

The **LGBT** Casebook

Edited by

Petros Levounis, M.D., M.A.

Jack Drescher, M.D.

Mary E. Barber, M.D.

American
Psychiatric
Publishing

A Division of American Psychiatric Association

Washington, DC
London, England

Note: The authors have worked to ensure that all information in this book is accurate at the time of publication and consistent with general psychiatric and medical standards, and that information concerning drug dosages, schedules, and routes of administration is accurate at the time of publication and consistent with standards set by the U.S. Food and Drug Administration and the general medical community. As medical research and practice continue to advance, however, therapeutic standards may change. Moreover, specific situations may require a specific therapeutic response not included in this book. For these reasons and because human and mechanical errors sometimes occur, we recommend that readers follow the advice of physicians directly involved in their care or the care of a member of their family.

Books published by American Psychiatric Publishing (APP) represent the findings, conclusions, and views of the individual authors and do not necessarily represent the policies and opinions of APP or the American Psychiatric Association.

If you would like to buy between 25 and 99 copies of this or any other American Psychiatric Publishing title, you are eligible for a 20% discount; please contact Customer Service at appi@psych.org or 800-368-5777. If you wish to buy 100 or more copies of the same title, please e-mail us at bulksales@psych.org for a price quote.

Copyright © 2012 American Psychiatric Association
ALL RIGHTS RESERVED

Manufactured in the United States of America on acid-free paper.
16 15 14 13 12 5 4 3 2 1
First Edition

Typeset in Adobe's Minion and Trade Gothic

American Psychiatric Publishing
A Division of American Psychiatric Association
1000 Wilson Boulevard
Arlington, VA 22209-3901
www.appi.org

Library of Congress Cataloging-in-Publication Data

The LGBT casebook / edited by Petros Levounis, Jack Drescher, Mary E. Barber. — 1st. ed.
p. ; cm.

Includes bibliographical references and index.

ISBN 978-1-58562-421-8 (pbk. : alk. paper)

I. Levounis, Petros. II. Drescher, Jack, 1951- III. Barber, Mary E., 1967-

[DNLM: 1. Homosexuality—psychology—Case Reports. 2. Bisexuality—psychology—Case Reports. 3. Gender Identity—Case Reports. 4. Mental Disorders—complications—Case Reports. 5. Mental Disorders—therapy—Case Reports. 6. Transsexualism—psychology—Case Reports. WM 611]

616.85'83—dc23

2012010020

British Library Cataloguing in Publication Data
A CIP record is available from the British Library.

in this book is accurate and medical standards, routes of administration sets set by the U.S. Food and medical research and change. Moreover, special included in this book. For cases occur, we recommend in their care or the care

sent the findings, conclusions represent the policies

her American Psychiatric Customer Service more copies of the same

E. Barber. — 1st. ed.

57-uality—psychology cases—complications homosexuality—psy-

2012010020

Contents

Contributors ix

Foreword xv
Pamela S. Hyde, J.D.

Preface xvii

PART I. Basic Principles

1 What's in Your Closet? 3
Jack Drescher, M.D.

2 Coming Out to Self and Others
Developmental Milestones 17
Kenneth M. Cohen, Ph.D.
Ritch C. Savin-Williams, Ph.D.

3 From Outlaws to In-Laws
Legal Standing of LGBT Americans' Family Relationships 35
Jennifer C. Pizer, Esq.

4 LGBT Parenting 59
Mary E. Barber, M.D.

5 Sexual Identity in Patient-Therapist Relationships 73
Petros Levounis, M.D., M.A.
Andrew J. Anson, M.D.



From Outlaws to In-Laws

Legal Standing of LGBT Americans'
Family Relationships

JENNIFER C. PIZER, Esq.

WHAT IS THE “LEGAL STANDING” of lesbian, gay, bisexual, and transgender (LGBT) family relationships in the United States today? As this chapter is finalized in early 2012, six states and the District of Columbia issue marriage licenses equally to same-sex and to different-sex couples.¹ The laws of another five states allow same-sex couples to assume the same legal rights and responsibilities that different-sex couples may assume, but by entering a civil union rather than by marrying.² Four states permit same-sex couples to acquire a similarly complete set of state law rights and duties by registering a domestic partnership, which lacks a formal ceremony through which the new legal status is created.³ Considering these 16 jurisdictions, more than one-third of the U.S. population now lives where state law offers same-sex couples full rights and duties through a state-conferred legal status. Recent studies indicate that 14% of same-sex couples in the United States are married (Badgett et al. 2011). In at

¹The states are Connecticut, Iowa, Massachusetts, New Hampshire, New York, and Vermont.

²These states are Delaware, Hawaii, Illinois, New Jersey, and Rhode Island.

³These states are California, Nevada, Oregon, and Washington.

least five more states, same-sex couples may register for a more limited state-conferred status entailing decision-making authority in various contexts and sometimes other state law rights as well.⁴ Many cities and counties also have registries in which same-sex couples may register their domestic partnership. But because family law rules operate at the state level, these local registries can provide only limited rights and recognition related to functions controlled at the local level.⁵

Two other areas of “family relationship recognition” make up the big picture—the private sector and the federal government. In the private sector, employee benefits (including health insurance for family members and the ability to take family medical leave) are valuable parts of compensation. Thanks to two decades of advocacy by employee groups and others, many of the largest companies voluntarily offer family benefits to employees with a same-sex life partner, and often also to those with an unmarried different-sex partner, as a matter of compensation equity.⁶

Lastly, because of the so-called Defense of Marriage Act (DOMA) enacted by Congress in 1996, federal law ignores the marital status of married lesbian and gay couples. This means the estimated 50,000 to 80,000 married same-sex couples in the United States are treated for federal law purposes as single, despite having full legal responsibilities and rights under state law.⁷ Because of Obama administration policy changes, the picture has improved for federal employees, for whom workplace benefits now include recognition of same-sex partners and children for many benefits such as family medical leave, bereavement leave, and relocation benefits, but not spousal health insurance.⁸ In addition, the Administration has been making changes in agency regulations to per-

⁴These states include Colorado, Hawaii, Maine, Maryland, and Wisconsin.

⁵These rights and recognitions can include health insurance and other family benefits for local government employees who have an unmarried life partner of the same or different sex, as well as family discounts at county museums and “family member” visitation privileges in local facilities such as hospitals and jails.

⁶According to survey data, 39% of Fortune 1000, 57% of Fortune 500, and 83% of Fortune 100 companies offer their employees benefits to cover a same-sex partner (Human Rights Campaign 2009). Note that these voluntary benefits are a term of employment and generally end when an employee leaves a job, and that an employer’s choice to recognize its workers’ family relationships does not entail recognition by government or other private parties, such as other businesses. In addition, despite the example set by these large companies, it is estimated that 70%–80% of private businesses, employing millions of workers, do not offer domestic partner benefits (Kaiser Family Foundation and Health Research and Educational Trust 2009). These conditions contribute to the reality that those in same-sex relationships tend to be uninsured and underinsured to a disproportionate extent (see Ponce et al. 2010).

