies, common law, or any other provisions or sources of law, as are granted to and imposed upon spouses”); see also *Koebke v. Bernardo Heights Country Club*, 115 P.3d 1212, 1218–19 (Cal. 2005) (discussing the rights, benefits, and obligations of domestic partners); *In re Domestic P’ship of Ellis*, 76 Cal. Rptr. 3d 401, 404–06 (Cal. Ct. App. 2008) (discussing the rights, benefits, and obligations of domestic partners and married couples upon the creation of their status and separation) (“To summarize, the Domestic Partner Act provides: (1) it must be construed liberally to give registered domestic partners the same rights and obligations as married couples, to the extent permissible by law; and (2) the same rights, protections, and benefits are to be

with the passage of the Domestic Partner Act, California gave domestic partners the “the same rights, protections, and benefits” and “the same responsibilities, obligations, and duties” as spouses.<sup>57</sup>

In 2013, the messy legal battle over Proposition 8, California’s constitutional amendment banning same-sex marriage after the California Supreme Court recognized it, finally resolved itself with the U.S. Supreme Court’s decision in *Hollingsworth v. Perry*.<sup>58</sup> Same-sex marriage in California unquestionably became legal.<sup>59</sup>

Following *Perry*, the legislature did not eliminate domestic partnerships or further amend its domestic partnership laws, even when other unmarried cohabiting couples sued for access to domestic partnership on equal protection grounds and lost.<sup>60</sup> Consequently, domestic partnerships in California remain available only to same-sex and elderly heterosexual couples.<sup>61</sup>

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granted to registered domestic partners dissolving their domestic partnership as are granted to spouses dissolving their marriage.”).

57. CAL. FAM. CODE § 297.5 (2015).

58. *Hollingsworth v. Perry*, 133 S. Ct. 2652, 2652 (2013) (holding that private parties lacked standing to appeal lower court decisions finding unconstitutional California’s state constitutional same-sex marriage ban, permitting California to resume same-sex marriages).

59. *E.g.*, Greg Botelho, *Same-Sex Marriages Resume in California after Court Gives Go-Ahead*, CNN (June 29, 2013), <http://www.cnn.com/2013/06/28/justice/california-same-sex-marriage/>.

60. *Holguin*, 18 Cal. Rptr. 3d at 759–60 (holding that surviving members of unmarried cohabiting couples are not denied equal protection by their exclusion from California’s domestic partnership statutes, which prevents them from having standing to sue for the wrongful death of a partner, because: “The Legislature rationally could have concluded the survivors of same sex couples and couples with an aged member eligible for Social Security benefits are deserving of solicitude because they are as likely to suffer economic loss from the death of their partners as are spouses but, because of other statutory schemes, they are legally or practically prevented from marrying. [Non-elderly opposite sex] [c] . . . are not entitled to the same solicitude because the law did not prevent them from marrying. Furthermore, the Legislature could reasonably have concluded the failure of opposite sex couples ‘to adopt the responsibility of the marital vows and the legal obligation resulting from a formal marriage ceremony evidenced a lack of permanent commitment which made compensation for loss of monetary support too speculative to calculate.”).

61. For an in-depth discussion of California’s domestic partnership statutes, as well as California’s path to same-sex marriage, see Hunter Starr, *A Clear and De-liberate Step: Chapter 721 Brings Domestic Partnerships Closer to Marriage*, 43 MCGEORGE L. REV. 655 (2012).

## II. The Plight of the Elderly Who Remarry

This Part examines the magnitude of the financial problems facing couples who want permanent, committed relationships without the negative impact remarriage has on retirement benefits and income. It begins by recognizing that an increasing number of elderly Americans face dire economic circumstances—a fact that did, and should, concern legislators. It then analyzes alimony termination rules, Social Security spousal retirement benefit rules, and special rules concerning the collective financial obligation of spouses when one receives nursing home care paid by Medicaid. Ironically, this Part shows that legislators' efforts to assist the elderly to skirt the financial consequences of remarriage have been a mixed bag: entering a domestic partnership often carries the same consequences as actually marrying. Federal efforts to bring same-sex couples into parity with married couples before *Obergefell* opened access to marriage for same-sex couples everywhere have only continued, closing but not eliminating the loophole legislators sought to open for elderly couples.

### A. The Pervasiveness of Poverty Among the Elderly

Legislators rightfully worry about the elderly's retirement benefits and social security income. For many, this income is their primary source of support.

Although wealth is concentrated in a small slice of America, including many elderly couples who have considerable assets,<sup>62</sup> a significant portion of the elderly live on the edge of poverty.

The majority of older Americans have little to no savings.<sup>63</sup> Half of all households headed by a person at least fifty-five years old<sup>64</sup> have

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62. The elderly are a resource-heavy population. See generally NINA A. KOHN, *ELDER LAW: PRACTICE, POLICY, & PROBLEMS* (2014); Margaret F. Brinig, *Grandparents and Accessory Dwelling Units: Preserving Intimacy and Independence*, 22 *ELDER L.J.* 381, Figure 1 (2015). And some elderly Americans have accumulated significant amounts of wealth. The National Institute of Retirement Savings recognizes that "[t]he dollars have really been concentrated at higher income levels." Katy Read, *The Real Story About Retirement: Millions of Baby Boomers Face Financial Crisis*, *STAR TRIB.* (Oct. 21, 2015), <http://www.startribune.com/the-real-story-about-retirement-millions-of-baby-boomers-face-financial-crisis/334718191/>. Consider Baby Boomers. As of 2010, "the top 5 percent controlled 54 percent of the assets. The top 10 percent controlled 70 percent of baby boomer assets. The top 25 percent controlled 89 percent. The bottom half only had 3 percent." *Id.*

63. Roughly three in ten individuals over fifty have zero savings (twenty-five to forty percent). Joe Seldner, *The Massive Problem of Senior Poverty is Here Today*, *HUFFINGTON POST* (Feb. 2, 2016), [http://www.huffingtonpost.com/joe-seldner/senior-poverty\\_b\\_9070986.html](http://www.huffingtonpost.com/joe-seldner/senior-poverty_b_9070986.html).

zero savings set aside for retirement.<sup>65</sup> By sixty-four, some will amass modest savings—a median retirement account of \$14,500<sup>66</sup>—but the savings for most<sup>67</sup> will permit a “bare-bones” retirement, at best.<sup>68</sup>

Private pensions do not make up for this deficit. Roughly one in four households headed by a person at least fifty-five have no private pension coverage.<sup>69</sup>

True, a third of the existing workforce also has nothing saved,<sup>70</sup> but older Americans have little opportunity to make-up shortfalls and are unlikely to do so by working longer.<sup>71</sup> Instead, for most elderly people, Social Security is, and will likely continue to be, their major source of income. For more than half of all married couples (fifty-three percent) and nearly three-quarters (seventy-four percent) of unmarried people, Social Security represents over half their income.<sup>72</sup> For nearly a quarter of married couples (twenty-two percent) and almost half (forty-seven percent) of unmarried individuals, Social Security makes up ninety percent or more of their income.<sup>73</sup>

Yet Social Security provides the elderly with little security. The average Social Security monthly benefit for retired workers is a mere \$1335.<sup>74</sup> This amount may be taxable and first goes toward paying

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64. Gail Marks-Jarvis, *Half of People Near Retirement Have No Savings*, CHI. TRIB. (June 5, 2015), <http://www.chicagotribune.com/business/yourmoney/ct-marksjarvis-0607-biz-20150605-column.html>.

65. *Social Security Basic Facts*, SOC. SECURITY ADMIN. (Oct. 13, 2015), <https://www.ssa.gov/news/press/basicfact.html>.

66. Read, *supra* note 62.

67. Fifty-nine percent of individuals between fifty-five and sixty-four have accumulated some savings, but the amounts they have gathered are frighteningly low: approximately fifty percent have \$104,000 or less, twenty-four percent have \$25,000 or less. Marks-Jarvis, *supra* note 64.

68. *Id.* For example, if an individual placed \$104,000 in an annuity that adjusts with inflation, it would only produce approximately \$310 each month for the length of her retirement. *Id.*

69. *Id.*; *Social Security Basic Facts*, *supra* note 65 (stating that fifty-one percent of the current workforce and twenty-nine percent of households headed by a person at least fifty-five have no private pension coverage).

70. *Social Security Basic Facts*, *supra* note 65 (stating that thirty-four percent of the existing workforce has zero savings for retirement).

71. Marks-Jarvis, *supra* note 64 (discussing studies by the Government Accountability Office and the Employee Benefit Research Institute that conclude it is unlikely that individuals can make up for deficient savings by working longer).

72. *Social Security Basic Facts*, *supra* note 65. Ninety percent of people sixty-five and older receive such benefits. *Id.*

73. *Id.*

74. *Id.*

one's Medicare premiums.<sup>75</sup> In many cities, the cost of living far outstrips what remains.<sup>76</sup> Consider, for example, more affordable Midwestern cities, where the cost of monthly necessities—food, rent, utilities—for a single person exceeds the average benefits check by almost \$1000.<sup>77</sup> And all this assumes that patterns of distributing Social Security benefits remain stable over time.<sup>78</sup> Living Social Security check to Social Security check can produce dire results. Some calculate that at least 10,000,000 people over fifty are “unsure of where their next meal will come from, if it comes at all.”<sup>79</sup> These “food insecure” individuals face a greater risk of depression and a fifty percent higher likelihood of a heart attack, to name only two significant health risks.<sup>80</sup> As a result, “many [elderly] have almost no independent ability to withstand financial shocks, such as expensive medical treatments that may not be covered by Medicare or Medicaid, or other unexpected, costly events.”<sup>81</sup> The “measure of protection to the average citizen and to his family . . . against poverty-ridden old age” that President Roosevelt envisioned when he signed the Social Security Act into law has proven modest insurance against the “hazards and vicissitudes of life.”<sup>82</sup>

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75. Seldner, *supra* note 63. Approximately sixty-one percent of recipients will not be taxed on their benefit. See Richard L. Kaplan, *Reforming the Taxation of Retirement Income*, VA. TAX REV. 327, 336 & n.58 (2012).

76. Most American workers will likely not be able to continue to maintain their standard of living after retirement. Marks-Jarvis, *supra* note 64 (estimating that between one-third to two-thirds will see their standard of living decline). This holds true even for individuals whose incomes are in the top third: approximately forty-three percent will see their standard of living slide. *Id.*

77. Kathleen Elkins & Skye Gould, *How Much It Costs for a Single Person to Live in 24 Major US Cities*, BUSINESS INSIDER (Aug. 28, 2015, 1:02 PM), <http://www.businessinsider.com/cost-of-living-single-people-2015-8> (giving basic costs of living in the following cities as \$2611 in Chicago, IL; \$2307 in St. Louis, MO; \$2176 in Cleveland, OH; and \$2117 in Cincinnati, OH).

78. Drew Desilver, *5 Facts About Social Security*, PEW RESEARCH CTR. (Aug. 18, 2015), <http://www.pewresearch.org/fact-tank/2015/08/18/5-facts-about-social-security/>.

79. Seldner, *supra* note 63; see also SARA STRICKHOUSER ET AL., FOOD INSECURITY AMONG OLDER ADULTS (Sept. 2014), [http://www.aarp.org/content/dam/aarp/aarp\\_foundation/2015-PDFs/AF-Food-Insecurity-2015Update-Final-Report.pdf](http://www.aarp.org/content/dam/aarp/aarp_foundation/2015-PDFs/AF-Food-Insecurity-2015Update-Final-Report.pdf).

80. Seldner, *supra* note 63; see also STRICKHOUSER *supra* note 79.

81. Peter Dizikes, *Study: Many Americans Die with 'Virtually No Financial Assets'*, MIT NEWS (Aug. 3, 2012), <http://news.mit.edu/2012/end-of-life-financial-study-0803>.

Some may, however, question whether the government should pay for something as expensive as long-term care.

82. Desilver, *supra* note 78 (quoting President Franklin D. Roosevelt as he signed the Social Security Act into law).

Nearly half of the elderly (forty-six percent) have less than \$10,000 in assets when they die. See Dizikes, *supra* note 81.



The scale of this poverty will only get worse with our exploding retiree population.<sup>83</sup> Seventy-six million baby boomers are heading into retirement.<sup>84</sup> More than one hundred million Americans are over fifty.<sup>85</sup> And the U.S. Government Accountability Office estimates that between now and 2030, the number of Americans over sixty-five will double and comprise twenty percent of the population.<sup>86</sup>

As the next Subparts explain, when this grim financial picture intersects with private and public sources of support for a divorced or widowed individual, marrying again sometimes carries a hefty price tag.

