



# NSCLC

**National Senior Citizens Law Center**

Protecting the Rights of Low-Income Older Adults

August 20, 2013

# The Demise of DOMA

## The Impact on Social Security, Medicare and Medicaid For Same Sex Couples

---

Gerald McIntyre  
Georgia Burke  
National Senior Citizens Law Center

*The National Senior Citizens Law Center is a non-profit organization whose principal mission is to protect the rights of low-income older adults. Through advocacy, litigation, and the education and counseling of local advocates, we seek to ensure the health and economic security of those with limited income and resources, and access to the courts for all. For more information, visit our Web site at [www.NSCLC.org](http://www.NSCLC.org).*

# Housekeeping

- ❖ All on mute. For technical questions and concerns, please use chat box.
- ❖ For substantive questions, please use questions box.
- ❖ Problems with getting on to the webinar? email [trainings@nsclc.org](mailto:trainings@nsclc.org)
- ❖ You will be sent copies of the slides after the presentation. Slides and a recording will also be available at [www.nsclc.org](http://www.nsclc.org)

# Today's topic

What we know today and what we don't yet know about the post-DOMA world for:

- ❖ Social Security
- ❖ SSI
- ❖ Medicare
- ❖ Medicaid

# Social Security

# Social Security Benefits Based on Marriage

- Spousal Benefit
- Widow's (Widower's) Benefit
- Lump Sum Death Benefit

# Spousal Benefit

- Allows beneficiary to receive a monthly benefit equal to the greater of the benefit to which she is entitled based on her earnings record or half of the spouse's benefit.



# Widow's (Widower's) Benefit

- Provides surviving spouse the greater of the benefit on her own earnings record or the earnings record of her spouse.

# Who Should Apply Now?

- Anyone, regardless of place of residence, who is in a:
  - Marriage
  - Civil Union
  - Registered Domestic Partnership

And believes she would otherwise meet the requirements for benefits

# Why Apply Now?

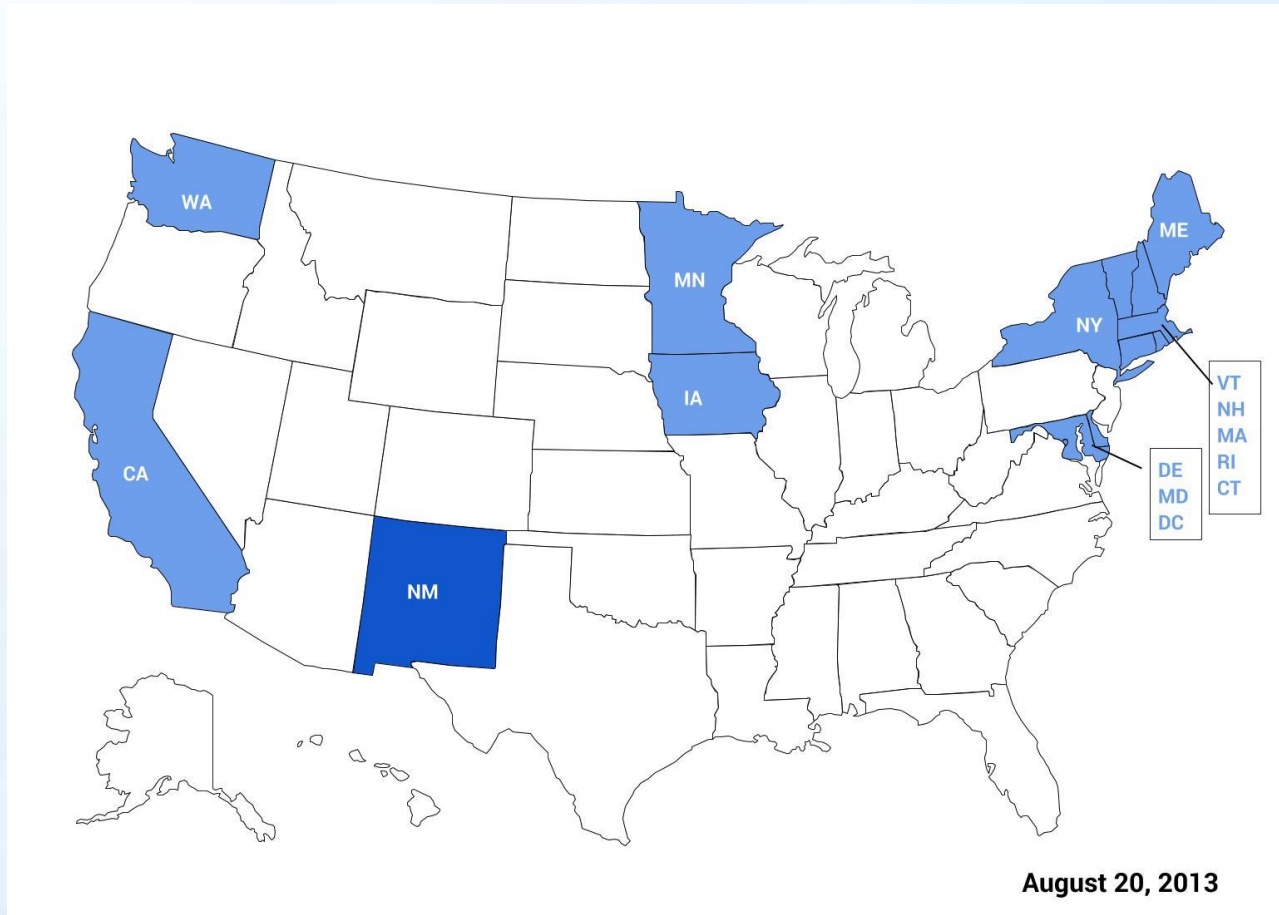
- Benefits awarded based on date of application.
- Each month of delay in filing could result in loss of a month of retroactive benefits.
- No need to see an attorney before applying.
- If denied, be sure to file Request for Reconsideration within 60 days.