⁷See Williams Institute S.598 testimony (Badgett et al. 2011).

mit some protections for same-sex partners in areas where private institutions receive federal funds, such as requiring fairness in hospital visitation, home mortgages and rental housing, and certain protections against partner impoverishment from the cost of long-term nursing home care.⁹ At the same time, these improvements do not fully alleviate the financial, practical, and emotional harms that DOMA inflicts by requiring the vast body of federal law and regulations to treat married lesbian and gay people as *unmarried*.¹⁰

The U.S. constitutional system of state sovereignty with mandatory interstate cooperation makes things considerably more complicated. Although state family law and related rules sometimes vary greatly, individual states have evolved independently and voluntarily to the current status in which they usually respect the marriages and parent-child relationships that other states allow for their own residents, even if a particular state’s own rules are different. Thus, when heterosexual couples and their families move to a new state, they sometimes find themselves subject to new, unexpected rules, but married couples can expect to remain married, and to remain legally bound to their children, whether their parental ties exist as a result of the adults’ legal relationship or from an adoption decree or other court order. Further, when a married, heterosexual couple travels and faces a question of whether their home state’s law or the different law of the place they are visiting controls, there generally is a settled approach for deciding which state has a stronger interest in enforcing its law. This system of interstate cooperation—often called “comity law”—exists against the backdrop of the U.S. Constitution’s “Full Faith and Credit” and “Privileges and Immunities” clauses, which call upon states to respect one another’s sovereignty while facilitating fair treatment of those who travel.

In the past roughly 15 years, however, about four-fifths of the states have created anti-gay exceptions to these rules, with three-fifths having done so by amending their constitutions. State family law rules have varied in the past, such as in their treatment of women and in criminalization or acceptance of interracial relationships. But the opposition to equal treatment of LGBT people—especially following law reform movements that largely have eliminated differential laws based on race, national origin, and sex—has been in dramatic con-

⁸The presidential memorandum providing some family benefits for federal workers with a same-sex partner, but not spousal health insurance, is posted at http://www.whitehouse.gov/the_press_office/Memorandum-for-the-Heads-of-Executive-Departments-and-Agencies-on-Federal-Benefits-and-Non-Discrimination-6-17-09.

⁹The presidential memorandum requiring hospitals that receive federal funding to respect patient wishes concerning visitation and surrogate decision making, if those wishes were put in writing, is available at http://www.whitehouse.gov/the_press_office/presidential-memorandum-hospital-visitiation.

¹⁰See Williams Institute S.598 testimony (Badgett et al. 2011).

trast to the predictability and practicality achieved over the years for heterosexual couples and their families. These politics have forged an interstate legal landscape that is discriminatory and confusing in complex new ways. However, the consequences—unintended by many voters—are inspiring stronger calls for reform, including for interim steps to reduce the harms in the meantime.¹¹

Indeed, laws and court rules are changing at an encouraging pace, although not nearly fast enough for the roughly 9 million people living in the United States today who identify as LGB or T (Gates 2011), of whom nearly 600,000 are in same-sex relationships (Gates and Cooke 2011), with roughly twenty percent of them raising 250,000 children (Badgett 2010).

In the United States, only 21 states and the District of Columbia explicitly protect workers against sexual orientation discrimination on the job, and only 7 explicitly protect against gender identity discrimination (National Gay and Lesbian Task Force 2011); federal law does not explicitly forbid either form of employment bias, though some protection exists under more general laws and the U.S. Constitution.¹² State and federal anti-bias protections are similarly inadequate regarding education, housing, health care services, financial services, and other commercial transactions. And even where civil rights laws are comprehensive and civic leaders trumpet a welcoming climate, antigay attitudes remain pervasive (Sears and Mallory 2011). Great numbers of LGBT Americans thus still live in fear of losing financial and personal security.

Why the Law Matters to Mental Health Professionals

Why discuss the state of the law in a book about mental health needs? There are several reasons. First, it is helpful for health professionals to grasp how the legal system's inclusion or exclusion of same-sex couples may be causing or exacerbating a patient's anxiety, depression, or other psychiatric conditions. In addition, from a practical perspective, mental health professionals may need to know who has decision-making authority and/or responsibility if a patient becomes incapacitated, and with whom a patient's information may be shared if a

¹¹For example, in addition to the regulatory changes referenced above, President Obama also has endorsed the Respect for Marriage Act, which would repeal DOMA (<http://www.whitehouse.gov/blog/2011/07/19/president-obama-supports-respect-marriage-act>).

It now has 32 sponsors in the Senate and 138 sponsors in the House of Representatives.

¹²Note that the federal and state constitutions apply only against government, and separate civil rights laws are required to constrain the conduct of private businesses and individuals.

patient cannot say. Absent a formal designation by the patient, state law usually allocates authority according to legally recognized family relationships. Absent a competent spouse, the law usually empowers adult children, siblings, or other relatives to speak for one who is incapacitated. Likewise, a parent may consent to or refuse medical care for a minor child as long as the parent has a legal tie to the child. Those with deeply meaningful but legally unrecognized relationships usually have no right to make decisions or even to receive information. The legal status of relationships also frequently determines whether a person is eligible for health insurance as a member of the primary insured's family, or for victim services or compensation when a loved one has been injured or killed.

It therefore can be necessary for mental health professionals to consider at the start of a treatment relationship, and to reconfirm over time, who plays an important role in a patient's life and whether those whom a patient would wish to be involved in his or her care have the necessary authorization.

Origins of Law Reform

Historically, American law has not treated LGBT people and their families fairly and with respect. Until recently, the law—like the health professions—did not recognize sexual orientation and gender identity as characteristics that exist along a spectrum for everyone. The tide was turning by 1996, when the U.S. Supreme Court was asked to consider the validity of a state constitutional amendment approved by Colorado's voters to negate antidiscrimination laws enacted by the municipalities of Aspen, Boulder, and Denver to protect lesbians, gay men, and bisexual persons. Colorado's Amendment Two required that protections for LGB people could be passed only at the state level. The U.S. Supreme Court concluded the amendment was invalid because, by closing the doors of local government and requiring that just this minority group take its requests for help to the state level, it violated the federal guarantee of equal protection.¹³

In 2003, the U.S. Supreme Court invalidated the remaining state sodomy laws as inconsistent with constitutional guarantees of individual liberty. Justice Kennedy's lead opinion expresses concern for the lives and dignity of gay people and deems same-sex relationships worthy of constitutional respect.¹⁴ The decision ensured that no longer could sodomy laws continue to be invoked as reasons to fire workers, to deny parents custody of their own children, and to restrict student speech and organizing, among other things. This marked a new era for LGBT Americans by affirming that the constitutional guarantees of liberty and equality apply without regard to sexual orientation.

¹³*Romer v. Evans*, 517 U.S. 620 (1996).

¹⁴*Lawrence v. Texas*, 539 U.S. 558 (2003).

Where We Are Now

The Supreme Court's *Romer* and *Lawrence* decisions, although breakthroughs, did not entirely erase the many prior adverse rulings or the countless court decisions, laws, and policies discriminating against LGBT people. Thus, the movement to reform American law—state by state and at the federal level—continues. The rapid pace of this reform is the reason why this chapter requires a time marker.

