LESBIAN GAY, BISEXUAL AND TRANSGENDER AND HIV ISSUES IN HEALTHCARE

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1. **INTRODUCTION TO THE LGBT COMMUNITY**

A. Understanding LGBT Terminology.

B. Types of LGBT Relationships.

C. Texas Homosexuality Conduct Law and *Lawrence v. Texas.*

§ 21.06. Homosexual Conduct

(a) A person commits an offense if he engages in deviate sexual intercourse with another individual of the same sex.

(b) An offense under this section is a Class C misdemeanor.

SUPREME COURT OF THE UNITED STATES
John Geddes Lawrence and Tyrone Garner, Petitioners v. Texas

Justice Kennedy delivered the opinion of the Court.

The present case does not involve minors. It does not involve persons who might be injured or coerced or who are situated in relationships where consent might not easily be refused. It does not involve public conduct or prostitution. It does not involve whether the government must give formal recognition to any relationship that homosexual persons seek to enter. The case does involve two adults who, with full and mutual consent for each other, engaged in sexual practices common to a homosexual lifestyle. **The petitioners are entitled to respect for their private lives. The State cannot demean their existence or control their destiny by making their private sexual conduct a crime. Their right to liberty under the Due Process Clause gives them the full right to engage in their conduct without intervention of the government. "It is a promise of the Constitution that there is a realm of personal liberty which the government may not enter."** *Casey, supra* at 847. The Texas statute furthers no legitimate state interest which can justify its intrusion into the personal and private life of the individual. . .As the Constitution endures, persons in every generation can invoke its principles in their own search for greater freedom. . .*It is so ordered.* June 26, 2003.

D. LGBT Parenting of Children - Adoption and Surrogacy.

There are two cases in Texas upholding adoption by two same-sex parents:

A. *Hobbs v. Van Stavern*, 249 S.W.3d 1 (Tex.App.–Houston [1st Dist.] 2006; and

B. *Goodson v. Castellanos*, 214 S.W.3d 741 (Tex.App.–Austin 2007)

> . . . there is no direct statement of public policy found in the family code or the constitution prohibiting the adoption of a child by two individuals of the same sex. . . Accordingly, any concern with the propriety of this adoption must yield to the directly stated public policy of this State prohibiting a direct or collateral attack on a judgment more than six months after an adoption is ordered and providing children with a stable home environment. *See* Tex. Fam. Code Ann. § § 162.012 (six-month deadline); 153.001 (overall public policy of State); *Wristen v. Kosel*, 742 S.W.2d 868, 870 (Tex.App.–Eastland 1987, writ denied) (when both parents love child, public interest is neither directly nor adversely affected by question of which parent is appointed managing conservator of child); *see also Van Stavern*,----S.W.3d at----, 2006 WL 3095439, at 3, 2006 Tex.App. LEXIS 9529, at 9-10 (rejecting argument that appointment of both members of same-sex couple as joint managing conservator violated public policy).

Pediatrics Official Journal of the American Academy of Pediatrics, The Effect of Marriage, Civil Union, and Domestic Partnership Laws on the Health and Well-Being of Children. This information is current as of July 7, 2006.

Research exploring the diversity of parental relationships among gay and lesbian partners is just beginning. The legalization of same-gender marriage in Massachusetts in 2004 offers the first true opportunity to study how same-gender marriage affects family life and child development. In addition to the findings discussed above, current research on same-gender couples who have been able to jointly adopt and establish legal ties between children and both parents suggests that **legal recognition of same-gender marriage may strengthen ties between partners, their children, and their extended families.**

On the matter of same-gender marriage, in May 2005 the Assembly of the American Psychiatric Association (APA) approved a statement in support of legalizing same-gender marriage. Approval by the organization's board of directors in July 2005 made psychiatry the first medical specialty to publically support same-gender civil marriage. Specifically, the APA policy states, "In the

interest of maintaining and promoting mental health, the American Psychiatric Association supports the legal recognition of same-sex civil marriage with all rights, benefits, and responsibilities conferred by civil marriage, and opposes restrictions to those same rights, benefits, and responsibilities.

E. HIV 101.

HIV is spread primarily by:

(1) Not using a condom when having sex with a person who has HIV. All unprotected sex with someone who has HIV contains some risk. However:

- Unprotected anal sex is riskier than unprotected vaginal sex.
- Among men who have sex with other men, unprotected receptive anal sex is riskier than unprotective insertive anal sex.

(2) Having multiple sex partners or the presence of other sexually transmitted diseases (STDs) can increase the risk of infection during sex. Unprotected oral sex can also be a risk for HIV transmission, but it a much lower risk than anal or vaginal sex.

(3) Sharing needles, syringes, rinse water, or other equipment used to prepare illicit drugs for injection.

(4) Being born to an infected mother – HIV can be passed from mother to child during pregnancy, birth or breast feeding.