# Marriage Recognition by Social Security

- Determined by court of insured's state of domicile
  - Spousal benefits – at time of application
  - Widow(er)'s benefits – at time of death
  - Death benefit – at time of death

If domiciled outside U.S. – look to law of D.C.

# States Which Authorize or Recognize Same Sex Marriages



# What Is Domicile?

- Permanent home - place to which you always intend to return.
- Change of domicile.

# Alternative Definition of Spouse When Marriage Not Recognized

Deemed to be spouse or widow(er) of insured if applicant would, under laws applied by courts in determining devolution of intestate personal property, have same status as spouse or widow(er) of insured.

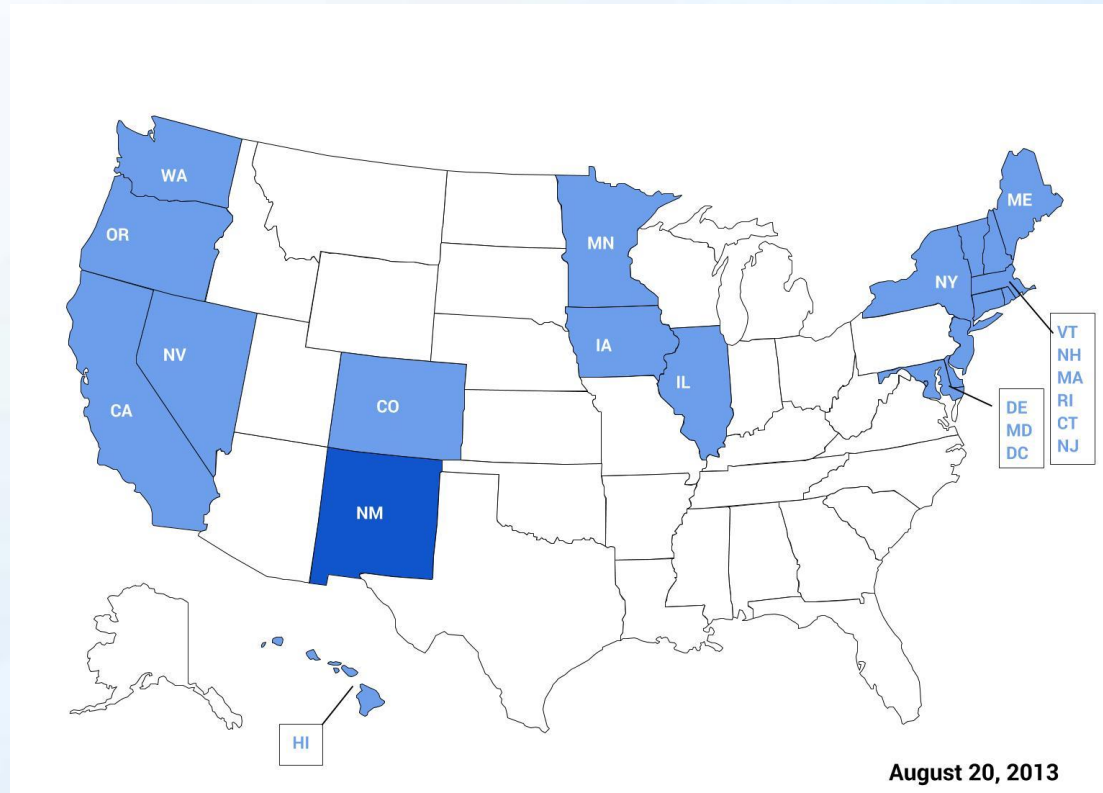
42 U.S.C. 416(h)(1)(A)(ii).