Looking forward, then, four features characterize this period of legal and policy reform. *First* is the gulf between parts of the country in which same-sex couples are fully equal, with the same opportunities to create family relationships within marriage as different-sex couples, and other regions in which family recognition is denied through explicit state laws and/or constitutional amendments. Because family law historically has been the province of the states, geographic diversity is not a new phenomenon. What is new is the rapid divergence of states—from a consistent, but largely unconscious, denial of recognition to same-sex couples, to affirmative recognition in some places and emphatic rejection in others.

Second is the resulting uncertainty and confusion that LGBT people may experience when traveling and the vulnerability and anxiety they can face as a result. The United States is one country, and as a modern society it is highly mobile. Ideas are influenced by a dominant national news and entertainment market. Many businesses operate on a national, if not an international, scale and expect employees to travel frequently and sometimes to relocate. Vacation destinations advertise to all corners and try to entice a diversity of travelers. Geographic and cultural distances have seemed to shrink for many Americans. But this is much less true for LGBT people.

Third is that the federal government still largely denies the existence of married gay couples by expressly reserving federal marital benefits and protections, such as Social Security spousal support and equal federal tax treatment, only to heterosexually married Americans, despite the thousands of married same-sex couples in the country.

Fourth is the attention being paid to the needs of LGBT people, and to their families, and the resulting pace of change. The direction of the change process now appears clearly toward inclusion and eventual equality. This means there is pride, optimism, and impatience where once there was mostly shame, fear, and hiding. But with rapid positive change in some places, and backlash in others, many LGBT people are confused, and even overwhelmed, by questions regarding matters most Americans do not think twice about. These can range from whether rental car companies will see a couple as a family or charge them an “extra driver” fee, and whether to complete one or two U.S. customs “family” declaration forms, to whether their state and federal tax returns should be consistent.

These four features characterize family law today, both in the rules recognizing same-sex couples or not and in those governing their parent-child relationships.

What follows are brief descriptions of the systems regulating these relationships, including ways that current law sometimes protects, sometimes excludes, and sometimes creates confusion, depending on where couples are and the issues they face.

The State-by-State Patchwork of Rules Establishing Rights and Responsibilities for Adult Couples

The most visible features of marriage may be those relating to solemnization of a couple's new status. But the rights and duties with respect to each other, relatives, and society can provide essential crisis management for couples and their dependents, including entitlement to financial and other supports. As noted earlier, in the absence of a formal designation of someone, the law determines who can make decisions for a patient and have access to information. The person designated by default may be an estranged blood relative rather than the patient's trusted, day-to-day companion.

Likewise, if a patient's mental health is being affected by relationship problems, it can be helpful for those providing treatment to know whether she or he is stressed because a former partner is breaking a promise of support, or because the patient just realized the law will not enforce the promise. Is the patient feeling betrayed by the former partner, or also by a discriminatory society? Perhaps the patient also is angry at himself or herself for not having understood his or her legal vulnerability. Given how the law is improving in some states and not in others, it is easier than ever for LGBT people to be optimistic that those in authority will treat a same-sex partnership the same way as a heterosexual marriage; yet in many places, such optimism will prove unfounded.

What follows is an overview of issues to be considered, keeping in mind that 1) the legal details are evolving in some parts of the country and not in others at present; 2) federal law has only just started to recognize same-sex couples; 3) many employers have brought their benefit plans in line with their nondiscrimination policies, but a great many have not and are not compelled by law to do so; and 4) the ever-expanding national conversation about marriage equality for same-sex couples can exacerbate the uncertainty and the gulf between the broader rights those couples believe they have and the more limited rights they actually may have.

Marriage And Civil Union: A Comprehensive State Status Created Through a Formal Ceremony

Massachusetts was the first state in the country to require that marriage licenses be issued without regard to the gender or sexual orientation of the applicants. The Iowa Supreme Court reached a similar conclusion, unanimously, in 2009.

In addition, the legislatures of New Hampshire, New York, Vermont, and the District of Columbia all have voted to open marriage to lesbian and gay couples.¹⁵ Connecticut also allows same-sex couples to marry. After that state's legislature created "civil unions" for same-sex couples in 2005, with the same rights and duties as marriage, the Connecticut Supreme Court ruled in 2008 that the separate status was inherently unequal and failed to provide the equality that the state's constitution requires.¹⁶

The Vermont legislature first coined the term *civil unions* back in 2000, after that state's supreme court ruled that lesbian and gay couples are entitled to equal rights and responsibilities but left open whether that could be accomplished through a separate status or whether marriage must be opened. The New Hampshire legislature followed Vermont's lead, passing a civil unions law in 2008. Both state legislatures then voted in the spring of 2009 to open marriage to same-sex couples and to phase out civil unions. Similarly, in the District of Columbia, the city council created a comprehensive domestic partnership system open to both same-sex and different-sex couples, then opened marriage equally to all couples regardless of gender and sexual orientation, following fast on the heels of Vermont and New Hampshire. Couples in the District can have either partnership or marriage, but not both; if a same-sex couple marries, doing so terminates their domestic partnership.

Of the five states that now allow adult couples to enter into a civil union, Delaware, New Jersey, and Rhode Island offer the status to same-sex couples only, with the same rights and duties as marriage but a separate legal meaning and, as a practical matter, a lesser social status. Hawaii and Illinois, in contrast, offer that separate status without regard to gender or sexual orientation.

Public Registration Systems for Extending Legal Protections and Recording Couples' Commitments

In contrast with the states that have opened marriage or created civil unions, others use a centralized registration system that allows same-sex couples (and

¹⁵In the spring of 2009, the Maine legislature also approved marriage for same-sex couples, and Governor Baldacci signed the bill. But the change was reversed by a voter referendum in November 2009. The Washington State legislature passed a marriage bill and Governor Gregoire signed it in February 2012, although a repeal referendum contest is anticipated. That same week, New Jersey's governor vetoed a similar bill. Lastly, as this chapter is finalized, a bill to allow same-sex couples to marry in Maryland appeared headed for Governor O'Malley's signature.

¹⁶The Connecticut Supreme Court drew extensively from the May 2008 California Supreme Court decision that, under that state's constitution, lesbian and gay couples must be allowed to marry. An estimated 18,000 same-sex couples married in California between June and November 2008, when voters passed Proposition 8, placing the different-sex-only marriage restriction into the California Constitution.

sometimes different-sex couples) to record the existence of a domestic partnership already formed, without need for a license or solemnization. California was first to take what had been a local registration concept to the state level, in 2000 allowing same-sex couples to file a form with the secretary of state's office and thereby acquire minimal legal rights. In subsequent years, the legislature expanded the rights and obligations of registered couples to nearly those of married couples. Then, in 2009, the California Supreme Court held that the rights offered to gay and nongay couples must be fully equal as a matter of state constitutional law, except for the different-sex requirement for marriage.¹⁷

Washington and Oregon have followed a similar path, with Washington reaching the goal of complete state rights and duties for registered partners in multiple steps between 2007 and 2009, and Oregon doing so with one law in 2007. Nevada enacted a partnership system with full rights and duties in 2009, with two key distinctions. First, the registry is open to both same- and different-sex couples (like civil unions in Hawaii and Illinois). Second, leaving a blatant and constitutionally suspect discrimination, it excludes equal benefits for state workers with a registered partner rather than a spouse.

