



LGBT OLDER ADULTS: FACING LEGAL BARRIERS TO TAKING CARE OF LOVED ONES

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ISSUE SUMMARY

Lesbian, gay, bisexual and transgender (LGBT) older adults face many challenges not faced by their heterosexual counterparts. Some of the most unconscionable are laws that stand in the way of LGBT people taking care of those they love, in life and in death. Under federal law and most state laws, LGBT people are not granted family or medical leave to take care of a sick or terminally ill partner. Furthermore, LGBT people could be excluded from medical decision-making for a partner. Finally, upon the death of a partner, LGBT people are often denied making end-of-life decisions about last rites, funerals and disposition of remains.

DENIED FAMILY AND MEDICAL LEAVE

Government programs and laws supporting the care of loved ones at home generally presume that care is provided by a spouse or biological kin. However, because LGBT older adults are generally excluded from marriage, and are often single, their caregivers are often “families of choice,” such as partners and friends. As a result, LGBT elders might be denied leave to take care of a sick partner or friend.

The federal Family Medical Leave Act (FMLA) requires public and large private employers to grant up to 12 work weeks of unpaid annual leave to care for a spouse, child or parent with a serious health condition. The FMLA provides these caregivers flexibility, leave and a job guarantee. However, LGBT people who are caring for their partner or other loved ones risk losing their jobs because families of choice are not recognized by the FMLA. This exclusion can also prevent an LGBT elder from receiving needed care from a partner or loved one.

Most state medical leave laws also exclude family-of-choice caregivers. However, state laws can include more comprehensive requirements that protect LGBT older adults. For example, the California Family Rights Act requires large employers to give 12 weeks of unpaid leave to care for a seriously ill domestic partner (under this Act, registered domestic partners are entitled to the same benefits as heterosexual spouses).¹



Federal and state laws make it harder for same-sex couples to take care of each other. The older couples pictured above temporarily set aside these disparities to celebrate their long-time relationships at the 2008 Thunderstorm Pride March.

BARRIERS TO VISITATION AND MEDICAL DECISION-MAKING

Many heterosexual spouses take for granted that they will have access to each other’s hospital rooms and be in charge of each other’s medical decisions, should one spouse be incapacitated. Same-sex couples have no such assurance.

Unless an LGBT elder has specific (and often expensive) legal arrangements in place, most states give priority to opposite-sex spouses and biological kin for medical and long-term care decision-making and visitation, rather than life partners or families of choice. President Obama recently mandated that all hospitals receiving Medicare and Medicaid payments grant their patients the right to designate visitors and medical decision makers. However, this mandate does not apply to nursing homes and assisted living facilities—and anecdotal data shows that LGBT older adults still face extra hurdles in acting as a default medical decision maker for their partner. While a heterosexual

¹ Jurisdictions with more comprehensive policies include California, Connecticut, the District of Columbia, Hawaii, Massachusetts, New Jersey, New Mexico, Oregon, Rhode Island and Vermont.

Partner of 33 Years Dies While Man Rushes Home to Retrieve Documents

John Crisci and Michael Tartaglia were partners for 33 years and thought they had obtained every protection available under Colorado law. But when Tartaglia died in January of 2004, Colorado law kept them apart, as shown in the following excerpt from the *Denver Post*:

In the mountain home he designed and built with Tartaglia, John Crisci takes a moment to collect himself, his eyes welling up with tears, as he recalls once more the events of Jan. 8, 2004.

"It doesn't get any easier no matter how many times you say it," he manages, his voice wavering. This is a story Crisci has told to the Colorado legislature, to newspaper reporters and to various groups throughout the state.

When Tartaglia collapsed at the gym on his 70th birthday, Crisci was with him. But the legal papers documenting the couple's relationship were at their home, 15 minutes away by car. So while an ambulance rushed Tartaglia to Denver's St. Anthony Central Hospital, Crisci could not be with him, as any spouse would expect to be.

"They just weren't going to allow it," Crisci said of the paramedics. Instead, he rushed home to retrieve his documents, then drove 30 minutes to the hospital, only to find his worst fears confirmed. Tartaglia was already dead.²

Woman Removed from Dying Partner's Bedside

In 2005, Sharon Reed, a resident of Washington state, was repeatedly told to leave her dying partner's hospital room by a temporary night nurse at Seattle's University of Washington Medical Center. Reed had all the legal directives to serve as the health care agent for her partner of 17 years, Jo Ann Ritchie. Through the documents, Ritchie authorized Reed "[t]o provide for companionship for me and to be accorded the status of a family member for purposes of visitation" and "to provide for such companionship for me as will meet my needs and preferences at a time when I am disabled or otherwise unable to arrange for such companionship."