# Registered Domestic Partnerships & Civil Unions

- Registered domestic partnerships and civil unions provide for intestate succession of personal property on same basis as for husband & wife.
- Domestic partnerships (RDPs) & civil unions (CUs) can thus be basis for marriage based Social Security & Medicare benefits.



# States Which Authorize or Recognize Same Sex Marriage, Registered Domestic Partnerships or Civil Unions



# Registered Domestic Partnerships & Civil Unions

- RDPs & CUs provide access to marriage based benefits for both same sex and opposite sex couples in states that recognize relationship.
- Outreach critical.
- Most eligible people in RDPs & CUs totally unaware of possible benefits.

# Eligibility vs Entitlement

- Eligible – Person who meets all requirements for entitlement but has not applied
- Entitled – Person has applied and proven right to benefits
  
- Person can suspend receipt of benefits and is still considered to be entitled

# Spousal Benefit – Who is Eligible?

- Marriage, RDP or CU recognized in state of domicile or DC law if overseas.
- Whose domicile? -- Insured spouse whose earnings are basis for benefit.
- When is domicile considered? -- only at time of application.
- No need to live together to receive benefits.

# Spousal Benefits - Eligibility

- Spouse entitled to old age or disability benefits; and
- You are at least age 62, or have in your care for an entire month a child who is entitled to children's benefits on earnings of spouse and is under age 16 or disabled; and
- You are not entitled to old age or disability benefit greater than spousal benefit.
- Spousal relationship must have lasted until at least 1<sup>st</sup> day of one year anniversary month.

# Spousal Benefits

## Exceptions to One Year Duration Rule

- You and insured are natural parents of a child.
- In the month before the marriage (or RDP or CU) you were eligible for, or if you had been old enough would have been eligible for certain auxiliary benefits under the Social Security Act or Railroad Retirement Act.

# Who Can Benefit From Spousal Benefits?

# Examples

- If both spouses are already receiving benefits and the benefit of one is less than half the benefit of the other, the spouse with the lower benefit can file for a spousal benefit to bring her total benefits up to one-half the amount of the spouse with the higher benefit.



# Examples

If Olga is already receiving old age or disability benefits and Jennifer, her spouse, is between the ages of 62 and 70, Jennifer may want to file for a spousal benefit now and wait until age 70 to apply on her own earnings record, thereby assuring a much higher benefit in later life.

CAVEAT - If Jennifer is still working and is between ages 62 and 66, she will be subject to an earnings test, which reduces her benefits once her earnings exceed a certain amount. Once she reaches age 66, the earnings test no longer applies.

# Examples

- If neither spouse is receiving benefits and both are age 62 or over, spouse Henry may want to consider filing for old age benefits and immediately suspending, thus allowing spouse Eduardo to apply for a spousal benefit, which he can continue to receive until age 70, when he will file on his own earnings record. This allows both spouses to maximize their long term benefits.

# Divorced Spouse Benefit

- Age 62 or over
- Marriage, RDP or CU duration of at least 10 consecutive years
- Not currently married
- Insured entitled to old age or disability benefit
  - Insured need not be entitled if divorce at least 2 years old and insured at least age 62

# Divorced Spouse Benefit Exceptions to Duration Requirement

- **NONE**

# Widow(er)s Benefit

- Eligible surviving spouse can receive benefit equal to spouse's benefit unless entitled to greater benefit on her own account
- Important protection against poverty in old age
- Domicile of deceased determines relationship recognition

# Widow(er)s Benefit Requirements

- At least age 60 or 50, if disabled with additional requirements if on basis of disability
- Unmarried or married after age 60 or after age 50 for certain people with disabilities
- Not entitled to old age benefit greater than that of insured

# Widow(er)s Benefit Requirements

- In addition must satisfy any one of the following requirements:
  - You and insured were natural parents of child.
  - You were married to insured when one adopted the other's child or when both adopted a child under age 18.
  - Must have been in marriage (RDP or CU) for at least 9 months with certain exceptions.
  - In month before marriage (RDP or CU) you were eligible for or if you had been old enough would have been eligible for certain auxiliary benefits under Social Security Act or Railroad Retirement Act.