Maine and Wisconsin also have state-level partnership registries, but with limited rights similar to the interim protections California and Washington adopted for a time. Since 1997, Hawaii has allowed any two adults of same or different sexes who are ineligible to marry to register as "reciprocal beneficiaries," and thereby acquire limited protections; approval of Hawaii's civil unions legislation in 2011 did not eliminate this registration system. Colorado has created a similar status called "designated beneficiaries," which permits two adults to designate each other for various purposes without attesting to an intimate domestic relationship.

As noted earlier, these state registration systems built on a concept first adopted at the municipal level, starting in the mid-1980s. The local registries have limited ability to convey legal rights, as municipalities generally lack authority over key subject areas, such as spousal and child support, inheritance, medical decision making, torts, tax, and evidence. At the same time, any official recognition of same-sex relationships helps to insist that such relationships be respected. Also, the public recording of couples' intentions—even locally—can be relevant in later disputes with third parties, or if the couple breaks up. In addition, some municipalities use their registries to offer partner benefits to their employees, and some private employers do as well.¹⁸

¹⁷In *Strawss v. Horton*, 46 Cal. 4th 364 (2009), the California Supreme Court upheld Proposition 8 but also ruled that those same-sex couples who married before its passage remain married, and that the remaining state equality guarantee requires that the rights and duties offered to different-sex couples through marriage and to same-sex couples through domestic partnership registration must be the same.

Agreements Authorizing One to Act or Provide Benefits for Another

Through a formal writing—often called a *power of attorney*¹⁸—a competent adult may designate another to act on his or her behalf in a range of contexts. These commonly include medical decision making,¹⁹ visitation in a health care setting, or acting with respect to financial or other matters. State laws usually impose requirements to make sure such private documents reflect an individual's free and informed actions.

Often a document designed for health care settings will specify that it acquires force only when the individual is incapacitated or for another reason unable to act for himself or herself. Such documents also may select among blood relatives who otherwise would have equal legal authority to speak, and might disagree. Most important for many LGBT people, such a document can override the legal presumption that a blood or legal relative has authority to make a decision and/or to visit, and instead can authorize any other person or multiple people to do so.

An individual's ability to choose whom he or she wishes to act on his or her behalf does not require that state law allow that individual to enter into any particular form of relationship with the person or persons so designated. Unlike the state's power to create a family status for the range of purposes governed by family law (including rights to receive benefits from third parties and the government), private documents recording individuals' wishes about matters over which they have sole authority should be honored even in states with laws denying legal recognition to same-sex couples as couples.

In addition to a power of attorney for medical decisions, other key documents for giving force to one's choices include a will, trust, or other estate plan; powers of attorney for financial matters; up-to-date beneficiary designations for one's 401(k) or other retirement accounts; life insurance policies; annuities; and other financial planning tools (see Lambda Legal 2010; see also Burda 2004; Clifford et al. 2010). As discussed in the next subsection, options vary among

¹⁸Whether to require public registration of an employee's domestic relationship or to rely on a private affidavit system is the employer's choice. In some places especially, an employee may be deterred from accessing family health insurance by fear of coming out as an LGBT person in the absence of an antidiscrimination law. But employees can be just as worried about revealing their sexual orientation to their employer within a confidential affidavit system. These fears appear to be among the reasons that same-sex partners remain underinsured (Ponce et al. 2010).

¹⁹These also are called a *health care proxy* and can include an *advance health care directive*, recording an individual's wishes about accepting or refusing life-sustaining treatment if it were to be concluded that the person is sufficiently damaged or in pain, will not recover, and cannot express his or her wishes.

states for protecting parent-child relationships, and an ounce of completing an option is worth many pounds of later attempted cure. Lastly, although family courts do not always enforce relationship contracts as written, such documents can be invaluable evidence of what each party understood about the other, understood both to have agreed, and intended for their relationship.²⁰

Same-Sex Couples and Parenthood

The federal and state constitutions protect each person's right to have and raise their own children. That does not, however, entail rights to insist that the government provide parenthood through adoption, fostering, or publicly funded reproductive assistance. In past decades, most lesbians and gay men became parents through a heterosexual relationship and only later came out. Many then faced bias in court if the nongay parent asserted that the child would suffer if raised by a lesbian or gay parent.

As discussed by Barber in Chapter 4 of this book, "LGBT Parenting," however, much has changed. Today, while more same-sex couples are adopting children jointly, more also are having children together, with medical assistance, in ways that leave one of the adults without a legal relationship with the couple's child or children. Just as when a child predated the adults' relationship or when one adult adopts singly, the law considers the other adult a "nonparent" who usually cannot make decisions for the child or provide health or other benefits that depend on a legal bond. Likewise, if the legal parent dies or the adults' relationship fails, the nonlegal parent may have no rights to continue the parent-child relationship, and the child may have no claim for support, intestate inheritance, or other benefits from the "nonparent," even if that adult has been a parent in daily reality since the child's birth.

Parental status often arises from biology (genes and/or gestation) but also can be created by a court order. Adoption is the most common and can be individual, joint, or by a step- or "second" parent. In step- and second-parent adoptions, a parent consents to creation of parental rights in another adult, without relinquishing her own rights.

State law also can presume parental status in specified circumstances, such as when an adult receives a child into his home and holds the child out as his own. Or, if a child is born to a married couple, both spouses may be presumed to be parents even if a third adult donated genetic material or caused the pregnancy through intercourse.

²⁰Consider especially the discussion of pre- and postnuptial (and analogous pre- and post-domestic partnership registration) agreements in Hertz and Doskow 2011.

These presumptions can be very helpful for same-sex couples who plan for a child together, as they need at least genetic material from elsewhere, if not also a gestational surrogate. But although a presumption may allow both partners to be seen as parents in their home state, they should reduce that presumption to a court order and/or also obtain an adoption judgment if possible. This is because the Full Faith and Credit clause requires states to respect other states' *judgments* even when they disagree with the underlying *laws*. Presumptions, in contrast, commonly lose force when one leaves that state.

Some issues remain unclear as new forms of parentage judgments are used by courts, especially for couples who have had children with medical assistance, because these judgments cost less (but have fewer procedural safeguards) than adoption. Lawyers often recommend second-parent adoption rather than a parentage judgment because it is clearer that adoption judgments should be respected state-to-state. But any form of judgment is better than a presumption, and a legal presumption is better than nothing.

Lastly, even in states without procedures allowing both same-sex parents to secure their parental ties, a legal parent can express her wishes in writing about who should be named guardian of a child or children should that need arise. Courts do not always honor such plans even if formalized, but making such arrangements can help.