### B. Alimony Termination Rules in California, Washington, and New Jersey

For divorcees, remarriage threatens to exacerbate what may already be a precarious economic situation. Although many marriages end in divorce,<sup>87</sup> “gray divorces”—that is, divorces of couples over fifty—lead the way in divorce rates. Since 1990, divorce rates among this group have increased, even as divorce rates have dropped or stabilized for other age groups.<sup>88</sup> Over half of “gray divorces are to couples in first marriages”<sup>89</sup>—the majority of which involve marriages

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83. Marks-Jarvis, *supra* note 64.

84. Read, *supra* note 62.

85. Seldner, *supra* note 63.

86. Marks-Jarvis, *supra* note 64.

The Social Security Administration estimates that by 2035, “the number of older Americans will increase from 48 million today to 79 million.” *Social Security Basic Facts*, *supra* note 65.

87. Current studies estimate that somewhere between forty-two to fifty percent of married couples will divorce. Scott Stanley, *What is the Divorce Rate, Anyway?: Around 42 Percent, One Scholar Believes*, FAMILY STUDIES (Jan. 22, 2015), <http://family-studies.org/what-is-the-divorce-rate-anyway-around-42-percent-one-scholar-believes/> (last updated Jan. 23, 2015) (discussing recent scholarship on divorce rates).

88. Brigid Schulte, *Till Death Do Us Part? No Way. Gray Divorce on the Rise*, WASH. POST (Oct. 8, 2014), <https://www.washingtonpost.com/blogs/she-the-people/wp/2014/10/08/till-death-do-us-part-no-way-gray-divorce-on-the-rise/>; see also Sam Roberts, *Divorce After 50 Grows More Common*, N.Y. TIMES (Sept. 20, 2013), [http://www.nytimes.com/2013/09/22/fashion/weddings/divorce-after-50-grows-more-common.html?\\_r=0](http://www.nytimes.com/2013/09/22/fashion/weddings/divorce-after-50-grows-more-common.html?_r=0).

One-fourth of all divorcees involve married couples over fifty, and the divorce rate for those over sixty-five has tripled. Jennifer Newton, *Over 50s Fuel U.S. Divorce Revolution: Record Number of Older Couples Break Up with a Quarter Now Splitting Up Later in Life*, DAILY MAIL (Nov. 3, 2015), <http://www.dailymail.co.uk/news/article-3301544/Over-50s-fuel-U-S-divorce-revolution-Record-number-older-couples-break-quarter-splitting-later-life.html>.

89. Schulte, *supra* note 88.

that lasted more than twenty years.<sup>90</sup> In the best of circumstances, divorce can impose a significant economic strain. For retirees, it has been called “the worst retirement move you can make.”<sup>91</sup>

For the elderly who are struggling financially, it may be tempting to remarry in order to take advantage of combined resources with a new love interest. Yet, if one or both individuals is receiving alimony after an earlier marriage, remarriage may be fiscally unfeasible due to state alimony termination rules.

To be sure, alimony awards upon divorce are “very rare”<sup>92</sup> and have become rarer over time.<sup>93</sup> But alimony provides tangible financial support—in 2013, recipients reported \$9.2 million in alimony payments on their tax returns<sup>94</sup>—and often reflects the recipient’s sacrifices and contributions to the marriage that precluded greater workplace participation.<sup>95</sup> Moreover, an alimony award generally results only when the recipient cannot provide for her own needs and there is an income disparity between the spouses.<sup>96</sup>

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90. *Id.* (reporting that fifty-five percent of gray divorcees having been married to each other for over twenty years).

91. See, e.g., Caren Chesler, *The Worst Retirement Move You Can Make*, THE FISCAL TIMES (Sept. 22, 2011), <http://www.thefiscaltimes.com/Articles/2011/09/22/The-Worst-Retirement-Move-You-Can-Make>.

92. In 2009, 349,000 individuals reported alimony payments from their former spouses as income. U.S. CENSUS BUREAU, STATISTICAL ABSTRACT OF THE UNITED STATES (2012), <https://www.census.gov/prod/2011pubs/12statab/socins.pdf> (data reported above taken from Table 542 in the abstract). Only around three percent of recipients were men. Beth Pinsker, *Breadwinning Women Are Driving Alimony Reform*, TIME (Nov. 17, 2015), <http://time.com/money/4116161/alimony-reform-spousal-support/>.

93. In 1989, 15.5% of divorced or separated women were awarded spousal support. U.S. DEP’T OF COMMERCE: BUREAU OF THE CENSUS: CHILD SUPPORT AND ALIMONY 1989 (1991), <http://www2.census.gov/prod2/popscan/p60-173.pdf> (data reported above taken from Table L in the Census report). Last year, scholars estimated that alimony was awarded in roughly ten percent of cases. Pinsker, *supra* note 92 (quoting Judith McMullen, a professor of law at Marquette University). Further, alimony is usually awarded only when one spouse in a usually wealthy couple stays at home caring for children.

94. Pinsker, *supra* note 92.

95. For a discussion of why alimony is paid, see JOHN DEWITT GREGORY ET AL., UNDERSTANDING FAMILY LAW §§ 9.01, 9.03, 9.04 (4th ed. 2013).

96. UNIFORM MARRIAGE AND DIVORCE ACT § 308(a) (1973).

Many jurisdictions now prefer to award time-limited alimony, rather than permanent periodic alimony, believing that time-limited alimony will encourage the recipient to become self-supporting. See, e.g., *In re Marriage of Rodriguez*, 834 N.E.2d 71, 75 (Ill. App. Ct. 2005) (“The purpose of a time limit on the award is generally intended to motivate the recipient spouse to take the steps necessary to attain self-sufficiency.”). Concerns about losing alimony are less pronounced with time-limited alimony.

Although the theories behind alimony have changed over time with the advent of no-fault divorce and the rise of women's workplace participation, this duty of support arose from the marriage itself and responds to the need of the weaker-earning spouse for continuing support.<sup>97</sup> While state alimony laws vary widely,<sup>98</sup> permanent periodic alimony generally terminates upon the death of either ex-spouse or the remarriage of the alimony recipient.<sup>99</sup>

Courts have long recognized that statutory termination rules and divorce settlement agreements that terminate alimony in the event of remarriage "might give [the recipient] reason to decide against remarriage."<sup>100</sup> Cutting off alimony in the "typical" case works a deep unfairness where a woman "has sacrificed her earning capacity to her marriage and who, as an equitable and practical matter, must look to her former husband for financial support following a separation or divorce."<sup>101</sup> Nonetheless, living with another person often changes one's

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97. One way to explain the obligation to pay alimony after divorce is that marriage is a contract between the spouses to support one another until death. Thus, when one spouse "breaches" the contract by committing a fault that ends the marriage before death, the other could recover on the contract for support in the form of alimony. Lynn D. Wardle, *Beyond Fault and No-Fault in the Reform of Marital Dissolution Law*, in RECONCEIVING THE FAMILY: CRITIQUE ON THE AMERICAN LAW INSTITUTE'S PRINCIPLES OF THE LAW OF FAMILY DISSOLUTION 9 (Robin Fretwell Wilson ed., 2006).

Others explain the obligation as "founded in the law of tort—the 'duty is to make pecuniary amends for the consequences of an illicit act.'" Katherine Shaw Spaht, *Postmodern Marriage as Seen through the Lens of the ALI's "Compensatory Payments"*, in RECONCEIVING THE FAMILY: CRITIQUE ON THE AMERICAN LAW INSTITUTE'S PRINCIPLES OF THE LAW OF FAMILY DISSOLUTION 9 (Robin Fretwell Wilson ed., 2006) (citing CIV. CODE art. 1382 (Fr.), which corresponds to LA. CIV. CODE ANN. art. 2315).

Others see alimony as compensation for losses in earning capacity flowing from the allocation of marital duties in the marriage, such as when one party does all the childcare. See Ira Mark Ellman, *The Theory of Alimony*, 77 CAL. L. REV. 1, 81 (1989).

98. E.g., Laura W. Morgan, *Current Trends in Alimony Law: Where Are We Now?*, 34 ABA: FAMILY ADVOC. 8, 8–11 (Winter 2012), [http://www.americanbar.org/publications/gpsolo\\_ereport/2012/april\\_2012/current\\_trends\\_alimony\\_law.html](http://www.americanbar.org/publications/gpsolo_ereport/2012/april_2012/current_trends_alimony_law.html).

99. E.g., Gary L. Young Jr., *Alimony as affected by recipient spouse's remarriage in absence of controlling specific statute*, 47 A.L.R. 5th 129 (1997); see also WALTER WADLINGTON, RAYMOND C. O'BRIEN & ROBIN FRETWELL WILSON, DOMESTIC RELATIONS: CASES AND MATERIALS (7th ed. 2013) ("Traditionally alimony terminated with remarriage of recipient or death of either party, unless the parties otherwise agree."); see generally, *Alimony, Maintenance, and Other Spousal Support*, 50 STATE STATUTORY SURVEYS: FAMILY LAW: DIVORCE AND DISSOLUTION, THOMSON REUTERS 0080 SURVEYS 11, tbl. 1 (2015).

100. *Bell v. Bell*, 468 N.E. 2d 859, 861 (Mass. 1984) (quoting majority decision by O'Connor, J.).

101. *Id.* at 863 (Abrams, J., dissenting).

need for support from an ex-spouse because it multiplies resources in the household, permitting the modification or complete termination of alimony.<sup>102</sup> Consequently, the American Law Institute recommends that the establishment of a domestic partnership, or the continuous maintenance of a common household with a partner, should permit a court to suspend payments of support, unless it “would work a substantial injustice.”<sup>103</sup>

To see how entering domestic partnerships with marriage-like rights and protections advantages alimony recipients, this Subpart first reviews the alimony termination statutes in New Jersey, Washington, and California. It then illustrates how remarrying, instead of staying single or entering into a domestic partnership, results in starkly different financial outcomes for alimony recipients in two of the three states.

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102. A growing number of jurisdictions specifically address cohabitation as a terminating event in their alimony statutes. For example, South Carolina provides that alimony will end after the recipient cohabits continuously for ninety days. *See* S.C. CODE ANN. § 20–3–130 (2011). Other states make cohabitation with another person, regardless of their sex, grounds for modification, whatever the length of the relationship. *See, e.g.*, GA. CODE ANN. § 19–6–19(b) (2012) (“Subsequent to a final judgment of divorce awarding periodic payment of alimony for the support of a spouse, the voluntary cohabitation of such former spouse with a third party in a meretricious relationship shall also be grounds to modify provisions made for periodic payments of permanent alimony for the support of the former spouse. As used in this subsection, the word “cohabitation” means dwelling together continuously and openly in a meretricious relationship with another person, regardless of the sex of the other person. In the event the petitioner does not prevail in the petition for modification on the ground set forth in this subsection, the petitioner shall be liable for reasonable attorney’s fees incurred by the respondent for the defense of the action.”).

Like the elderly, gay people who were previously married to someone of the opposite sex and are receiving alimony, face the same question of whether to marry. *See* Jill Bornstein, *At a Crossroad: Anti-Same-Sex Marriage Policies and Principles of Equity: The Effect of Same-Sex Cohabitation on Alimony Payments to an Ex-Spouse*, 84 CHI.-KENT L. REV. 1027 (2010).

103. *See* ALI, PRINCIPLES OF THE LAW OF FAMILY DISSOLUTION: ANALYSIS AND RECOMMENDATIONS, § 5.09 (2000). While the PRINCIPLES leave states the discretion to define how long a common household must be maintained, the Reporters’ comments suggest that two years would be appropriate when the couple has a child in common, and three years without. The Reporters urge that the durational requirement “be long enough to make it likely that the parties have established a life together as a couple . . . [with] some significant impact on the circumstances of one or both parties.” *Id.* at cmt. (d).

### 1. ALIMONY TERMINATION RULES

In California, unless a written agreement of the parties provides otherwise, a party's obligation to pay alimony terminates "upon the death of either party" or upon the remarriage of the party receiving alimony.<sup>104</sup>

In Washington, unless altered by a written agreement or an express provision in a divorce decree, a party's obligation to pay alimony terminates "upon the death of either party," "the remarriage of the party receiving maintenance," or the "registration of a new domestic partnership of the party receiving maintenance."<sup>105</sup>

New Jersey's laws are more complex. A party's obligation to pay alimony terminates upon the death of either party, but any accrued arrearages prior to that date must be paid.<sup>106</sup> Further, a party's obligation to pay permanent or limited duration alimony terminates when the party receiving alimony either remarries or enters into a civil union—notably, *not* a domestic partnership—but the paying spouse will owe any arrearages that have accrued prior to the terminating event.<sup>107</sup> If, however, a party is required to pay rehabilitative or reimbursement alimony, the paying spouse's obligation to pay will generally not terminate if the receiving spouse enters into a civil union or remarries.<sup>108</sup>

Even though entering into a domestic partnership in New Jersey or California will not automatically terminate alimony, in New Jersey and California alimony can be modified when the recipient's need changes materially, which can occur when one shares a residence and expenses with one's domestic partner.<sup>109</sup> California uses a rebuttable presumption that a recipient's need for spousal support decreases

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104. CAL. FAM. CODE § 4337 (2015).