# Widow(er)s Benefit as Surviving Divorced Spouse

- Deceased must have died fully insured
- Marriage (RDP or CU) must have lasted at least 10 consecutive years
- You are at least 60 years old or at least 50 and meet certain disability related conditions
- You are not entitled to old age benefit equal to or greater than deceased's
- You are unmarried or married after age 60 or age 50 in case of people with disabilities



# Lump-Sum Death Benefit

- Provides \$255 benefit to widow(er) of deceased if they were living together at time of death
- Same criteria for determining spousal status as for spousal benefit
- Based on laws of domicile of insured at time of death
- Must apply within two years of death unless receiving spousal benefit at time of death

# Warning – Possible Downside of Windsor

A very small number of people who are receiving Widow(er)s benefits or benefits as a divorced spouse and subsequently entered into a same sex marriage (RDP or CU) prior to age 60 could lose their current benefits as a result of their new relationship being recognized.

# Can I Be Penalized for Filing an Application for Benefits?

- No, you can never be penalized for filing an application even if you are clearly not eligible for the benefits you seek.
- All applications must be taken, whether they have merit or not.
- A 60 year old can file for old age benefits even though claim is totally without merit.
- What you cannot do is provide false or misleading information as to relevant facts such as age or place of domicile.

# Where is SSA on Implementation?

- SSA has issued instructions to take all claims, but instructions not as clear as we would like (title refers only to marriage).
- At present only processing limited number of claims for spousal benefits where marriage took place in state of domicile and where marriage took place after arbitrary cutoff date.
- Status of implementation changing rapidly. SSA is in dialogue with advocates on needed changes.

# Implementation (cont.)

- Claims for survivor benefits or divorced spouse benefits not being processed yet
- Claims based on RDPs & CUs not being processed yet

# **Supplemental Security Income (SSI)**

# Supplemental Security Income (SSI)

- If SSA has determined you are entitled to Social Security spousal benefit, then that spouse is your spouse for SSI purposes.
- If married under law of state where you are both domiciled, then you are married for SSI. This does not include Registered Domestic Partnerships or Civil Unions.

# Supplemental Security Income (SSI)

- If married and both are at least age 65 or disabled and living together, then eligibility and benefit amount must be determined by combined income and resources.
- If married and living together, but only one is age 65 or disabled, then income and resources of categorically ineligible spouse are deemed to the other spouse, usually resulting in ineligibility.



# Supplemental Security Income (SSI)

- If a couple is living together and “holding out” to the community as husband and wife, then they are considered to be married for purpose of SSI eligibility and benefit amount.
- “Holding out” provision explicitly restricted to opposite sex couples.

# Supplemental Security Income (SSI)

- Impact of Windsor in SSI not expected to be very significant since so few couples in general receive SSI.

# Medicare

# Medicare

## Who is a spouse?

- Medicare uses SSA rules.
- Future changes in SSA POMS will apply to Medicare programs.

# Qualifying for Medicare Part A

- Premium free Part A-requires 40 quarters for individual or spouse.
- Like Social Security, must be married one year.
- Eligible at 65. Spouse with work history must have turned 62.

# Qualifying for Medicare Part A

Kathy (65) - no quarters, Marta (61) - qualifying work history

- Today - Kathy must pay Part A premium.
- If married more than a year, no premium liability starting month Marta turns 62.
- If marry next month, no premium liability starting the month of their first wedding anniversary.

What are \$\$? Part A Premium is:

- \$243/mo if 30-39 quarters
- \$441 if less than 30 quarters

•  
If you think you may qualify, call Social Security and apply NOW!

# Enrolling in Medicare Part B

- General rule: Must enroll during initial enrollment period or late enrollment penalty.
- Employees still working and covered spouses can delay Part B enrollment if working and covered by employer insurance.
- Get Special Enrollment Period when employment ends.
- DOMA denied exception and denied SEP to spouses/domestic partners.
- Result: gap in coverage/late enrollment penalties.

# Medicare Part B and Part D premiums

- For most, Part B premium -- \$104.90/mo (2013)
- Higher income pay more for Part B and for Part D
- Uses MAGI - Modified Adjusted Gross Income from most recent income tax filing
- If married filing jointly -- MAGI > \$170,000
- Other status -- MAGI > \$85,000
- Increase based on a sliding scale

What are the \$\$?