Federal Discrimination Against Same-Sex Couples

Whether a same-sex couple is married, in another state relationship status, or not, federal law does not and cannot treat them equally at present. For those legally married, the so-called Defense of Marriage Act (DOMA)²¹ restricts the terms *spouse* and *marriage* for federal-law purposes to different-sex partners and their legal union. It also purports to allow states to ignore any interstate-respect duties the federal Full Faith and Credit clause may impose concerning same-sex couples' lawful marriages.

There were no legally married lesbian or gay couples in the United States, or anywhere in the world, when Congress enacted DOMA. But 15 years later, because of that law, tens of thousands of married same-sex couples with full legal obligations under state law cannot file their federal income tax returns jointly, still face federal estate taxes as if they were unrelated, are not recognized for Social Security purposes and some important impoverishment protections in

²¹ Congress passed DOMA in 1996, after the Hawaii Supreme Court required a trial to test the state's different-sex-only marriage law. That trial—with dueling experts addressing the needs of children—drew national attention and prompted Congress to pass DOMA in record time.

Medicaid, and lack the ability to have a foreign-born spouse immigrate. Married lesbian and gay federal employees still are ineligible for some important benefits, especially spousal health insurance. This unequal treatment of federal workers notably includes military service members, who now can serve openly because the Don't Ask, Don't Tell policy is repealed but remain ineligible for equal benefits for their family members, no matter how lengthy or dangerous their service.

In addition, for public and private sector employees alike, the federal tax laws consider health insurance for an employee's same-sex spouse (or domestic partner) to be taxable imputed income, unlike insurance for an employee's different-sex spouse.

As of this writing, DOMA is being challenged in at least a dozen cases, which are expected to take years. They are boosted by the Obama administration's conclusion that DOMA is unconstitutional and does not deserve a defense by the Justice Department, a role briskly taken by lawyers hired by the House of Representatives. In addition, a bill to repeal DOMA is pending in Congress.²² While many anticipate that it faces a long, contentious road, support seems to be building among the public and national leaders.²³

DOMA blocks federal benefits for married lesbian and gay couples based on their marital status, but same-sex couples in civil unions and registered domestic partnerships have a different problem—those statuses do not exist in federal law. Yet, as noted earlier, through new regulations and policy changes *not* barred by existing statutes, the Obama administration has begun recognizing same-sex family relationships of federal employees for a range of employee benefits.²⁴

²² The Respect for Marriage Act, S. 598, was introduced into the Senate in March 2011 by Senator Dianne Feinstein and had 32 cosponsors as of February 2012. Its companion bill was first introduced in the House in 2009 by Representative Jerrold Nadler and was pending in that chamber as H.R. 1116 with 138 cosponsors as of February 2012. President Obama formally endorsed it on July 19, 2011, on the eve of its first Senate hearing. See <http://www.whitehouse.gov/blog/2011/07/19/president-obama-supports-respect-marriage-act>.

²³ According to an April 2009 Quinnipiac University poll, 54% of voters believe the section of DOMA that denies federal benefits and protections to same-sex spouses should be repealed, while 39% support that part of the law. See <http://www.quinnipiac.edu/x1295.xml?ReleaseID=1292>.

²⁴ These include family medical leave, childcare, and relocation benefits. See http://www.whitehouse.gov/the_press_office/Memorandum-for-the-Heads-of-Executive-Departments-and-Agencies-on-Federal-Benefits-and-Non-Discrimination-6-17-09. They do not, however, include family health insurance or certain pension benefits. See, e.g., *Golinski v. U.S. Office of Personnel Management*, with case documents available at <http://www.lambdalegal.org/in-court/cases/golinski-v-us-office-personnel-management.html>.

In the health arena, the Obama administration also is using the power of the federal purse to insist that facilities receiving Medicaid and Medicare funds respect patient wishes for visitation and decision making. Medical staff must honor private documents expressing patient wishes; however, they may not need to respect family relationships that same-sex couples have formalized under state law. Thus, it remains unclear what protection patients will receive if they have not written such documents or if their loved ones cannot produce them. Yet, President Obama's policy condemns antigay discrimination in this context, and favors liberal visitation for patient comfort, within medical norms given a patient's health needs.²⁵ That message seems likely to inspire greater recognition of same-sex relationships, and of health professionals' duty to treat all patients with respect.

Similarly, the Obama administration has issued new regulations for programs administered by the Department of Housing and Urban Development, to require greater access and protections for same-sex partners. And the Internal Revenue Service now treats "community income" earned by same-sex spouses in California, and by registered domestic partners in California, Nevada, and Washington, the same as community income of married heterosexual couples.²⁶ In doing so, the IRS is applying long-standing Supreme Court precedents appropriately and has opened a presumably transitional chapter in which same-sex couples must file their federal and state income tax returns according to different rules. This chapter is necessary if same-sex couples are to reach a future in which federal and state laws all recognize them and their families. But it can be confusing and aggravating now for taxpayers, and probably for IRS agents, too, as these rules are unclear in some respects and are inconsistent with the federal laws that still ignore same-sex couples for the range of other federal tax purposes.²⁷

One last example of special relevance to health professionals is "ERISA," the law setting federal standards for employer-provided health and pension plans.²⁸ Enacted in the 1970s to protect employees against malfeasance by employers

²⁵ See <http://www.whitehouse.gov/the-press-office/presidential-memorandum-hospital-visitation>.

²⁶ These are the states in which same-sex couples may enter a broad status and then are presumed to earn wages as "community property" owned equally by both. See http://www.janhdalegal.org/publications/factsheets/fs_the-irs-applies-income-splitting-community-property.html.

²⁷ Estate taxes are another area of federal taxation where the family relationships of same-sex couples are ignored no matter how long a couple was together, or how intertwined their financial lives may have been. See, e.g., *Windsor v. United States*, Civil Action No. 1:10-cv-8435 (S.D.N.Y. 2011).

²⁸ ERISA stands for the Employee Retirement Income Security Act. It does not apply to public employee benefit plans and does not preempt state regulation of insurance or medical practice.

and those hired to manage their benefit plans, it now preempts claims against many private employers for equal benefits based on state family laws and/or nondiscrimination laws.

Comparing the Options—What Works, and Why?

A Complete State-Law Package Has Balance and Is Efficient

Marriage, civil unions, and broad domestic partnership laws all offer comprehensive packages of state-law rights and responsibilities that relate to and are in proportion with one another; the rules operate as a balanced system. A duty to pay each other's debts, for example, generally corresponds to a right to receive financial support from each other; to receive damages from a third party who causes the death of the other; and to transfer property from one to the other without taxation. With decision-making authority, these packages include default rules for property ownership and inheritance that apply in the absence of explicit plans. They also include a requirement to end the relationship through a supervised legal proceeding—such as a divorce, dissolution, or termination.

As noted, competent adults can control some of their affairs through private planning. An estate plan and health care proxy can alter some defaults; a "prenuptial" or other relationship agreement can limit disputes and guide a separation (Hertz and Doskow 2011). But, no one can change taxation or tort liability rules with a private contract.