105. WASH. REV. CODE ANN. § 26.09.170 (2015).

106. N.J. STAT. ANN. § 2A:34-25 (2015).

107. *Id.*

108. *Id.* ("The remarriage or establishment of a new civil union of a former spouse or partner receiving rehabilitative or reimbursement alimony shall not be cause for termination of such alimony by the court unless the court finds that the circumstances upon which the award was based have not occurred or unless the payer spouse or partner demonstrates an agreement or good cause to the contrary.").

109. Washington also recognizes that cohabitation may modify or terminate alimony. *E.g., In re Marriage of Tower*, P.2d 863, 867–68, 867 n.4 (Wash. App. Ct. 1989) (holding that cohabitation will only terminate alimony if the court finds in a modification hearing that there was a "substantial change of circumstances in the recipient's finances" and arguing that the same standard should be applied even upon remarriage).

when he or she cohabits with a non-marital partner; New Jersey acknowledges that cohabitation may result in the suspension or termination of alimony payments.<sup>110</sup>

## 2. MAKING THE RULES CONCRETE

To understand the impact of these statutes, consider a hypothetical couple. Nicola and Hunter were married for thirty years. Both retired five years ago, and each receives retirement income from their jobs of \$15,871 annually.<sup>111</sup> They orally agreed that, if they ever divorced, any alimony order would not terminate upon either party's remarriage.

When Hunter turned sixty, he decided to pursue a Master of Finance degree so he could open an elder financial planning firm. Nicola used the last of her inheritance from her mother to pay the full \$59,334<sup>112</sup> for Hunter's degree so he could avoid student loans. As inheritance, that money was Nicola's separate, not marital, property.<sup>113</sup>

Shortly after graduation, Hunter, who was now making \$100,000 a year at his new business, divorced Nicola so that he could marry his secretary. The court ordered Hunter to pay Nicola reimbursement alimony for \$59,334 and permanent alimony for \$26,825.80 a year.<sup>114</sup> The order did not specify any additional circumstances under which alimony would terminate.

Shortly after the divorce, Nicola fell in love with Luke, who, like herself, was sixty-two. Hunter has never been late on his alimony payments.

What happens if Nicola marries Luke? The oral agreement between Nicola and Hunter would have no effect in any of the three states. In California and Washington, Nicola's marriage to Luke

110. CAL. FAM. CODE § 4323(a)(1) (West 2016); N.J. STAT. ANN. § 2A:34-23 (West 2016).

111. *E.g.*, Emily Brandon, *How Seniors Are Paying for Retirement*, US NEWS (Jan. 27, 2014), <http://money.usnews.com/money/retirement/articles/2014/01/27/how-seniors-are-paying-for-retirement>.

112. *E.g.*, *MSF Tuition and Fees*, COLL. OF BUSINESS AT ILL., <https://business.illinois.edu/msf/admissions/fees/> (last visited Apr. 23, 2016).

113. Gary L. Blum, *Inherited Property as Marital or Separate Property in Divorce Action*, 38 A.L.R.6th 313 (2008).

114. In Washington, California, and New Jersey, after considering specified factors, it is within the sound discretion of the courts whether to award alimony and in what amounts to do so. In other words, these states are not guideline driven when determining alimony amounts. In this example, however, we used Illinois' new alimony guidelines to project a permanent maintenance award for Nicola. *See* 750 ILCS 5/504 (2015).

would wipe clear Hunter's obligation to reimburse her for his tuition and to pay her alimony. If Niccola lives as long as life tables would predict, by marrying, she would forfeit \$711,200.94, assuming that Hunter did not die first.<sup>115</sup> In New Jersey, Niccola would receive \$59,334 in reimbursement alimony, but Hunter's obligation to pay her periodic alimony until death would terminate with her remarriage, saving Hunter over \$650,000.

Now consider what happens if Niccola enters into a registered domestic partnership with Luke. In California and New Jersey, Hunter would still have to pay Niccola all of the ordered alimony—\$711,200.94—unless a judge found that Niccola's cohabitation with Luke warranted a reduction in her alimony, or termination altogether. In Washington, Hunter would not have to pay Niccola any of the ordered alimony—putting Niccola in the same position as if she had married Luke.

Niccola's most rational move in California and New Jersey is to become Luke's domestic partner.<sup>116</sup> As Part I explained, California's and New Jersey's domestic partnership benefits closely track the benefits of marriage, meaning that Niccola is generally benefitted as much by being in a domestic partnership with Luke as she would be by marrying him. *But* entering into a domestic partnership would mean that Niccola may not have to walk away from nearly three quarters of a million dollars in alimony.

If Niccola lived in Washington, however, it would make little difference whether she married Luke or became his domestic partner. Marriage and domestic partnership provide similar benefits and both cause the forfeiture of alimony.

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115. If Niccola were born on January 1, 1954, her additional life expectancy is 24.3 years. *Life Expectancy Calculator*, SOC. SEC. ADMIN., <https://www.socialsecurity.gov/cgi-bin/longevity.cgi> (last visited Apr. 23, 2016) (calculated as a life expectancy of 24.3 years times \$26,825.80 (\$651,886.94) + reimbursement alimony of \$59,334, for a total of \$711,200.94).

Alimony would also terminate on Hunter's death, but we are assuming he outlives Niccola.

116. In common law marriage states, alimony termination may also be triggered by simply cohabiting, agreeing to be bound, and holding out as married. *See Common Law Marriage*, 50 STATE STATUTORY SURVEYS, THOMPSON REUTERS 0080 SURVEYS 20 (2010).

### C. Social Security Spousal Benefit Rules

As Part II.A explained, Social Security represents the primary or only source of income for many elderly people. Because the New Jersey, Washington, and California legislatures were concerned about the elderly's Social Security benefits being reduced or eliminated upon remarriage,<sup>117</sup> this Part focuses on spousal retirement benefits. Although calculating the amount of Social Security spousal retirement benefits depends upon many factors, we posit a married couple in which both are not disabled, both are sixty-two,<sup>118</sup> and neither is caring for disabled children or children under sixteen.<sup>119</sup>

As state legislators recognized, Social Security spousal retirement benefit rules affect whether previously married elderly individuals can remarry without suffering financial losses. As this Part shows, however, Social Security now treats non-marital legal relationships—"NMLRs" in agency parlance—like marriage for some purposes, constricting the possibility that domestic partnerships can provide the "upside" of marriage without the downside.

#### 1. SPOUSAL RETIREMENT BENEFIT RULES

Spouses typically become eligible to receive Social Security spousal retirement benefits when the spouse whose employment qualifies for Social Security (the "worker spouse") begins receiving retirement benefits.<sup>120</sup> This spouse (the "non-worker spouse") is, however, generally only eligible to receive a fraction of the benefit amount

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117. *E.g.*, *Holguin v. Flores*, 18 Cal. Rptr. 3d 749, 751 (Cal. Ct. App. 2004).

118. In the case of heterosexual couples, Washington, New Jersey, and California only open their domestic partnership statuses to couples where at least one partner is sixty-two, so we use this age.

If a spouse is under sixty, he or she could not collect on the divorced or deceased spouse's retirement benefits, although some sixty year olds may be eligible to do so. SOC. SEC. ADMIN., UNDERSTANDING THE BENEFITS 13-15 (2016), <https://ssa.gov/pubs/EN-05-10024.pdf>.

119. Benefit rules vary widely based on these factors. *Id.*

In many cases, there will be two worker spouses—not a worker spouse and a non-worker spouse—and one will try to draw on the other's work record because the two have divergent records, with one spouse's record substantially more favorable for benefit purposes. Importantly, spousal benefits are a significant subsidy to the traditional family with a stay-at-home spouse; the fact that someone who is working may collect on the other spouse's better working record makes the subsidy for traditional families mildly more equitable.

120. *Id.*

In the case of divorced spouses, an ex-spouse may be able to begin drawing benefits even when the worker has not yet begun receiving benefits. *Retirement Planner: If You Are Divorced*, SOC. SEC. ADMIN., <https://www.ssa.gov/planners/retire/divspouse.html> (last visited Apr. 23, 2016).



that a worker spouse receives. Absent a child under nineteen in the home and attending school, the amount the non-worker spouse may receive will vary depending on whether the couple divorced after ten years of marriage or the worker spouse died.<sup>121</sup> As Figure 1 graphically shows, if the worker spouse is living, the non-worker spouse is “eligible for . . . up to half of the [worker spouse’s] retirement . . . benefit amount.”<sup>122</sup> If the worker spouse is deceased, a non-worker spouse or ex-spouse is eligible to receive a survivor benefit that ranges “from 75 to 100 percent” of the deceased spouse’s benefit.<sup>123</sup>

Two other factors also impact the amount of a worker spouse’s benefit: the worker spouse’s age when he or she begins drawing benefits and whether the worker spouse is still working while drawing benefits. A worker spouse’s full retirement age depends upon the year of her birth, presently ranging from age sixty-six to sixty-seven.<sup>124</sup> Worker spouses may choose to draw Social Security retirement benefits as early as sixty-two, but if they do so, their benefits are reduced.<sup>125</sup> If the worker spouse who draws early continues to work, his or her benefits will be further reduced until reaching full retirement age if his or her wages exceed a modest annual limit.<sup>126</sup> Thus, if a worker spouse decides to draw Social Security at sixty-two when her full retirement age is sixty-six, she will currently receive only seventy-five percent of her benefit and may see that amount reduced further if she earns over roughly \$16,000 in the years prior to reaching her full re-

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121. LAWRENCE A. FROLIK & RICHARD L. KAPLAN, *ELDER LAW IN A NUTSHELL* 307-310 (6th ed. 2014).

122. That amount may be lessened because the total amount of money that can be paid to a family is generally “equal to about 150 or 180 percent” of a spouse’s retirement benefit. *UNDERSTANDING THE BENEFITS*, *supra* note 118, at 13–14.

123. *Id.*; see SOC. SEC. ADMIN., *SURVIVORS BENEFITS* 8–9, <https://ssa.gov/pubs/EN-05-10024.pdf> (last visited Apr. 23, 2016); see also *Survivors Planner: How Much Would Your Survivors Receive?*, SOC. SEC. ADMIN., <https://www.ssa.gov/planners/survivors/onyourown5.html> (last visited Apr. 23, 2016).

If the deceased worker was “already receiving reduced benefits when [he or she] die[d], survivor benefits are based on that amount.” *Id.*

124. Full retirement age is sixty-six for those born in 1943 to 1954 and sixty-seven for those born in 1960 and later. *UNDERSTANDING THE BENEFITS*, *supra* note 118, at 9.

125. Benefits are reduced by 0.5% for each month she started her Social Security before her full retirement age. *Id.* at 10.

126. *Id.* at 10–11.

The annual limit was \$15,720 in 2015. *Id.* Generally, her benefits will be reduced by \$1 for every \$2 she earns above that amount, but, in the year that she reaches her full retirement age, until the month that she hits her full retirement age, when her benefits will only be reduced by \$1 for every \$3 that she earns over a different annual limit—\$41,880 in 2015. *Id.*

irement age.<sup>127</sup> Conversely, worker spouses may postpone drawing their benefits until *after* their full retirement age, allowing their Social Security benefit to grow by a set percentage each month until the worker spouse turns seventy or starts drawing benefits.<sup>128</sup>

As Figure 1 shows, an elderly individual's remarriage or domestic partnership may impact spousal retirement benefits in three scenarios: (1) when the worker spouse dies while married to the non-worker spouse; (2) when the worker spouse dies after the worker and non-worker spouse divorced; and (3) when the worker spouse is still alive after the couple's divorce. Social Security uses different eligibility guidelines in each instance.<sup>129</sup>

In Scenario 1 (a worker spouse died while still married to a non-worker spouse), a widow or widower is eligible to collect benefits based on the deceased spouse's work record once the surviving spouse reaches sixty years of age.<sup>130</sup> The widow or widower will not, however, receive full benefits until he or she reaches full retirement age and cannot receive spousal benefits if he or she remarries before age sixty and his or her own work record benefit is lower.<sup>131</sup> Widows and widowers also receive "a one-time payment of \$255."<sup>132</sup>

In Scenario 2 (the worker spouse is alive but divorced from the non-worker spouse), the ex-spouse may qualify for benefits if he or she meets the following criteria:

- Have been married . . . for at least 10 years;
- Have been divorced at least 2 years;
- Be at least 62 years old;
- Be unmarried; and

127. *See id.* at 10.