Top penalty for Part B: premium + \$230.80

Top penalty for Part D: premium + \$ 66.60



# Qualifying for the Low Income Subsidy (LIS or “extra help”)

- Helps with costs of Medicare prescription drug benefit—Part D
- Premiums, co-pays, donut hole coverage
- Automatic if receive SSI or Medicaid
- Income and resource standards if not automatic

# Impact of marriage

- Count income of applicant, spouse living in the same home, and any relative of applicant or spouse living in the home for whom applicant or spouse contributes at least  $\frac{1}{2}$  of support.
- Do not count income of non-relatives living in the home.
- Mid-year Status Changing Event--Marriage, divorce, separation/reunification, annulment, or death of spouse.

# Impact of marriage

Countable resources max (exclude personal residence):

- Individual \$13,300
- Couple \$26,580

Countable income max:

- Individual \$17,235
- Couple \$23,265

# Medicaid

# Limited Pre-Windsor Flexibility

DOMA applied to all statutory requirements for Medicaid.

In 2011, CMS guidance identified areas where states could use regulatory flexibility. <http://downloads.cms.gov/cmsgov/archived-downloads/SMDL/downloads/SMD11-006.pdf>

- Liens for estate recovery - could drop if same sex partners
- Transfer of asset penalties - could waive
- Estate recovery - could decide undue hardship

States were not required to make changes.

# Qualifying for Medicaid

## **Medicaid based on age or disability:**

- Who is spouse? Use state definition
- Count spouse income and assets. Domestic partners?
- Generally use SSI methodology; flexibility to be more generous

# Qualifying for Medicaid

## Medicare Savings Programs:

- QMB- Qualified Medicare Beneficiary
- SLMB- Special Low-Income Medicare Beneficiary
- QI- Qualified Individual

Count spouse income and assets

# Qualifying for Medicaid

## Expansion Medicaid

- Use Modified Adjusted Gross Income (MAGI) from income tax filing.
- No asset limits.
- If file jointly, spouse income will count.
- Look for IRS rules, especially re: civil unions/domestic partners.

Think about the 65 + cliff.



# Spousal Impoverishment Protection in Medicaid

Today

- Mandatory when one spouse is in a nursing home or other institution and is not expected to return to the community. State option to extend to spouse of individual receiving HCBS.

Starting  
January 1,  
2014

- Mandatory that states extend application to spouse of individual receiving nursing home level of care in the community.

# Spousal Impoverishment Protection: What is it?

A certain amount of a couple's combined resources is protected for the spouse living in the community.

Depending on how much of his or her own income the community spouse actually has, a certain amount of income belonging to the spouse in the institution can also be set aside for the community spouse's use.

# What are the \$\$?

## Varies by state:

Minimum monthly  
maintenance needs  
allowance

\$1,891.25 - \$2,898.00

Community spouse monthly  
housing allowance

\$567.38 (more in AK and HI)

Community spouse resource  
standard

\$23,184 - \$115,920

Home equity limits

\$536,000 - \$802,000

# Estate Recovery

## What is it?

CMS requires states to attempt to recover from a beneficiary's estate certain Medicaid costs expended on the beneficiary

### Any age

Nursing home costs; must put lien on home

### 55 and over

Nursing costs + most HCBS, and related hospital and prescription drug services

### Both

May seek recovery of other Medicaid costs

# Estate Recovery--What is the spousal exemption?

- If spouse is living in the home, no lien.
- No estate recovery from spouse when beneficiary dies.
- Often no attempt to recover from estate of spouse.

# Asset transfer penalty

- If an individual transfers an asset at less than fair market value during 5-year look-back period, transfer penalty delays right to Medicaid coverage.
- Applies to individuals receiving LTC and HCBS waiver services and their spouses.
- Transfers to spouses OK.
- Interaction with estate recovery.

# Personal care attendant services

- Medicaid benefit—non-medical assistance. Bathing, toileting, food prep, protective supervision, etc.
- Rules more restrictive for spouse v. roommate.
  - Many states won't pay spouse.
  - Others have limits, restrictions.
  - Why? Spouse is “legally responsible party.”

---

**Next steps:  
What can advocates do?**



# What's next

Encourage Social Security and Medicare applications NOW.



Watch for policy announcements.



Individualized counseling—  
everyone's situation is different.

Gerald McIntyre [GMcIntyre@nsclc.org](mailto:GMcIntyre@nsclc.org)

Georgia Burke [GBurke@nsclc.org](mailto:GBurke@nsclc.org)

*More information available at*

[www.nsclc.org](http://www.nsclc.org)