Moreover, for gay and straight alike, preparing such documents can be easier said than done. No one enjoys anticipating sickness, death, or a breakup. So, people procrastinate. Just finding a lawyer can be stressful enough, and then making the decisions about bequests and in case of divorce can be even more so.

The "carrot" of a wedding party and the "stick" of social pressure to marry have long provided incentives inducing heterosexual couples to come within the default system. Marriage and, perhaps to a lesser extent, civil unions now are providing similar incentives for some lesbian and gay couples in a dozen jurisdictions.

Solemnization Is Communication

The ceremony of marriage and civil unions performs functions that can be especially helpful for LGBT people. First is the expressive ritual that can facilitate communication within a couple's network of family, relatives, and friends—an unequivocal "coming out" that invites attendance, not debate. It affirms as it creates in-laws for those who once would have been outlaws. The ritual also confirms clearly for the couple that each is making a full commitment to the other, something often left murky when couples cohabit but cannot—or do not—formalize their relationship legally.

Partnership registration does not include this ritual. While having legal rights is far better than not having them, many couples feel the bureaucratic nature of registration and the withholding of solemnization is stigmatizing; the fewer couples

who register compared with those who marry when they can seems to confirm that full equality and the affirmation of a ceremony—plus the security of knowing full legal rights are entailed in the usual way—appeal to many gay couples (Badgett and Hernan 2011; Ramos et al. 2009), though certainly not all (Franke 2011).

Consistently with the research findings, multiple state high courts have concluded that their states' separate, lesser systems of civil unions or domestic partnerships do not satisfy constitutional guarantees of equal protection. One reason is that the lesser status conveys stigma, as noted earlier. In addition, novel, different names connote something alien, which creates confusion and disconnect. Too often, people from rental car agents to paramedics and hospital admitting clerks do not see domestic or civil union partners as family and instead take the view, "when in doubt, don't"—meaning, they do not honor the status as they would that of spouses. Similarly, employers sometimes balk at the (minimal) effort needed to offer domestic partner benefits, but assume that their married gay employees should have the same family benefits as their married heterosexual ones.

Bad Laws Invite Bad Behavior

It sometimes is said that among the strongest arguments for "gay marriage" is the need for "gay divorce." Too often, promises made across pillows, broken after love has waned, prove unenforceable because too vague or otherwise disputed. Similarly, when emotions shift, beneficiary designations can be changed overnight.

If a couple has married or entered another broad status, the family court will have a role in deciding what is fair if the relationship ends. Without such a status to bring disputes into family court, in contrast, an abandoned partner can present contract, fraud, or other claims in civil court. That, however, often is a steep, expensive, uphill climb.

The difference between having a legal status and not can be even more stark and anguishing when parental rights are at stake. If same-sex parents have not secured the parental status of both adults, one likely will have a superior position, if not the *only* protected position. Following the death or incapacity of the legal parent, relatives may get custody instead of a parent-in-fact who lacks legal status.

Moreover, there is nothing new about the legal parent turning against the "nonparent" and denying visitation after a separation if and when antigay laws offer the opportunity. Lawyers who represent LGBT clients in family matters long have discouraged such use of discriminatory laws. But legal texts overflow with cases showing that domestic disputes can bring out the worst in people, regardless of sexual orientation.²⁹

Uncertainties Facing Transgender People

When the gender of both adults in a couple determines whether they may enter a legal status, state law controls how each one's gender is ascertained. But few

states have clear rules to explain whether or how a person legally may change from the sex assigned at birth and recorded on the birth certificate.³⁰

Usually, a marriage that is valid when entered remains valid even if something happens later that would have prevented the marriage had it happened earlier, such as a loss of competence by either spouse. This rule should hold for a gender transition after marriage as well, though few cases have addressed it to date. The lack of explicit gender-definition laws makes things murkier for those who transition *before* marrying. Often it is unclear whether a state respects gender reassignment at all, or whether it matters how much gender-related medical treatment a person has received. Life can be uncertain indeed if a couple does not know what gender their state may deem one of them to be and whether that will invalidate their marriage. For example, courts in Florida, Kansas, and Texas have ruled that gender transitions cannot be recognized (absent future action by the legislature)—voiding marriages the spouses had entered as a heterosexual couple and denying the postoperative transsexual spouses' parental rights, inheritance, and tort claims.

Thus, the private documents and other legal planning discussed earlier can be all the more important for those who cannot be confident what a court might say in a future challenge to a marriage. And again, while courts do not always enforce relationship agreements as written, such documents can record what each party understood about the other and intended for their relationship (Hertz and Doskow 2011³¹). That record can dissuade a nontransgender spouse from later claiming a marriage should be voided because she or he did not know the transgender spouse had transitioned, an assertion that might seem hard to credit, but which divorce courts have heard.

²⁹The divergence between gay-friendly and gay-unfriendly states now tempts some parents to seek advantage in a new way—by taking a child from the family's home state to one with different policies. Existing laws impede such tactics even when the destination state otherwise might not recognize the second parent's rights as such. But interstate flight adds cost and headache, regardless of whether it ultimately is unsuccessful.

³⁰Many states allow changes of name and the gender markers on identity documents (see, e.g., [http://www.transgenderlawcenter.org/cms/content/td-document-change](http://transgenderlawcenter.org/cms/content/td-document-change) or http://www.nclrights.org/site/DocServer/td_namechg_kit.pdf?docID=1281) but still may lack clear rules about how sex is to be determined for gender-restricted purposes, such as marriage.

³¹One example is *Vecchione v. Vecchione*, in which the wife argued that her marriage should be voided because her husband allegedly fooled her into believing he had been born male. The case is discussed in Flynn 2001. See also *Karntanas v. Karntanas*, 884 So. 2d 155 (Fla. App. 2004) (wife persuaded court to void her marriage, and husband's presumed parental rights with it, because Florida law should not recognize his gender transition).

Some Benefits and Costs of Interstate Variation

In our federalist system, the states historically have been laboratories of experimentation, so to speak, especially for family law. They have been free to test no-fault divorce, joint custody, community property, and, more recently, legal recognition for same-sex couples and their parenting relationships.

But variation among states now also poses challenges for same-sex couples. For example, they may visit Cape Cod or Niagara Falls to marry but, unlike heterosexual couples who do the same, later may find themselves unable to divorce. Perhaps paradoxically, many states say they cannot end lesbian and gay couples' out-of-state or foreign-country marriages because they would have to recognize those marriages—contrary to their own policy—in order to terminate them. Further, because in-state residency is *not* required for marriage but *is* required for divorce, gay couples now can find themselves in “wed-lock” of a sort heterosexual couples have not experienced for decades.