128. *Id.*

129. Each of these scenarios follow different eligibility rules. For example, in the case of divorced spouses, even if the worker spouse has not yet begun receiving benefits but is eligible to do so—and the couple has been divorced for two years or more—the non-working ex-spouse may draw benefits based on the other's work record. *Retirement Planner: If You Are Divorced*, SOC. SEC. ADMIN., <https://www.ssa.gov/planners/retire/divspouse.html> (last visited Apr. 23, 2016). If an individual receives widower's or widow's benefits and their own retirement benefit exceeds what the individual is eligible to receive based on their deceased spouse's earnings, they may switch to receiving their own benefits after sixty-two years, permitting such individuals to receive "one benefit at a reduced rate and then switch to the other benefit at the full rate when [they] reach full retirement age." UNDERSTANDING THE BENEFITS, *supra* note 118, at 11.

130. *Id.* at 14.

131. SURVIVORS BENEFITS, *supra* note 123, at 5; *Survivors Planner*, *supra* note 123.

132. UNDERSTANDING THE BENEFITS *supra* note 118, at 15.

Not be eligible for an equal or higher benefit based on his or her own work or someone else's work.<sup>133</sup>

Finally, in Scenario 3 (a worker spouse died after divorcing the non-worker spouse), the ex-spouse is eligible for survivor benefits if he or she meets the following criteria:

Be at least age 60 years old . . . and [was] married to [the deceased spouse] for at least 10 years; . . . and

Not be entitled to a benefit based on his or her own work that is equal or higher than the full insurance amount on your record; and

Not be currently married, unless the remarriage occurred after age 60 . . . .<sup>134</sup>

For our purposes, the most important factor in each scenario is whether otherwise eligible non-worker spouses may become ineligible to receive spousal retirement benefits upon remarriage. But rules governing both eligibility to receive benefits due to one's marriage and disqualification from receiving those benefits after marrying another differ depending on the scenario. In Scenario 2, the non-worker spouse is barred from receiving the worker spouse's spousal retirement benefits after remarrying.<sup>135</sup> In Scenarios 1 and 3, if a "widow, widower or surviving divorced spouse remarries before he or she reaches age 60 . . . they cannot receive benefits as a surviving spouse" during a later marriage—although that individual could claim benefits under the prior marriage if the later marriage ends by annulment, divorce, or death.<sup>136</sup> Finally, in Scenarios 1 and 3, if an ex-spouse remarries after turning sixty, he or she is eligible for the higher of the deceased spouse's or the new spouse's benefits if his or her own work record benefits are lower.<sup>137</sup> But he or she will only become eligible to receive benefits based on the new spouse's work record after reaching age sixty-two.<sup>138</sup>

Figure 1 graphically illustrates the spousal retirement benefit rules.

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133. *Id.* at 14.

134. *Id.* at 15.

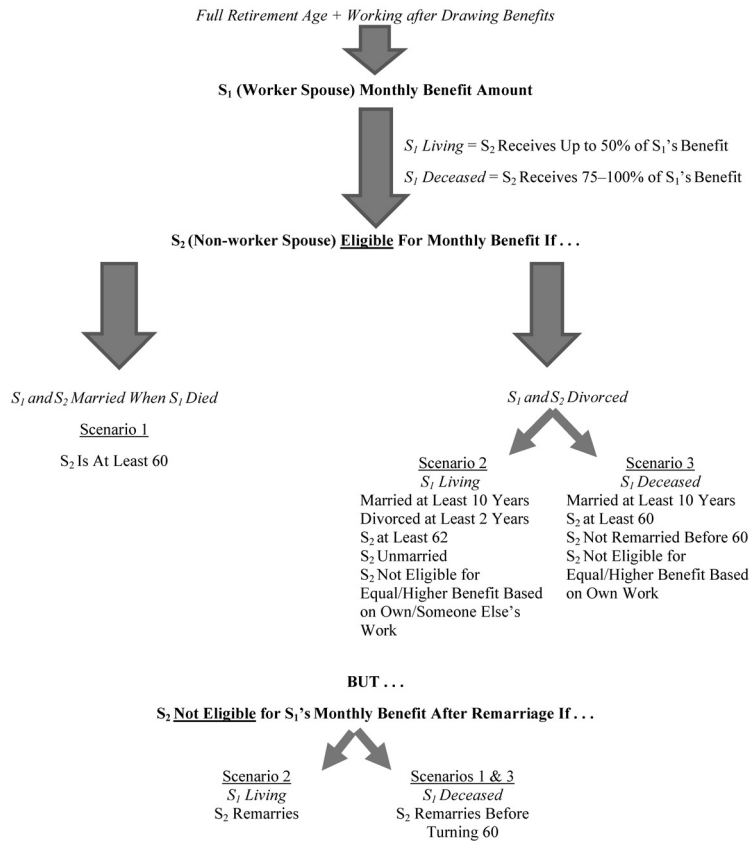
135. *Id.* at 14.

136. *Survivors Planner*, *supra* note 123 (emphasis omitted); *Retirement Planner*, *supra* note 120.

137. UNDERSTANDING THE BENEFITS, *supra* note 118, at 15.

138. SURVIVORS BENEFITS, *supra* note 123, at 10.

FIGURE 1: SOCIAL SECURITY SPOUSAL RETIREMENT BENEFITS ELIGIBILITY RULES



## 2. BENEFIT RULES FOR INDIVIDUALS IN NON-MARITAL LEGAL RELATIONSHIPS

Social Security defines NMLRs as “legal relationships for two individuals who are not considered married, but are provided with some (or all) rights that could be associated with marriage.”<sup>139</sup> Recently, the Social Security Administration (the Administration) issued guidance that NMLRs may affect and even trigger Social Security

139. SOC. SEC. ADMIN., GN 00210.004, SAME-SEX RELATIONSHIPS - NON-MARITAL LEGAL RELATIONSHIPS (Feb. 10, 2016), <https://secure.ssa.gov/poms.nsf/lnx/0200210004>.

benefits<sup>140</sup>—although the Administration “do[es] not consider *all* individuals in NMLRs married for benefit purposes.”<sup>141</sup>

Individuals receiving Social Security benefits must inform the Administration of their NMLRs.<sup>142</sup> This reporting requirement appears to extend to both same-sex and opposite-sex individuals.<sup>143</sup> Yet, effective February 10, 2016, some same-sex claimants in NMLRs who apply for Social Security spousal benefits will be treated as if married.<sup>144</sup> The Administration has not yet decided whether *opposite*-sex claimants in NMLRs should be treated as married for benefit purposes; instead, it refers each case for a legal opinion and, presumably, decides such claims on a case-by-case basis.<sup>145</sup>

As it stands, then, the Administration treats only a subset of people in NMLRs as married for benefit purposes: certain same-sex couples. Surely, some elderly domestic partners would seek to claim benefits based on their domestic partner’s work record. But, in the situations envisioned by legislators in New Jersey, California, and Washington, domestic partners are unlikely to seek benefits based on their domestic partner’s work record if that risks benefits they currently receive as a result of a prior marriage. The question becomes whether the Administration will treat persons in NMLRs as married for all purposes, not just entitlement to benefits.

This brings us to what happens with couples who are *not* now claiming benefits from their domestic partner. As noted earlier, Social Security requires all individuals receiving benefits to report that they have entered into a NMLR. Logically, the Administration may proceed in one of three ways when non-claimant individuals report that

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140. *I am Receiving Social Security Benefits. Must I Tell Social Security I Am in a Civil Union or Other Non-marital Legal Relationship?*, SOC. SEC. ADMIN., <https://faq.ssa.gov/link/portal/34011/34019/Article/3928/I-am-receiving-Social-Security-benefits-Must-I-tell-Social-Security-I-am-in-a-civil-union-or-other-non-marital-legal-relationship> (last visited Apr. 23, 2016).

141. SAME-SEX RELATIONSHIPS - NON-MARITAL LEGAL RELATIONSHIPS, *supra* note 139 (emphasis added).

142. *I am Receiving Social Security Benefits*, *supra* note 140.

143. *Id.*

144. SAME-SEX RELATIONSHIPS - NON-MARITAL LEGAL RELATIONSHIPS, *supra* note 139 (discussing Title II benefits).

Title II benefits paid to “individuals who are ‘insured’ under the Act by virtue of their contributions to the Social Security trust fund through the Social Security tax on their earnings . . . .” *Disability Evaluation Under Social Security*, SOC. SEC. ADMIN., <https://www.ssa.gov/disability/professionals/bluebook/general-info.htm> (last visited Apr. 23, 2016).

145. SAME-SEX RELATIONSHIPS - NON-MARITAL LEGAL RELATIONSHIPS, *supra* note 139.

they are in a NMLR: (1) ignore the relationship for spousal benefit purposes; (2) follow the same procedure for claimants in same-sex NMLRs, detailed next; or (3) come up with new rules for how to treat these couples.

The most attractive option for the Administration may well be to treat non-claimant individuals in NMLRs as it does same-sex claimants in NMLRs, leveraging the complex process already in place. Here, the Administration's process for handling cases in which same-sex couples in NMLRs apply for spousal benefits is illuminating.<sup>146</sup>

The Administration uses a multi-step process to determine whether same-sex claimants in NMLRs "can be treated as [being in] a marital relationship for purposes of determining entitlement to Title II . . . benefits<sup>147</sup> and meet[] the duration of marital relationship requirement."<sup>148</sup> We will explain the process as it would be applied to a same-sex claimant in a NMLR in Washington, New Jersey, and California.

First, the NMLR must have been "valid in the state where it was established."<sup>149</sup> This assessment requires a five-step determination. The claimant must identify a NMLR as entitling him or her to a benefit.<sup>150</sup> The relationship must have been established in certain states, including Washington, New Jersey, and California.<sup>151</sup> The type of NMLR that the claimant alleges must have been of a specified relationship type for the state where it was established.<sup>152</sup> Domestic partnerships are acceptable relationship types in Washington, New Jersey, and California.<sup>153</sup> The NMLR must have been established within a certain date range.<sup>154</sup> In California, the NMLR must have been established on or after January 1, 2000; in New Jersey, the date is July 10, 2004 through February 19, 2007; and, in Washington, the date is July

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146. The following procedure assumes that Title XVI aspects of concurrent claims are not at issue, which would require the determination of marital status, and that it is not necessary to request a legal opinion about a NMLR. *See id.*

147. Tom Ventimiglia, *What is the Difference Between Title II and Supplemental Security Income Disability?*, TOMVENTLAW.COM (May 25, 2010), <http://www.tomventlaw.com/title-ii-vs-ssi/what-is-the-difference-between-title-ii-and-supplemental-security-income-disability/>.

148. SAME-SEX RELATIONSHIPS - NON-MARITAL LEGAL RELATIONSHIPS, *supra* note 139.

149. *Id.*

150. *Id.*

151. *Id.*

152. *Id.*

153. *Id.*

154. *Id.*

22, 2007.<sup>155</sup> Finally, the Administration must establish when the NMLR came into existence: in California, “the date the domestic partnership was entered into;” in New Jersey, “the date of the affidavit of domestic partnership;” and, in Washington, “the date the domestic partnership was registered.”<sup>156</sup>

Second, the NMLR must “qualify as a marital relationship using the laws of the state of the [Number Holder (NH)]’s domicile” when the claim was filed or the NH died.<sup>157</sup> A NMLR will “qualif[y] as a marital relationship . . . if a claimant could inherit a spouse’s share of the NH’s personal property should the NH die without leaving a will under state law.”<sup>158</sup> This again requires a multi-step determination. The Administration must determine in which state the NH was domiciled.<sup>159</sup> Next, if the NH is alive, the Administration must determine the state of domicile for the NH,<sup>160</sup> where the NMLR was established, and whether the state where established grants inheritance rights.<sup>161</sup> If the state where the NMLR was established does not give inheritance rights, the claimant will be considered unmarried.<sup>162</sup> California, New Jersey, and Washington all grant inheritance rights.<sup>163</sup>

Finally, the Administration must determine the duration of the NMLR, measured from “the date that the couple entered into the NMLR.”<sup>164</sup> To claim spousal benefits, the claimant must have been in the NMLR for one year.<sup>165</sup> If, however, the claimant is seeking survi-

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155. *Id.*

156. *Id.*

157. *Id.*

Generally, if the case is a “life case,” the law “of the State where the worker is domiciled when the claimant files” will apply. SOC. SEC. ADMIN., GN 00305.001 DETERMINING FAMILY STATUS (March 24, 2014), <https://secure.ssa.gov/poms.nsf/lnx/0200305001>.