"The day before Jo died, she told me, 'I'm scared, don't leave me,'" said Reed. "I promised I would stay with her, but every time I tried to see Jo, [the nurse] would scream at me to get out of the room, 'You don't belong here.' She was very hostile from the beginning."

Reed told ABCNews.com that she felt she had let her partner down at the end of life. "Ours was the kind of relationship that had been a dream of a lifetime for both of us," said Reed. "We had spent the last 17 years buying a home, raising a child, being successful in our careers, having loyal friends and sharing time with our families. ... We absolutely adored each other and everybody knew it," she said.

Source: caselaw.lp.findlaw.com,³ ABCnews.com

couple is rarely challenged to produce a marriage license, same-sex couples must often produce paperwork proving their relationship or medical decision-making authority, which they might not have on hand in a medical emergency. For example, if an individual is rushed to the hospital and is not carrying these relevant documents, a loved one could legally be denied access (see sidebar above).

Worse, even when a couple has the appropriate documentation, there have been numerous incidents of hospitals disregarding legally valid medical powers of attorney or advance healthcare directives, or prohibiting same-sex partners from visiting with one another, even in cases involving critical injuries and illnesses (see sidebar at right). While these type of practices are illegal, many LGBT people do not have the resources to challenge these actions, nor can these actions usually be resolved in the rushed timeframe of a medical emergency.

EXCLUDED FROM END-OF-LIFE DECISIONS

Similar issues arise in regard to funeral decisions and disposition of remains, with states prioritizing biological kin for these tasks unless an LGBT elder has the appropriate legal documentation in place. Again, practices vary from state to state. Some states offer a separate document or form that confers end-of-life decision-making authority. Other states allow an individual to confer this authority within another document such as the health care power of attorney or a will. And other states have weak protections for the deceased's preferences and only respect their wishes if they have a prepaid funeral (e.g., West Virginia). Finally, in the worst of examples, some states may allow next of kin to challenge and override any decisions made by the deceased individual (e.g., Michigan).

² Michael Mills, "Legal Rights for All Couples," *Denver Post*, August 20, 2006.

³ http://caselaw.lp.findlaw.com/scripts/getcase.pl?court=wa&vol=2008_app/607472MAJ&invol=4; referenced February 17, 2010.

⁴ "Who Has the Right to Make Decisions About Your Funeral?" Funeral Consumers Alliance, <http://www.funerals.org/your-legal-rights/funeral-decision-rights>, accessed February 10, 2010.

POLICY AND ADVOCACY SOLUTIONS

- **Marriage.** Most same-sex couples cannot marry, but even where legal at the state level, the federal government does not recognize such marriages under the Defense of Marriage Act (DOMA). As a result, same-sex couples are treated as legal strangers for the purposes of family and medical leave laws, and often, for laws and policies surrounding medical and end-of-life decision-making. To ensure older same-sex couples are able to take care of each other—and to provide access to critical safety net programs—Congress must repeal DOMA and states must establish marriage for all couples.
- **Inclusive family and medical leave laws.** The ability to take care of a loved one should extend beyond married spouses. Policymakers should broaden the definition of covered caregivers in federal and state family and medical leave laws. For example, these laws could adopt language similar to that found in the National Family Caregiver Support Program, which broadly recognizes “an adult family member, or another individual, who is an informal provider of in-home and community care to an older individual.”
- **Inclusive medical and end-of-life decision-making laws.** State laws governing default medical decision-making, funerals and disposition-of-remains laws should respect domestic partnerships and families of choice—even where legal documents are not in place or on-hand. States should also make it easier for older adults to designate caregivers and decision-makers. For example:
 - The Arizona Advance Health Care Directive Registry allows residents to store living wills and power-of-attorney documents on a secure website, which are then accessible 24 hours a day, seven days a week. Users can also keep a registry card in their wallets, which doctors and nurses can then use to access the database and determine the type of end-of-life care a person wants, even if the person is incapacitated.
 - The Colorado Domestic Partner registry allows individuals to fill out and submit a form that, among other things, allows a person to designate another individual for medical decision-making and disposition of remains.
- **Training health care providers.** Health care providers should be made aware of current laws, regulations and policies regarding the visitation and medical decision-making rights of LGBT people.

ABOUT THIS BRIEF

This is one of a series of issue briefs based on content from *Improving the Lives of LGBT Older Adults*, a report which provides an in-depth examination of the issues facing LGBT elders, and potential solutions for improving their lives. For more information, visit www.lgbtmap.org or www.sageusa.org.



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