The Lack of Comprehensive Antidiscrimination Laws

Any discussion of the legal status of same-sex couples must acknowledge the vulnerability that all LGBT people, whether coupled or single, experience due to the lack of comprehensive antidiscrimination laws at both state and federal levels. Although the lack of explicit federal protections is glaring (Lambda Legal 2011), a minority of states now do have laws forbidding discriminatory treatment based on sexual orientation and/or gender identity, and some require equal treatment whether one has, or is, a same-sex spouse or partner rather than one of a different sex. Those rules can apply in employment, housing, and/or public accommodations.³²

At the federal level, as noted earlier, some new regulations aim to reduce discrimination in programs receiving federal funds. In addition, federal and state laws forbidding sex discrimination in employment and educational programs protect against sexual harassment and also protect against mistreatment due to perceptions that an LGBT person does not conform to gender stereotypes, and, to an evolving extent, due to a gender transition. The U.S. Constitution and state constitutions also offer some protections from government discrimination

³²“Public accommodations” generally means enterprises and organizations offering goods or services to the public for a fee. They can range from local grocery stores to national car rental companies, to regulated services such as banking and insurance, to licensed professional services such as medical care.

against LGBT people, although cases to enforce constitutional protections can be complicated and the doctrines are still evolving.³³

And yet the lack of express protections against sexual orientation and gender identity discrimination in the federal civil rights laws that apply to employment, housing, education, and public accommodations may be taken as meaning that such discrimination is lawful and consistent with national policy, despite the regulatory changes made by the Obama administration. Especially given how much anti-LGBT discrimination remains (Sears and Mallory 2011), strong federal civil rights protections are overdue.

Such protections would not transform behavior overnight. But they would shift responsibility for controlling bias-motivated abuse from individuals who experience or witness discrimination to those who discriminate or have authority over institutions, as has been done to reduce other prejudice. Moreover, explicit antibias rules encourage LGBT people to expect better treatment, to speak up when treated badly, and thereby to educate those around them who otherwise might remain oblivious about the effects of their behavior or that of others (Frost et al. 2011).

Conclusion

Family law for LGBT people has become complicated. Inconsistency, uncertainty, and change have become the most salient features of how our national legal system treats LGBT people and their families. There now is wide recognition that the law is evolving toward inclusion and protection of same-sex couples. Nevertheless, many high-profile civic, religious, and political leaders oppose these changes.

Even assuming this reform continues apace, the process is erratic. Evolution overall does not dictate the answer in a particular context. Although progress is accelerating, achieving full equality will take time. Many LGBT people, and their loved ones, undoubtedly will experience painful, unjust treatment along the way. The faster the reform process can be, the quicker and deeper the shifts in public attitudes, and the better for everyone who is, or cares about, a lesbian, gay, bisexual, or transgender person.

Key Points

- Some laws governing the family rights of LGBT people are getting better, others worse; the situation is unstable, confusing, and stressful.

³³ The most commonly invoked protections are the guarantees of equal protection, due process, liberty and privacy, and the first amendment protections for freedom of speech and association.

- In many states, same-sex partners may not enter any family status—such as marriage, civil union, or registered domestic partnership—with broad protective rules. Even when same-sex couples have entered a status under a state's laws, they remain vulnerable because other states and the federal government do not respect it.
- Whether in a family status under state laws or not, same-sex partners should express their wishes in formal documents regarding matters over which they have control—such as medical decisions, financial affairs, and inheritance—because those documents allow respect for individuals' wishes instead of an assumption in state law and ought to retain their force in interstate travel.
- Wherever they live, same-sex partners raising children should secure all parent-child relationships with court judgments if possible, even if state law recognizes all of the relationships, because judgments are due respect from other states.
- U.S. federal law does not afford equal status to LGBT individuals. It ignores married same-sex couples and so denies rights such as Social Security spousal support, equal federal tax treatment, and the ability to have a foreign-born spouse immigrate.

References

- Badgett MVL. The impact of expanding FMLA rights to care for children of same-sex partners. June 2010. Available at: <http://williamsinstitute.law.ucla.edu/research/marriage-and-couples-rights/the-impact-of-expanding-fmla-rights-to-care-for-children-of-same-sex-partners-2>. Accessed November 6, 2011.
- Badgett MVL, Herman JL. Patterns of relationship recognition by same-sex couples in the United States. November 2011. Available at: <http://williamsinstitute.law.ucla.edu/wp-content/uploads/Badgett-Herman-Marriage-Dissolution-Nov-2011.pdf>. Accessed February 24, 2012.
- Badgett MVL, Gates GJ, Hunter ND, et al. Written testimony: S.598, The Respect for Marriage Act: assessing the impact of DOMA on American families. July 20, 2011. Available at: <http://williamsinstitute.law.ucla.edu/research/marriage-and-couples-rights/written-testimony-s-598-the-respect-for-marriage-act-assessing-the-impact-of-doma-on-american-families>. Accessed November 6, 2011.
- Burda JN. Estate Planning for Same-Sex Couples. Chicago, IL, American Bar Association Publishing, 2004.

- Chifford D, Hertz E, Doskow E. A Legal Guide for Lesbian and Gay Couples, 15th Edition. Berkeley, CA, NOLO Press, 2010.
- Flynn T. Transforming the debate: why we need to include transgender rights in the struggles for sex and sexual orientation equality. *Columbia Law Review* 101:392–420, 2001.
- Frankle KM. Marriage is a mixed blessing. *The New York Times*. June 23, 2011. Available at: <http://www.nytimes.com/2011/06/24/opinion/24franke.html>. Accessed November 6, 2011.
- Frost DM, Leavor K, Meyer IH. Minority stress and physical health among sexual minorities. Poster presented at the 119th annual convention of the American Psychological Association, Washington, DC, August 4–7, 2011. Available at: <http://williamsinstitute.law.ucla.edu/research/health-and-hiv-aids/minority-stress-and-physical-health-among-sexual-minorities-2>. Accessed November 6, 2011.
- Gates GJ. How many people are lesbian, gay, bisexual and transgender? April 2011. Available at: <http://williamsinstitute.law.ucla.edu/research/census-lgbt-demographics-studies/how-many-people-are-lesbian-gay-bisexual-and-transgender>. Accessed November 6, 2011.
- Gates GJ, Cooke AM. United States Census Snapshot: 2010. 2011. Available at: <http://williamsinstitute.law.ucla.edu/wp-content/uploads/Census2010Snapshot-US-v2.pdf>. Accessed February 23, 2012.
- Hertz H, Doskow E. Making It Legal: A Guide to Same-Sex Marriage, Domestic Partnerships, and Civil Unions, 2nd Edition. Berkeley, CA, NOLO Press, 2011.
- Human Rights Campaign. The state of the workplace for lesbian, gay, and transgender Americans, 2007–2008. 2009. Available at: http://www.hrc.org/files/assets/resources/HRC_Foundation_State_of_the_Workplace_2007-2008.pdf. Accessed November 6, 2011.
- Kaiser Family Foundation and Health Research and Educational Trust. Employer health benefits: 2009 annual survey. 2009. Available at: <http://ehbs.kff.org/pdf/2009/7936.pdf>. Accessed November 6, 2011.
- Lambda Legal. Take the power: tools for life and financial planning. November 10, 2010. Available at: <http://www.lambdalegal.org/publications/take-the-power>. Accessed November 6, 2011.
- Lambda Legal. An unfulfilled promise: lesbian and gay inequality under American law. July 5, 2011. Available at: http://www.lambdalegal.org/publications/factsheets/fs_an-unfulfilled-promise.html. Accessed November 6, 2011.
- National Gay and Lesbian Task Force. State nondiscrimination laws in the U.S. June 14, 2011. Available at: http://www.thetaskforce.org/downloads/reports/issue_maps/non_discrimination_6_11_color.pdf. Accessed November 6, 2011.
- Obama B. Memorandum for the heads of executive departments and agencies: federal benefits and non-discrimination. June 17, 2009. Available at: http://www.whitehouse.gov/the_press_office/Memorandum-for-the-Heads-of-Executive-Departments-and-Agencies-on-Federal-Benefits-and-Non-Discrimination-6-17-09. Accessed November 6, 2011.
- Obama B. Presidential memorandum—hospital visitation: memorandum for the Secretary of Health and Human Services. April 15, 2010. Available at: http://www.whitehouse.gov/the_press_office/presidential-memorandum-hospital-visitation. Accessed November 6, 2011.
- Ponce NA, Cochran SD, Pizer JC, et al. The effects of unequal access to health insurance for same-sex couples in California. *Health Aff (Millwood)* 29:1539–1548, 2010.