If, however, the case is a “death case,” the law “that existed in the State where the worker was domiciled at the time of death” applies. *Id.*

158. SAME-SEX RELATIONSHIPS - NON-MARITAL LEGAL RELATIONSHIPS, *supra* note 139.

159. *Id.*

160. *Id.*

161. If the state does not grant inheritance rights, the Administration must “[r]efer the claim for a legal opinion.” If the NH was domiciled in a different state than the NMLR was established in, the Administration must “[r]efer the claim for a legal opinion;” and determine whether that state grants inheritance rights. *Id.*

162. *Id.*

163. *Id.*

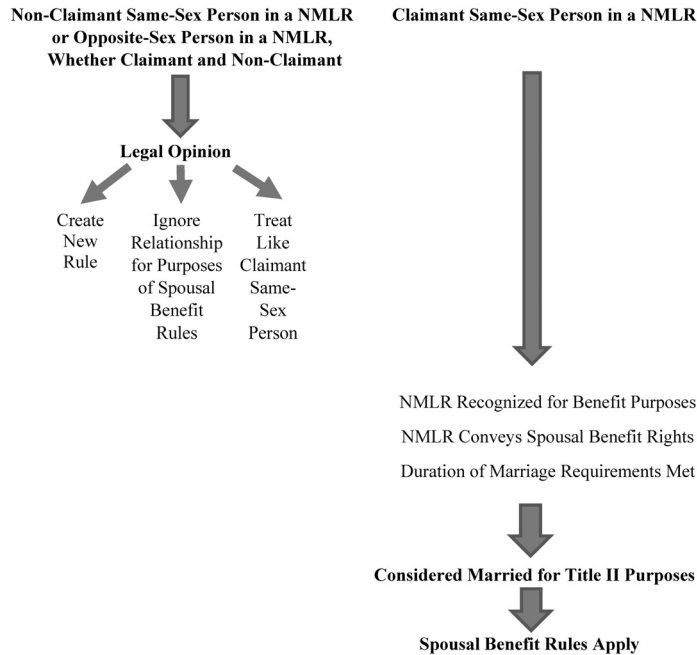
164. *Id.*

165. *Id.*

vor spousal benefits, the claimant must have been in the NMLR for nine months.<sup>166</sup>

Figure 2 graphically illustrates these rules.

FIGURE 2: SOCIAL SECURITY RETIREMENT BENEFITS RULES FOR CLAIMANT AND NON-CLAIMANT SAME-SEX AND OPPOSITE-SEX PERSONS IN NMLRS



Because the Administration does not consider all individuals in NMLRs married for all purposes, there is an unequal advantage to those who receive remarriage benefits and escape marriage penalties. In the end, the question remains: why should individuals in NMLRs who are similarly situated to married individuals receive the benefits of second marriage-like relationship, but not suffer marriage penalties?

166. *Id.*



#### D. Medicaid Spousal Support Rules

Much like Social Security, Medicaid is a financial lifeline for the elderly, providing long-term care for those who could not otherwise finance such services.

The question of parity between married couples and domestic partners figures prominently when one party seeks to have Medicaid, a means-tested program, pay for his or her long-term care. As this Subpart explains, whether a specific couple gains or losses in the quest to have Medicaid pay for the ailing party's care—without destituting the healthy party—is highly sensitive to whether the couple can be considered “married,” who the stronger-earning party is, how an unmarried couple owns property (separately or jointly), what wealth they have individually and together, and a medley of other factors, including state laws. Medicaid's evolving treatment of domestic partners further complicates an already complicated inquiry.

Health care is one of the largest expenses for individuals over the age of sixty-two.<sup>167</sup> For a retired couple, total health care costs after retiring amount to approximately \$395,000,<sup>168</sup> consuming as much as twenty percent of a person's income by their eighties.<sup>169</sup> A large portion of those health care costs will be consumed by long-term care.<sup>170</sup>

Nearly every American will need long-term care,<sup>171</sup> and individuals over sixty-five are likely to need such care for an average of three

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167. Katie Lobosco, *Don't Freak out About Health Care Costs in Retirement*, CNN MONEY (Dec. 30, 2015, 12:25 PM), <http://money.cnn.com/2015/12/30/retire-ment/retirement-health-care-costs/>; Nancy Anderson, *The Biggest Expenses in Retirement—And How to Prepare for them Now*, FORBES (Mar. 1, 2015, 10:51 AM), <http://www.forbes.com/sites/nancyanderson/2015/03/01/the-biggest-expenses-in-retirement-and-how-to-prepare-for-them-now/#578768986857>.

168. Sheyna Steiner, *Expect Retirement Health Care Costs to be Higher than You Think*, BANKRATE (Dec. 8, 2015), <http://www.bankrate.com/finance/insurance/expect-retirement-health-care-costs-to-be-higher-than-you-think.aspx>.

169. Health care costs typically balloon “from 10 percent of income for those in their 50s to 20 percent for people in their 80s,” with medical costs constituting an estimated 12.1% of the expenses for those over sixty-two. Anderson, *supra* note 167; Tom Sightings, *Take Control of Your 6 Biggest Retirement Expenses*, U.S. NEWS (Aug. 31, 2015, 10:09 AM), <http://money.usnews.com/money/blogs/on-retire-ment/2015/08/31/take-control-of-your-6-biggest-retirement-expenses>.

170. For a detailed examination of long-term care, who needs it, and its costs, see Erica L. Reaves & MaryBeth Musumeci, *Medicaid and Long-Term Services and Supports: A Primer*, THE HENRY J. KAISER FAMILY FOUND. (Dec. 15, 2015), <http://kff.org/medicaid/report/medicaid-and-long-term-services-and-supports-a-primer/>.

171. Wade Pfau, *Costs and Incidence of Long-Term Care*, FORBES (Jan. 5, 2016, 10:50 AM), <http://www.forbes.com/sites/wadepfau/2016/01/05/costs-and-incidence-of-long-term-care/#60f507792fe5>.

years.<sup>172</sup> This care can be extremely costly. In 2015, a semi-private nursing home room cost on average \$80,300 annually; a private room, \$91,250.<sup>173</sup> As detailed next, Medicaid, a joint state and federal program, will only pick up the tab for this long-term care if the recipient satisfies rigorous financial needs tests.<sup>174</sup>

#### 1. MEDICAID LONG-TERM CARE RULES FOR MARRIED COUPLES

The state considers a married couple's combined income and assets when deciding whether a person in need of long-term care for at least thirty days in a nursing facility or medical institution (the Beneficiary Spouse or, in Medicaid parlance, the Institutionalized Spouse) is sufficiently poor to have Medicaid pay for that care.<sup>175</sup> As a means-tested entitlement, the state is eager not to subsidize wealthy couples. In this context, a couple's marriage can both benefit and penalize them.

Married couples benefit by being able to shield wealth. When Medicaid treats income and assets as unavailable to pay for care, these resources do not have to be "spent down" for the Beneficiary Spouse to become Medicaid eligible. Married couples also benefit by being able to preserve certain assets and specified amounts of income for the spouse who is not in need of care (the Non-Beneficiary Spouse or, in Medicaid parlance, the Community Spouse).

Married couples are, however, penalized because they have duties of support to each other, which here means that if the Beneficiary Spouse has few resources, Medicaid will look to the Non-Beneficiary

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The number of individuals who will need long-term care in their lifetime ranges from sixty-nine percent to ninety-seven percent. *Id.*

172. *Id.*

173. *Annual Median Cost of Long Term Care in the Nation*, GENWORTH (Dec. 1, 2015), <https://www.genworth.com/corporate/about-genworth/industry-expertise/cost-of-care.html>. For additional information, see *Selected Long-Term Care Statistics*, FAM. CAREGIVER ALL. (Jan. 31, 2015), <https://www.caregiver.org/selected-long-term-care-statistics>.

174. WADLINGTON ET AL., *supra* note 99, at 22; see also Letter from Vikki Wachino, Dir., Ctrs. for Medicare & Medicaid Servs., Dep't of Health and Hum. Servs., to State Medicaid Dirs., 1-2 (May 7, 2015) (discussing the Affordable Care Act's Amendments to the Spousal Impoverishment Statute), <https://www.medicaid.gov/federal-policy-guidance/downloads/smd050715.pdf>.

Transfer penalties may be triggered even if the applicant is dirt poor, causing people in need to be denied coverage because of technicalities. But Medicaid can provide hardship waivers.

175. For an in-depth discussion of many spousal issues arising in the context of Medicaid eligibility for long-term care, see Raymond C. O'Brien, *Selective Issues in Effective Medicaid Estate Recovery Statutes*, 65 CATHOLIC U. L. REV. 27 (2015).

Spouse to fund that care before the state does. Consequently, the Beneficiary Spouse may be forced to live on “quite modest” amounts that may be “inadequate to sustain the [Non-Beneficiary] Spouse’s accustomed standard of living.”<sup>176</sup>

Medicaid’s financial needs tests depend on the income and resources of both the Non-Beneficiary and Beneficiary Spouses.<sup>177</sup> The state takes a “snapshot” of the “couple’s resources on the date the [Beneficiary] Spouse permanently enters the long-term care facility.”<sup>178</sup>

In determining eligibility, the state considers all property of either spouse, whether individually or jointly held, “to be available to the [Beneficiary] [S]pouse.”<sup>179</sup> Reducing one’s assets is often critical to being Medicaid eligible,<sup>180</sup> prompting the need for complicated “look back” rules to police impermissible transfers designed to reduce assets enough to become Medicaid eligible. Medicaid takes a hard look at any transfers to individuals or trusts in the five years before applying for Medicaid. Impermissible transfers may be added into the financial “snapshot” and result in exclusion for a penalty period.<sup>181</sup> Crucially,

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176. OFF. OF ASSISTANT SEC’Y FOR POLICY & EVALUATION, DEP’T OF HEALTH & HUM. SERVS., SPOUSES OF MEDICAID LONG-TERM CARE RECIPIENTS 1 (April 2005), <https://aspe.hhs.gov/sites/default/files/pdf/74086/spouses.pdf>.

177. WADLINGTON ET AL., *supra* note 99, at 22–23.

Medicaid generally determines an applicant’s eligibility using the same tests used to determine eligibility for Supplemental Security Income, which is the “Federal income maintenance program for poor elderly and disabled persons.” OFF. OF ASSISTANT SEC’Y FOR POLICY & EVALUATION, *supra* note 176, at 1.

178. WADLINGTON, ET AL., *supra* note 99, at 23.

For additional information on how assets will be counted, see *Financial Requirements—Assets*, LONGTERMCARE.GOV, <http://longtermcare.gov/medicare-medic-aid-more/medicaid/medicaid-eligibility/financial-requirements-assets/> (last visited Apr. 23, 2016).

179. WADLINGTON, ET AL., *supra* note 99, at 23.

If either spouse “has an interest in property with a legal right to sell, claim or cash it out,” the state will assign that property its fair market value. OFF. OF ASSISTANT SEC’Y FOR POLICY & EVALUATION, *supra* note 176, at 2.

180. *Id.*

If applicants are deemed to own assets that make them ineligible for Medicaid, they “may qualify at a later date after the excess is depleted, either by spending it down on medical bills or other necessary expenses, or by employing various financial planning strategies.” *Id.* at 3.

For a discussion of general financial planning strategies to shelter assets, see *id.* at 7–11.

181. WADLINGTON, ET AL., *supra* note 99, at 23.

For example, transferring assets for less than their fair market value in order to establish Medicaid eligibility is prohibited. *Eligibility*, MEDICAID.GOV, <https://www.medicaid.gov/medicaid-chip-program-information/by-topics/eligibility/eligibility.html> (last visited Apr. 23, 2016). This prohibition “[a]ppplies when assets are transferred, sold, or gifted for less than they are worth by individuals in long-term

however, “transfers of any type of asset to a spouse or to another person for the sole benefit of the spouse” and “the transfer of a home to a spouse” are exempt from penalties, although, as discussed below, home equity limits and asset caps may apply.<sup>182</sup>

In this financial needs assessment, Medicaid also excludes certain assets of married couples when determining Medicaid eligibility,<sup>183</sup> including:

The first \$3000 of assets if they live as a couple [and are both Medicaid applicants] or \$2000 each if they live apart . . .

Limited amounts of household goods and personal property

A vehicle [used for transportation]

Up to \$1500 in funds designated for burial expenses, and contracts, spaces, or other irrevocable burial arrangements without limits for each spouse

Life insurance with cash surrender value of less than \$1500 [and]

Certain income-producing property.<sup>184</sup>

Medicaid applies special rules to how the applicant’s primary place of residence is treated when determining eligibility.<sup>185</sup> At least \$552,000 in home equity, and as much as \$828,000 in some states, is excluded from the snapshot calculation.<sup>186</sup> For purposes of the calcula-

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care facilities or receiving home and community-based waiver services, by their spouses, or by someone else acting on their behalf.” *Id.*

As for trusts, if “an individual, their spouse, or anyone acting on the individual’s behalf establishes a trust using at least some of the individual’s funds, that trust can be considered available to the individual for purposes of determining eligibility for Medicaid.” *Id.*

182. Memorandum from Cindy Mann, Dir., Ctrs. for Medicare & Medicaid Servs., Dep’t of Health and Human Servs., to State Medicaid Dirs. 2 (May 30, 2014), <https://www.medicaid.gov/Federal-Policy-Guidance/Downloads/SMD-14-005.pdf> (discussing *Windsor* and Non-MAGI Populations); see 42 U.S.C. §§ 1396p(c)(1)(A, J), (c)(2)(A–B) (2016).

183. OFF. OF ASSISTANT SEC’Y FOR POLICY & EVALUATION, *supra* note 176, at 3.

184. *Id.*; see also FROLIK & KAPLAN, *supra* note 121, at 118. For a full list of exclusions, see 20 C.F.R. §§ 416.1205, 416.1210 (2015).

185. For a thorough discussion of these rules, as well as Medicaid coverage for long-term care generally, see JULIE STONE, CONG. RES. SERV., MEDICAID COVERAGE FOR LONG-TERM CARE: ELIGIBILITY, ASSET TRANSFERS, AND ESTATE RECOVERY (Jan. 31, 2008), <https://www.crsreports.com/download?hash=8f3074b172eff5f75a68cc898255e67c11bd026aa32f7d240bace009000d50a9>.

186. 2016 SSI and Spousal Impoverishment Standards, MEDICAID.GOV, <https://www.medicaid.gov/medicaid-chip-program-information/by-topics/eligibility/downloads/2016-ssi-and-spousal-impoverishment-standards.pdf> (last visited Apr. 23, 2016).

Home equity equals the fair market value minus any debts that the home secures, but the critical question is the amount of the applicant’s equity interest in the home because it is that interest that is counted in the eligibility determination. *Financial Requirements—Assets*, *supra* note 178 (“[Y]our equity INTEREST, which is what is important, depends on whether you own the home by yourself or with someone

tion, only the applicant's fractional interest in the house is counted.<sup>187</sup> For example, if the house is solely owned, one hundred percent of the equity is counted, but if the house is jointly owned with one other person, fifty percent of the equity counts.<sup>188</sup> However, all the home's equity is exempt when an applicant's spouse "lawfully resid[es]" in the home.<sup>189</sup> Further, although states can seek recovery of Medicaid expenses from a Beneficiary's estate if the Beneficiary was over fifty-five years of age and "received nursing facility services, home and community-based services, or related hospital and prescription drug services,"<sup>190</sup> states may not recover against the estate when the Beneficiary is survived by a spouse until the surviving spouse dies.<sup>191</sup> As explained below, states can also choose not to pursue recovery against the Beneficiary's estate when doing so "would be an undue hardship."<sup>192</sup>

In addition to outright exclusions,<sup>193</sup> beginning in 1988, Congress enacted a series of measures to prevent "'spousal impoverishment,' fearing that the eligibility test would leave [Non-beneficiary] spouses with little or no income or resources," making it impossible for them that "to live out their lives with independence and dignity."<sup>194</sup> Thus, for all married couples, including same-sex married couples after

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else. In our example, if you own the home by yourself, your equity interest is the entire equity value . . . . If you own your home jointly with your spouse or someone else, though, your equity interest is only half of the home's equity value . . . .")

187. *Id.*

Individuals may, however, be able to reduce their equity interest in their home to become Medicaid eligible. See 42 U.S.C. § 1396p(f) (2012).

188. *Financial Requirements—Assets*, *supra* note 178.

189. 42 U.S.C. § 1396p(f); 20 C.F.R. § 416.1210 (discussing spouses and other qualified dependents); STONE, *supra* note 185.

190. Memorandum from Cindy Mann, Dir., Ctrs. for Medicare & Medicaid Servs, Dep't of Health and Human Servs., to State Medicaid Dirs. 3 (June 10, 2011) (discussing Same Sex partners and Medicaid liens, transfers of assets, and estate recovery), <http://www.medicareadvocacy.org/wp-content/uploads/2011/06/Same-Sex-Partners-SMD-6-10-11-2.pdf>.

191. *Id.* (discussing Medicaid liens, transfers of assets, and estate recovery and rules relating to surviving spouses and certain surviving children).

192. *Financial Requirements—Assets*, *supra* note 178; see also 42 U.S.C. § 1396p(f).

193. See Columbia Legal Services, *Questions and Answers on Medicaid for Nursing Home Residents*, WASHINGTONLAWHELP.ORG (Jan. 2016), <http://www.washingtonlawhelp.org/files/C9D2EA3F-0350-D9AF-ACAE-BF37E9BC9FFA/attachments/6AE100FE-D195-42BE-9C03-EF792D270BA9/5170en.pdf>.

194. *Spousal Impoverishment*, MEDICAID.GOV, <https://www.medicaid.gov/medicaid-chip-program-information/by-topics/eligibility/spousal-impoverishment-page.html> (last visited Apr. 23, 2016).

*Obergefell*,<sup>195</sup> some of a couple's resources and income are preserved for the Non-Beneficiary Spouse through three devices.<sup>196</sup>

First, the Non-Beneficiary Spouse may keep his or her own income, although that income is counted in the eligibility determination.<sup>197</sup> The Non-Beneficiary Spouse may also retain an amount of the couple's property up to the Community Spouse Resource Allowance (CSRA) amount. States will decide the CSRA amount that will apply to their state, which must fall within federal maximum (\$119,220) and minimum (\$23,844) thresholds, although there may be ways to keep more than the maximum threshold.<sup>198</sup> In approximately twenty-five states, if a couple has less than the minimum CSRA amount, a Non-Beneficiary Spouse may keep all of the couple's assets.<sup>199</sup>

Second, the Non-Beneficiary Spouse may receive some of the Beneficiary Spouse's income when necessary for the Non-Beneficiary Spouse's "self-support."<sup>200</sup> After a portion of the Beneficiary Spouse's income goes to his or her care, the Non-Beneficiary Spouse is permitted to keep an amount out of the couple's income known as the Minimum Monthly Needs Allowance (MMNA), without making the Beneficiary Spouse ineligible for Medicaid.<sup>201</sup> The Non-Beneficiary Spouse's own income and income from the couple's property count

195. Memorandum from Vikki Wachino, Dir., Ctrs. for Medicare & Medicaid Servs., Dep't of Health and Hum. Servs., to State Medicaid Dirs. 1-2 (Dec. 1, 2015) (discussing *Obergefell* and Medicaid/CHIP eligibility), <https://www.medicaid.gov/Federal-Policy-Guidance/downloads/SHO-15-005.pdf>.

196. *Spousal Impoverishment*, *supra* note 194.

197. WADLINGTON, ET AL., *supra* note 99, at 23. However, while spousal poverty protections may prevent states from denying Medicaid eligibility for a Beneficiary Spouse, at least one court held that a state may grant Medicaid benefits to a Beneficiary Spouse and then file suit for spousal support against the Non-Beneficiary Spouse who makes a large amount of income. *Poindexter v. State*, 890 N.E.2d 410 (Ill. 2008).

198. *2016 SSI and Spousal Impoverishment Standards*, *supra* note 186; see also WADLINGTON, ET AL., *supra* note 99, at 23.

While it is exceptionally difficult to do so, a community spouse may be able to keep more than the maximum CSRA by: (1) "obtaining a court order for more"; (2) "requesting a hearing to petition for an amount sufficient to generate income consistent with Medicaid income protection guidelines for spouses"; or (3) "just saying no"—i.e., by taking sole ownership of marital assets and refusing to make any of them available to pay for the institutionalized spouse's care." OFF. OF ASSISTANT SEC'Y FOR POLICY & EVALUATION, *supra* note 176, at 5-6. This last tactic only works if states do not sue the community spouse for a failure to support the other spouse under state law; the refusal may prevent the institutionalized spouse from being able to qualify for Medicaid, although states may make a hardship determination so that they can provide Medicaid benefits anyway. *Id.* at 5 n.19, 6.

199. *Financial Requirements—Assets*, *supra* note 178.

200. WADLINGTON ET AL., *supra* note 99, at 23.

201. *Id.*

toward the MMNA.<sup>202</sup> If that amount does not reach the MMNA, the Beneficiary Spouse's income may be used to reach the MMNA amount.<sup>203</sup> For 2016, the MMNA in most states is \$1,991.25.<sup>204</sup> Either spouse may theoretically show "that the community spouse needs more income than the MMNA provides due to 'exceptional circumstances resulting in significant financial duress.'"<sup>205</sup>

Finally, in addition to the MMNA, the Non-Beneficiary Spouse is entitled to a Community Spouse Monthly Housing Allowance, presently \$597.38 in forty-eight states.<sup>206</sup>

As the next Subpart explains, while the amounts that the Non-Beneficiary Spouse is entitled to keep may be seen as "quite modest," "they far exceed the income and asset levels that may be retained in the case of unmarried recipients of Medicaid long-term care services."<sup>207</sup>

## 2. MEDICAID LONG-TERM CARE RULES FOR DOMESTIC PARTNERS

No provision of the Social Security Act references domestic partnerships and civil unions.<sup>208</sup> Consequently, unmarried individuals must apply for Medicaid as single individuals, even if they are in domestic partnerships or civil unions.

202. The community spouse first receives a "'credit' for income generated by the couple's property—calculated as 1/12 of 1.5% of the CSRA." *Id.*

203. *Id.* "Federal law presumes that the institutionalized spouse's income has, in fact, been made available to the community spouse before any adjustment may be made to bring the community spouse up to the MMNA." *Id.*

204. *2016 SSI and Spousal Impoverishment Standards*, *supra* note 186.

205. WADLINGTON ET AL., *supra* note 99, at 23 (quoting 42 U.S.C. § 1396r5(e)(2)(B)).

Community spouses may obtain higher MMNAs in three ways. OFF. OF ASSISTANT SEC'Y FOR POLICY & EVALUATION, *supra* note 176, at 4. A community spouse may receive a higher MMNA (capped in all states at \$2,980.50) if a community spouse has "exceptional housing costs," if "exceptional circumstances might otherwise cause them extreme financial hardship," or if a court orders additional support. *2016 SSI and Spousal Impoverishment Standards*, *supra* note 186; *see also* OFF. OF ASSISTANT SEC'Y FOR POLICY & EVALUATION, *supra* note 176, at 4–5. Courts, however, emphasize that "financial duress must be 'thrust upon the community spouse by circumstances over which he or she has no control.'" WADLINGTON ET AL., *supra* note 99, at 23. In *In re Gomprecht*, for example, "[t]he maintenance of a Manhattan apartment as well as a house in East Hampton" did not warrant a higher MMNA because the Non-Beneficiary Spouse "essentially sought to maintain her prior lifestyle and have the public subsidize it." 652 N.E.2d 936, 938–39 (N.Y. 1995).

206. *2016 SSI and Spousal Impoverishment Standards*, *supra* note 186.

207. OFF. OF ASSISTANT SEC'Y FOR POLICY & EVALUATION, *supra* note 176, at 1.

208. Memorandum from Cindy Mann, *supra* note 182, at 5.

For Medicaid eligibility purposes, it may be advantageous *sometimes* for couples to opt for domestic partnership over marriage—or for that matter to dissolve a marriage for Medicaid purposes, also known as a “Medicaid divorce.”<sup>209</sup> This is primarily because a Non-Beneficiary Partner’s income and assets cannot be taken to pay for a Beneficiary Partner’s long-term care.<sup>210</sup> If the Non-Beneficiary Partner has a higher net worth than the Beneficiary Partner, the Non-Beneficiary Partner will not have to spend down his or her non-exempt assets above the CSRA amount to qualify the Beneficiary Partner for Medicaid.<sup>211</sup>

In many instances, however, Medicaid rules substantially disadvantage domestic partners. While Non-Beneficiary Partners, as legal strangers to the applicant, can keep their income and any assets held in their name, they have no entitlement to their partner’s income or assets.<sup>212</sup> Even if the couple jointly owns a home, Medicaid may place a lien on it and pursue recovery for Medicaid’s expenditures against the Beneficiary Partner’s estate after the Beneficiary Partner dies.<sup>213</sup> Further, if the couple transfers assets between themselves during the five-year look-back period, Medicaid will not exclude the transfer, as it does with spouses, and may deny Medicaid eligibility for a penalty period.<sup>214</sup> As for income, Beneficiary Partners are required to contribute all of their income to their own care, after “[a] personal needs allowance of at least \$30” and “[a]n amount for medical expenses incurred . . . in the medical facility”<sup>215</sup>—assuming no other specified family members live in their household. Importantly, domestic partners do not count as family.<sup>216</sup>

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209. See generally Michael Farley, Note, *When “I Do” Becomes “I Don’t”: Eliminating the Divorce Loophole to Medicaid Eligibility*, 9 *ELDER L.J.* 27 (2001).