Quinnipiac University: Gays in the military should be allowed to come out, U.S. voters tell Quinnipiac University national poll. April 30, 2009. Available at: <http://www.quinnipiac.edu/x1295.xml?Released=1292>. Accessed November 6, 2011.

Ramos C, Goldberg NG, Badgett MVL. The effects of marriage equality in Massachusetts: a survey of the experiences and impact of marriage on same-sex couples. May 2009. Available at: <http://williamsinstitute.law.ucla.edu/research/marriage-and-couples-rights/effects-marriage-equality-measure/>. Accessed November 6, 2011.

Sears B, Mallory C. Documented evidence of employment discrimination and its effects on LGBT people. July 2011. Available at: <http://williamsinstitute.law.ucla.edu/research/workplaces/documentated-evidence-of-employment-discrimination-its-effects-on-lgbt-people>. Accessed November 6, 2011.

White House Blog: President Obama supports the Respect for Marriage Act. July 19, 2011. Available at: <http://www.whitehouse.gov/blog/2011/07/19/president-obama-supports-respect-marriage-act>. Accessed November 6, 2011.

Questions

- 3.1 If a competent adult has signed a “health care proxy” or “power of attorney for medical decisions” designating his or her same-sex partner to make decisions, can a legally recognized relative such as a parent or a child override the decisions made by the partner?
- No, but only if the patient has confirmed the validity of the document at the start of the treatment relationship.
 - No, the written document controls over legal relatives whether or not state law specifically provides for such documents.
 - No, but only if state law allows the couple to enter some kind of legal status and the couple has done so.
 - Yes, due to the so-called federal Defense of Marriage Act, if the health facility receives federal funding.

The correct answer is B.

In every state, a competent adult can (and should) state his or her wishes in a formal written document, and it will override the default designations of blood or legal relatives, regardless of whether state law confirms this. Such a document has legal effect separately from whether a given state allows same-sex couples to enter a relationship-recognition status.

- 3.2 If municipalities in State A allow same-sex couples to register as domestic partners, must a hospital in State A honor the relationship of same-sex couple that married or entered a civil union in State B for visitation, information-sharing, and decision-making purposes after one spouse/partner is injured while traveling in State A?

- Yes, the Full Faith and Credit clause and Privileges and Immunities clause of the U.S. Constitution require State A to respect the visiting couple’s legal status.
- Probably yes, if the hospital receives federal funding.
- Probably no, if State A has a broad constitutional amendment prohibiting recognition of same-sex couples’ marriages and civil unions and the spouse or partner cannot produce a health care proxy or other documents signed by the patient stating the patient’s wishes that the spouse be allowed to visit, receive confidential information, and/or make decisions for the patient.
- Yes, if the municipalities in State A include hospital visitation, information sharing, and decision-making among the rights of registered domestic partners.

The correct answer is C.

The Full Faith and Credit clause is generally thought not to apply to a legal status, but just to rights confirmed by a court judgment. If a state has passed a law or amended its constitution to deny respect to some out-of-state marriages, the Full Faith and Credit clause probably will not help. In the absence of a power of attorney or other document, the federal regulations may not help a same-sex partner gain access to the spouse’s bedside or to information, or make treatment decisions for an incapacitated patient.

- 3.3 Acme Enterprises, a Fortune 500 company, offers health insurance to its unmarried employees for either a same-sex or a different-sex partner. If Acme operates in a state that bans sexual orientation discrimination in employment but does not recognize any legal status for same-sex couples, may the company eliminate its domestic partner benefits program and offer insurance only for legal spouses?

- Yes. There is no federal statute requiring equal benefits for lesbian, gay, or bisexual employees with a same-sex partner, or for unmarried employees, and the federal ERISA law blocks any claims based on the state nondiscrimination law.
- No, as a national company, Acme Enterprises must comply with the federal Equal Protection clause and may not offer its heterosexual workers a way to qualify for family health insurance and no comparable way for its lesbian, gay, or bisexual workers to qualify an equally committed same-sex life partner.

- C. Yes, as long as the elimination of partner benefits is done to contain costs rather than out of prejudice against the company's nonheterosexual employees.
- D. Yes, as long as the company continues to offer spousal health insurance for employees with a same-sex spouse.

The correct answer is A.

The Equal Protection clause does not apply because Acme is a private company and the federal and state constitutions only apply against government. Although doing so would be obviously discriminatory, Acme probably can offer benefits only to its heterosexually married employees and not to its partnered employees and those with a same-sex spouse, because there is no federal law requiring equal benefits regardless of sexual orientation, and the federal ERISA law usually blocks enforcement of state antidiscrimination rights against private employers with respect to employer-provided health insurance.

CHAPTER

4

LGBT Parenting

MARY E. BARBER, M.D.

GAY PEOPLE USED TO BE accidental parents. They had children in heterosexual marriages or relationships, then they would come out but continue to be involved in their children's lives when the relationship ended. Sometimes the gay spouse became the primary parent, coparenting with a new same-sex partner.

This was the old story of gay parenting, amusingly told in the French film *La Cage aux Folles* (Molinaro 1978). In the film, Renato, a drag show club owner, and his partner Albin, the club's star performer, have together raised a son: Renato's biological child from a youthful fling with a woman. The film plays into the stereotype of gay men as flamboyantly effeminate and of gay relationships as having stereotypical gendered roles: Renato, the more conventionally masculine partner, plays the father role to their son, while Albin's role is decidedly maternal. When the adult son announces his engagement, his gay parents have the following exchange:

ALBIN: He's being taken from us, and we won't have any others.
 RENATO: Unless there's a miracle.

Starting in the 1990s, gay people became intentional parents. They came out, met same-sex life partners, and had children together using reproductive technologies or adoption. This new story of gay parenting, sometimes referred to as the gay baby boom or *gayby boom*, is captured in a more contemporary film. In *The Kids Are All Right* (Cholodenko 2010), Nic and Jules are a lesbian