210. E.g., K. Gabriel Heiser, *How Does a Domestic Partnership Affect Medicaid Eligibility*, AGINGCARE.COM, <https://www.agingcare.com/Articles/Domestic-Partnership-effect-on-medicare-eligibility-194334.htm> (last visited Apr. 23, 2016).

211. *Id.*

212. MOVEMENT ADVANCEMENT PROJECT, ET AL., *LGBT OLDER ADULTS AND LONG-TERM CARE UNDER MEDICAID 1* (Sept. 2010), <http://www.lgbtagingcenter.org/resources/pdfs/LGBTOlderAdultsandMedicaid.pdf>.

213. *Id.* at 2.

214. *Id.*

215. *Spousal Impoverishment*, *supra* note 194.

216. See *Key Facts: Determining Household Size for Medicaid and the Children’s Health Insurance Program*, HEALTH REFORM: BEYOND THE BASICS (Feb. 4, 2016), <http://www.healthreformbeyondthebasics.org/key-facts-determining-household-size-for-medicare-and-chip/>.



In practice, these rules create striking disparities between married and unmarried couples in the amount of assets and income available to a Non-Beneficiary Partner when the Beneficiary Partner receives Medicaid assistance for long-term care, as Figure 3 demonstrates.<sup>217</sup>

FIGURE 3. DIFFERENCE IN MEDICAID LONG-TERM CARE ASSISTANCE FOR MARRIED AND UNMARRIED COUPLES.<sup>218</sup>

| Assets Married and Unmarried Couples May Keep When Determining Medicaid Eligibility |  |   |  |  |
|---|--|---|--|--|
|   | Assets   | Home  | Income   |  |
| Married   | A portion of the couple's combined assets, up to \$119,220         | Non-Beneficiary Spouse can remain in home until death | Up to 100% of combined income to the \$1,991.25 MMNA cap           |  |
| Unmarried   | \$0 of the Beneficiary Partner's assets, but all of her own assets | Often loses home                                      | \$0 of the Beneficiary Partner's income, but all of her own income |  |

217. This chart is intended to generally illustrate Medicaid rules. Because Medicaid is a federal-state enterprise, the actual dollar amounts in any case will depend upon state rules. *See generally* O'Brien, *supra* note 175.

218. This chart is adapted from Figures 1–3 in MOVEMENT ADVANCEMENT PROJECT, ET AL., *supra* note 212, at 2–3; *see also* *Poverty Guidelines 01/25/2016*, U.S. DEP'T OF HEALTH & HUMAN SERVS., <https://aspe.hhs.gov/poverty-guidelines> (last visited Apr. 23, 2016). It assumes that no undue hardship waiver applies.

*Figure 3 Continued*

| Effect of Medicaid Asset Spend-down Rules on Married and Unmarried Couples |   |   |  |                        |
|--|---|---|--|------------------------|
|  | Initial Assets  | Medicaid Spend-down   | Final Assets Non-Beneficiary Partner Keeps                 | Total Assets Preserved |
| <i>Married</i>   | Couple has \$25,000 in joint savings and a home worth \$600,000 in applicant's name | <p>Non-Beneficiary Spouse can keep 100% of first \$23,844</p> <p>Non-Beneficiary spouse can keep entire value of home</p> <p>Medicaid may impose a lien on the home after the death of the Beneficiary Spouse, but it will not force a sale until the Non-Beneficiary Spouse dies</p>   | At least \$23,844 in savings<br>\$600,000 home             | \$623,844              |
| <i>Unmarried</i>   |   | <p>Medicaid requires a spend-down of \$12,500 of the joint savings</p> <p>\$48,000 in home equity will have to be spent down to meet home equity limits (assuming \$552,000 in home equity is excluded)</p> <p>Medicaid may place a lien on the home and force a sale for back costs after the Beneficiary Partner's death, even if the Non-Beneficiary Partner inherits the home</p> | \$12,500 in savings<br>Non-Beneficiary Partner is homeless | \$12,500               |

| How Medicaid Income Rules Can Impoverish Unmarried Couples <sup>219</sup> |                        |   |  |  |
|---|------------------------|---|--|--|
|   | Initial Monthly Income | How Medicaid Treats the Income Given a \$1,991.25 MMNA                              | Final Monthly Income of Non-Beneficiary Partner  | Non-Beneficiary Partner's Income as a Percent of Federal Poverty Level |
| Married   |                        |   |  |  |
| <i>Non-Beneficiary Spouse</i>   | \$750                  | Keeps own \$750 income<br>Keeps \$1,241.25 from Beneficiary Spouse                  | Non-Beneficiary Spouse has \$1,991.25 in monthly income<br>Only \$728.75 of the Beneficiary Spouse's income goes to Medicaid | 201%   |
| <i>Beneficiary Spouse</i>   | \$2,000                | \$30 personal allowance<br>\$728.75 goes to nursing home to defray Medicaid's costs |  |  |
| Unmarried   |                        |   |  |  |
| <i>Non-Beneficiary Partner</i>  | \$750                  | Keeps own \$750 income  | Non-Beneficiary Spouse has \$750 in monthly income<br>\$1,970 of the Beneficiary Partner's income goes to Medicaid           | 76%  |
| <i>Beneficiary Partner</i>  | \$2,000                | \$30 personal allowance<br>\$1,970 goes to nursing home to defray Medicaid's costs  |  |  |

The Centers for Medicare & Medicaid Services (CMS) has, however, taken steps to mute the disadvantages to a Non-Beneficiary Partner when a Beneficiary Partner receives Medicaid assistance for long-term care. In 2011, CMS released guidance on how to treat domestic partnerships that may be more generous than the treatment described above for ordinary cohabitants—although it is unclear whether this guidance extends to anyone other than same-sex partners.<sup>220</sup> Clearly drafted with same-sex partners in mind at a time when marriage was available to same-sex couples in only a handful of states,<sup>221</sup> CMS advised states that marriage-like protections relating to

219. Whether a couple gains by being married or unmarried is highly fact sensitive. Consider the difference if the Non-Beneficiary Person's income is \$4,000 and the Beneficiary Person's income is \$750. If a couple is married, the Non-Beneficiary Spouse will keep only \$1,991.25, with the remainder of roughly \$2,009 going to Medicaid; the Beneficiary Spouse will keep \$30 and give Medicaid \$720. If a couple is unmarried, the Non-Beneficiary Spouse will keep the full \$4,000; the Beneficiary Partner will keep \$30 and give Medicaid \$720.

220. *E.g.*, Heiser, *supra* note 210.

221. Robin Fretwell Wilson, *The Politics of Accommodation: The American Experience with Same-Sex Marriage and Religious Freedom*, in RELIGIOUS FREEDOM AND GAY

transfer of assets, estate recovery, and liens could be extended to domestic partners.<sup>222</sup>

Recall that Medicaid cannot pursue a lien against a Beneficiary Spouse's home when a living Non-Beneficiary Spouse lawfully resides there.<sup>223</sup> CMS advised that states could, by policy or rule, choose "not to pursue liens when the . . . domestic partner of the Medicaid beneficiary continues to lawfully reside in the house."<sup>224</sup>

States can also give domestic partners special consideration in asset transfers, although the vehicle for doing so—avoiding undue hardship—would not be the categorical exception afforded to spouses. Recall that asset transfers "of any type of asset to a spouse or to another person for the sole benefit of the spouse" and "transfer[s] of a home to a spouse" are exempt from Medicaid's look-back rules, which generally create a period of ineligibility for asset transfers for less than fair market value.<sup>225</sup> Using the existing discretion of states to not penalize asset transfers if doing so would cause an "undue hardship,"<sup>226</sup> "[s]tates may adopt criteria, or even presumptions," that transfer of "of ownership interests in a shared *home* to a . . . domestic partner would constitute an undue hardship."<sup>227</sup> Importantly, however, CMS did not suggest that *all* asset transfers to or for the sole benefit of a domestic partner should be considered under the undue hardship rubric.

States may sometimes pursue recovery of their Medicaid expenses against a Beneficiary Spouse's estate,<sup>228</sup> but they may not do so

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RIGHTS: EMERGING CONFLICTS IN THE UNITED STATES AND EUROPE Appendix C (Timothy S. Shah & Thomas F. Farr, eds., 2016).

222. Memorandum from Cindy Mann, *supra* note 190, at 1 (discussing Same Sex partners and Medicaid liens, transfers of assets, and estate recovery); *see also* O'Brien, *supra* note 175 (spelling out spousal rules and describing the evolution of relevant statutes).

For the general rules on liens, adjustments and recoveries, and transfers of assets, *see* 42 U.S.C. § 1396p (2012).

223. Memorandum from Cindy Mann, *supra* note 190, at 1–2.

224. *Id.*

225. *Id.* at 2.

226. An undue hardship would arise when the denial "would deprive the individual of medical care such that the individual's health or life would be endangered, or the individual would be deprived of food, clothing, shelter, or other necessities of life." *Id.*

227. *Id.* at 2–3 (emphasis added).

228. The state may pursue recovery if it had imposed a lien or if the Medicaid recipient was over fifty-five years of age and "received nursing facility services, home and community-based services, or related hospital and prescription drug services." Memorandum from Cindy Mann, *supra* note 190, at 3.

during the lifetime of the surviving Non-Beneficiary Spouse.<sup>229</sup> Moreover, states may waive estate recovery when recovery creates an “undue hardship for the deceased Medicaid recipient’s heirs.”<sup>230</sup> Because CMS gives states wide flexibility to craft “reasonable criteria” for deciding what constitutes an “undue hardship,” states may define “undue hardship” to reflect “reasonable protections [for the] domestic partner of a deceased Medicaid recipient.”<sup>231</sup>

In 2014, CMS instituted a far more sweeping protection for those in domestic partnerships (2014 Guidance). Specifically, Medicaid will recognize as marriages for all Medicaid purposes those civil unions or domestic partnerships “a state recognizes . . . as a marriage.”<sup>232</sup> In making this rule, CMS reminded states that they “have flexibility under previously announced policy to apply undue hardship waivers for all Medicaid recipients, regardless of sexual orientation, with respect to the application of liens, transfers of assets, and estate recovery rules.”<sup>233</sup> As the next Subparts explain, Washington, California, and New Jersey have all addressed the protections afforded to domestic partners when one partner needs Medicaid-paid long-term care.<sup>234</sup>

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229. *Id.* at 3.

230. *Id.*

231. *Id.*

232. Memorandum from Cindy Mann, *supra* note 182, at 5 (“[W]here a state recognizes a civil union or domestic partnership as a marriage, that marital status is recognized under the Medicaid and CHIP programs, consistent with this guidance. . . . This policy applies for eligibility purposes as well as for other purposes in the administration of the Medicaid program, such as spousal impoverishment, post-eligibility treatment-of-income, asset transfers, and estate recovery rules to the extent such rules can be applied under the state’s laws. Once a state elects its marriage recognition policy, that election shall apply consistently across the program (i.e., for both eligibility and post-eligibility purposes). However, . . . states have flexibility under previously announced policy to apply undue hardship waivers for all Medicaid recipients, regardless of sexual orientation, with respect to the application of liens, transfers of assets, and estate recovery rules.”).

233. *Id.*

234. For a detailed look at state-specific Medicaid provisions, see MOLLY O’MALLEY WATTS ET AL., MEDICAID FINANCIAL ELIGIBILITY FOR SENIORS AND PEOPLE WITH DISABILITIES IN 2015, THE HENRY J. KAISER FAMILY FOUND. Appendix (Mar. 1, 2016), <http://kff.org/report-section/medicaid-financial-eligibility-for-seniors-and-people-with-disabilities-in-2015-appendix/>.

## a. Washington

In a now-repealed regulation,<sup>235</sup> Washington specifically recognized that an undue hardship could exist when an asset transfer occurs between registered domestic partners.<sup>236</sup> Washington repealed the provision so that state authorities could “amend[] rules and creat[e] new rules in order to implement new federal regulations under the federal Patient Protection and Affordable Care Act” that have yet to be finalized.<sup>237</sup>

Washington also adopted two other regulations now reinstated after a temporary repeal.<sup>238</sup> First, Washington delayed recovery against the estate of Medicaid beneficiaries when survived by a domestic partner because of the undue hardship that would arise.<sup>239</sup> Second, Washington prevented Medicaid from filing liens against any property of a living beneficiary if his or her domestic partner lawfully resides in the beneficiary’s home.<sup>240</sup>

However, because Washington has decided that “for all purposes under state law, state registered domestic partners shall be treated the same as married spouses,”<sup>241</sup> CMS’ 2014 Guidance indicates that Medicaid should recognize Washington domestic partnerships as marriages for all Medicaid purposes.<sup>242</sup> Yet Washington has yet to say that it will do so.

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235. CR-103E, WASH. HEALTH CARE AUTHORITY (July 2011), <http://www.hca.wa.gov/rulemaking/Documents/103E-16-06-070.pdf>.

236. WASH. ADMIN. CODE § 182-513-1367 (2016).

237. 2015 WA REG TEXT 409616 (NS), 2015 WA REG TEXT 409616 (NS).

238. 2016 WA REG TEXT 397274 (NS), 2016 WA REG TEXT 397274 (NS).

239. WASH. ADMIN. CODE § 182-527-2750 (2016).

240. WASH. ADMIN. CODE 182-527-2820 (2016).

241. WASH. REV. CODE ANN. § 26.60.015 (2015) (“Any privilege, immunity, right, benefit, or responsibility granted or imposed by statute, administrative or court rule, policy, common law or any other law to an individual because the individual is or was a spouse, or because the individual is or was an in-law in a specified way to another individual, is granted on equivalent terms, substantive and procedural, to an individual because the individual is or was in a state registered domestic partnership or because the individual is or was, based on a state registered domestic partnership, related in a specified way to another individual. The provisions of chapter 521, Laws of 2009 shall be liberally construed to achieve equal treatment, to the extent not in conflict with federal law, of state registered domestic partners and married spouses.”).

242. Memorandum from Cindy Mann, *supra* note 182, at 5 (“[S]tates have flexibility under previously announced policy to apply undue hardship waivers for all Medicaid recipients, regardless of sexual orientation, with respect to the application of liens, transfers of assets, and estate recovery rules.”).

## b. California

California's Domestic Partner Rights and Responsibilities Act of 2003 (the 2003 Act) gave registered domestic partners (Registered Partners) "the same rights, protections, and benefits" and "responsibilities, obligations, and duties" as married couples.<sup>243</sup> Because federal law at that time did not recognize domestic partners for Medicaid benefits, the 2003 Act impacted only state-paid plans, such as California's Medically Indigent Adults in Long-Term Care Program (LTC).<sup>244</sup> Thus, if a Beneficiary Partner did not qualify for federally supported long-term care, California's agency, Medi-Cal, would place the otherwise eligible Registered Partner in the state-paid LTC program and apply spousal impoverishment rules to the Non-Beneficiary Registered Partner.<sup>245</sup> This was only a partial solution, however. If the Beneficiary Registered Partner became disabled or turned sixty-five, he or she would no longer "be eligible under the state-only LTC program and spousal impoverishment [rules that served to protect the Non-Beneficiary Registered Partner] would no longer apply."<sup>246</sup>

Because Medicaid now treats domestic partners as spouses when a state recognizes a domestic partnership as a marriage, California should apply spousal rules to Registered Partners, although it has yet to say it will do so. California has, however, committed to delaying recovery of reimbursement for Medi-Cal benefits from a beneficiary's estate for the lifetime of any surviving Registered Partner.<sup>247</sup> Further, Registered Partners may apply for undue hardship waivers to ineligibility determinations, although California has not issued specific guidance indicating that a registered partnership will trigger the undue hardship provisions.<sup>248</sup>

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243. CAL. FAM. CODE § 297.5 (2016).

244. Memorandum from Vivian Auble, Chief, Medi-Cal Eligibility Division, to all county welfare directors, administrative officers, Medi-Cal program specialists/liaisons, health executives, mental health directors, and QMB/SLMB/QI coordinators 3 (Feb. 9, 2009), <http://www.dhcs.ca.gov/services/medi-cal/eligibility/Documents/c09-03.pdf> (discussing the Domestic Partners Rights and Responsibilities Act of 2003).

245. *Id.* at 10.

246. *Id.* ("Because the Community Spousal Resource Allowance is determined for the initial month for which Medi-Cal is being requested, the property transferred to the community RDP becomes the property of the community RDP and is not counted again. The spousal income allocation will no longer be deducted from the income of the institutionalized RDP.")

247. CAL. CODE REGS. tit. 22, § 50963; *California's Medi-Cal Recovery Program Fact Sheet*, CANHR.ORG (Jan. 5, 2016), [http://www.canhr.org/factsheets/medi-cal\\_fs/PDFs/FS\\_MedCal\\_recovery\\_FAQ.pdf](http://www.canhr.org/factsheets/medi-cal_fs/PDFs/FS_MedCal_recovery_FAQ.pdf).

248. CAL. WELF. & INST. CODE § 14015.1 (2016).

## c. New Jersey

New Jersey has given little guidance on how a Non-Beneficiary Domestic Partner is to be treated when a Beneficiary Partner applies for Medicaid assistance with long-term care. The 2014 Guidance treating domestic partners as spouses is inapplicable in New Jersey because New Jersey never extended full marriage rights to domestic partners.<sup>249</sup> Domestic partners do have some obligations to each other: most pertinent, to be “jointly responsible for each other’s common welfare,”<sup>250</sup> which “means that each domestic partner agrees to provide for the other partner’s basic living expenses if the other partner is unable to provide for himself.”<sup>251</sup> Consequently, Medicaid generally will include a Non-Beneficiary Domestic Partner’s income and assets in determining the Beneficiary Domestic Partner’s Medicaid eligibility and require Non-Beneficiary Partners to use their separate assets and income to help pay for the Beneficiary Partner’s long-term care.<sup>252</sup> New Jersey does, however, permit domestic partners to apply for undue hardship waivers that would exempt asset transfers and the use of trusts from triggering ineligibility for long-term care.<sup>253</sup> But New Jersey has not clarified whether the Non-Beneficiary Domestic Partner who is penalized also receives any of the benefits accorded to spouses under Medicaid rules.

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249. N.J. STAT. ANN. § 26:8A-4 (2016); *Lewis v. Harris*, 908 A.2d 196, 214–15 (N.J. 2006).

250. N.J. STAT. ANN. § 26:8A-4(b) (2016).

251. N.J. STAT. ANN. § 26:8A-3 (2016).

252. *Domestic Partnership Agreement FAQ*, LAW OFFICES OF JONATHAN BRESSMAN LLC, <http://www.estatelawnj.com/articles/faq-s.html> (last visited Apr. 23, 2016) (“Domestic Partners become responsible for each other’s basic needs if their partner has insufficient means to pay for themselves. This may include long term nursing care. This is of special significance to opposite sex couples over 62 years of age who are considering becoming Domestic Partners.”); *New Jersey’s Domestic Partnership Act*, LSNJLAW (Jan. 30, 2015), <http://www.lsnjlaw.org/Family-Relationships/Civil-Unions/Pages/NJ-Domestic-Partnership-Act.aspx> (“Because one partner agrees to be jointly responsible for another partner when they register for a domestic partnership, the state may consider either partner ineligible for Medicaid because they will now count the income of the other partner. In particular, this may cause problems for opposite-sex couples who are 62 years of age or older and have chosen not to marry in order to maintain Social Security or other benefits, because their combined income or assets may make them ineligible for Medicaid.”).

253. N.J. ADMIN. CODE §§ 10:71-4.10, 10:71-4.11 (2016).



### III. The Future of Domestic Partnerships for the Elderly

If history is a guide, non-marital statuses will soon become a thing of the past—at least for same-sex couples. When states responded to the plight of committed same-sex couples by voluntarily embracing same-sex marriage,<sup>254</sup> those that had previously provided a marriage-alternative almost universally closed off those statuses after enacting marriage equality.<sup>255</sup> Couples in such statuses became married overnight when states like Connecticut,<sup>256</sup> Delaware,<sup>257</sup> New Hampshire,<sup>258</sup> Rhode Island,<sup>259</sup> and Vermont<sup>260</sup> converted their civil unions into marriages.

Domestic partnerships may not continue for the elderly either, if for no other reason than the statuses do not deliver all the gains anticipated. For the moment, Social Security is beginning to treat same-sex domestic partners as married for some purposes—permitting them to capture the benefits of marriage. One can easily imagine that couples formerly locked out of marriage will be asked to also assume the burdens of marriage—which may happen quickly given the speed with which federal regulators have moved after *Obergefell*. Alimony termination rules in two states, California and New Jersey, do allow domestic partners to continue to receive some or all the alimony due from former spouses, but the third, Washington, treats domestic partners like spouses, terminating alimony upon entering the new relationship. And this makes sense. The law generally has said that individuals can have one source of marital support at a time, not two.<sup>261</sup> It has generally taken into account fairness to the payor, who has an interest in keeping their wages when a former spouse receives support from another. That said, some forms of alimony should continue after remarriage or entering a domestic partnership because the payment reimburses the former spouse for investments made in the relationship or assists them in becoming self-supporting over time.<sup>262</sup>

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254. Wilson, *The Politics of Accommodation*, *supra* note 4.

255. See *supra* note 10 and accompanying text.

256. CONN. GEN. STAT. ANN. § 46b-38rr (2015).

257. DEL. CODE ANN. tit. 13, § 218 (2015).

258. N.H. REV. STAT. ANN. § 457:46 (2016).

259. 15 R.I. GEN. LAWS ANN. § 15-3.1-12 (2015).

260. VT. STAT. ANN. 18, § 5131 (2016) (repealing VT ST T. 18 § 5160 which resulted in new civil unions not being available after September 1, 2009).

261. *Joye v. Yon*, 586 S.E.2d 131, 133 (S.C. 2003).

262. See GREGORY ET AL., *supra* note 95.

Moreover, permitting the elderly to enter into domestic partnerships that give the upside of marriage without the downside creates a kind of gamesmanship that tests our understanding of marriage obligations. It also permits states to externalize the costs of that gamesmanship to the federal government, rather than absorbing it themselves. For instance, if an older couple in California receives the same state law protections as if married, while concurrently keeping the federal benefits tied to one partner's former marriage, it is the federal fisc that bears the cost of continuing those benefits, not the state. Federal regulators have been willing to play along, at least in some contexts like Medicaid. But their progressive treatment of domestic partners as spouses can carry both benefits and burdens. Whether this is desirable depends on whether partnered couples have *all* of the obligations of marriage without the name.

Ironically, as federal law progressively brings gay couples in non-marital statuses in line with its treatment of married couples, the elderly may follow. And that will mean the elderly will not be permitted to receive retirement benefits and income as if the new relationship, and attendant support, did not exist.

At the state level, fairness to younger families will play a role, too. The legislatures' decision to allow couples into domestic partnerships where one is sixty-two or older is both grossly under-inclusive and over-inclusive. It is under-inclusive because many similarly sympathetic people could also benefit from being domestic partners—including those who will never be able to marry, like two sisters who live together and are financially dependent on one another. These couples may be as financially interdependent but are barred from marriage, not simply dissuaded from marrying. Likewise, younger families forming outside marriage may benefit from the rights and protections that non-marital statuses offer. The fact that more families are formed outside marriage than inside marriage in certain communities gives real urgency to expanding the status if it continues, rather than keeping it an exclusive club.

Opening non-marital statuses only to the elderly is also over-inclusive.<sup>263</sup> While created to benefit couples in dire economic straits, nothing prevents wealthy individuals from also exploiting domestic partnerships to avoid marital penalties and maximize benefits. If

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263. California law does permit gay couples who can marry to elect to be domestic partners. See Part I *supra*.

these statuses are retained, states should seriously consider requiring that both partners be struggling financially upon entry—whether measured by living at a percentage of poverty, or receiving other benefits tied to low income, such as heating assistance, food stamps, or other barometers of need. California imbedded a means test into its domestic partnership statute when it required one party to qualify for certain social security benefits, like disability benefits.<sup>264</sup> Disability benefits are available only to financially needy disabled persons. Introducing a means test for *all* domestic partnerships would force wealthier couples to assume the full panoply of marriage obligations if couples want to capture the benefits of marriage.

However states and the federal government proceed, one thing is certain: domestic partnerships have been a work in progress all along and the final chapter has yet to be written. What should be done with status arrangements validly entered into in another age, before same-sex couples could validly marry, will bedevil policymakers for years to come.

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264. See Part I *supra*.