2. **MARRIAGE EQUALITY AND ORAL ARGUMENTS SCHEDULED FOR MARCH 2013 IN THE UNITED STATES SUPREME COURT.**

A. *Dennis Hollingsworth v. Kristin M. Perry*.

Statement of the Case

"From the beginning of California statehood, the legal institution of civil marriage has been understood to refer to a relationship between a man and a woman." *In re Marriage Cases*, 183 P.3d 384, 407 (Cal. 2008). In 2000, Californians passed Proposition 22, an initiative statute reaffirming that understanding. *See* CAL. FAM. CODE § 308.5. In 2008, the California Supreme Court nevertheless interpreted the State constitution to require that marriage be redefined to include same-sex couples and invalidated Proposition 22. *See In re Marriage Cases*, 183

P.3d 384 (Cal. 2008). Less than six months later, the People of California adopted Proposition 8, which amended the California Constitution to provide that "[o]nly marriage between a man and a woman is valid or recognized in California."

Respondents, a gay couple and a lesbian couple, filed this suit in the district court against State officials responsible for enforcing California's marriage laws, claiming that **Proposition 8 violates the Fourteenth Amendment to the United States Constitution**. The district court had subject matter jurisdiction under 28 U.S.C. § 1331. All of the public officials named as defendants informed the court that they would not defend Proposition 8. Petitioners, official proponents of that measure and the primarily formed ballot measure committee designated by the proponents as the official Yes on 8 campaign committee, *see* CAL. ELEC. CODE § 82047.5(b), moved to intervene to defend Proposition 8, and the district court granted the motion. After a trial, **the district court ruled that Proposition 8 violates the Fourteenth Amendment**. App. 137a. Petitioners appealed, and the Ninth Circuit stayed the district court's judgment barring enforcement of Proposition 8 pending appeal.

Constitutional Provisions Involved

The Equal Protection Clause of the Fourteenth Amendment provides: "[N]or shall any State. . . deny to any person within its jurisdiction the equal protection of the laws." U.S. CONST. amend. XIV, § 1.

Proposition 8, now codified as Article I, Section 7.5 of the California Constitution, provides: "Only marriage between a man and a woman is valid or recognized in California."

B. *United States of America v. Edith Schlain Windsor.*

In 2007, plaintiff married Thea Spyer, her same-sex partner of more than 40 years, in Canada. The couple resided in New York. When Spyer died in 2009, she left her estate for plaintiff's benefit.

In her capacity as executor of Spyer's estate, plaintiff paid approximately $363,000 in federal estate taxes. She thereafter filed a refund claim under 26 U.S.C. 2056(a), which provides that property that passes from a decedent to a surviving souse may generally pass free of federal estate taxes. The Internal Revenue Service (IRS) denied the refund claim on the ground that plaintiff is not a "spouse" within the meaning of DOMA Section 3 and thus not a "surviving spouse" within the meaning of Section 2056(a).

Plaintiff filed this suit challenging the constitutionality of DOMA Section 3 in the United States District Court for the Southern District of New York. She contended that, by treating married same-sex couples in New York differently from opposite-sex couples, Section 3, as applied by the IRS, violates the equal protection component of the Fifth Amendment. She sought declaratory and injunctive relief, as well as recovery of the $363.053 in federal estate taxes paid by Spyer's estate.

After plaintiff filed her complaint, the Attorney General sent a notification to Congress under 28 U.S.C. 530D that he and the President had determined that Section 3 of DOMA is unconstitutional as applied to same-sex couples who are legally married under state law.

The district court denied the motions to dismiss and granted summary judgment in favor of plaintiff, concluding that Section 3 of DOMA violates the equal protection guarantee of the Fifth Amendment

Question Presented

Section 3 of the Defense of Marriage Act (DOMA) defines the term "marriage" for all purposes under federal law, including the provision of federal benefits, as "only a legal union between one man and one woman as husband and wife." 1 U.S.C. 7. It similarly defines the term "spouse" as "a person of the opposite sex who is a husband or a wife." *Ibid.* The question presented is: Whether Section 3 of DOMA violates the Fifth Amendment's guarantee of equal protection of the laws as applied to persons of the same sex who are legally married un the laws of their State.

Equal Protection

By its express language, the Equal Protection Clause, part of the Fourteenth Amendment to the Unites States Constitution, provides that "no ***state*** shall ... deny to any person within its jurisdiction the equal protection fo the laws." Even though the Fourteenth Amendment Equal Protection Clause applies only to state governments, the requirement of equal protection has been read to apply to the federal government as a component of Fifth Amendment due process ever since *Bolling v. Sharpe*, 347 W.. 497 (1954). So whenever you talk about the federal government, you talk about the Fifth Amendment.

C. The Significance of "Marriage" vs. "Domestic Partnerships".

An Overview of Federal Rights and Protections Granted to Married Couples

There are 1,138 benefits, rights and protections provided on the basis of marital status in Federal law. Because the Defense of Marriage Act defines "marriage" as only a legal union between one man and one woman, same-sex couples - even if legally married in their state - will not be considered spouses for purposes of federal law.

The following is a summary of several categories of federal laws contingent upon marital status.

Social Security

Social Security provides the sole means of support for some elderly Americans. All working Americans contribute to this program through payroll tax, and receive payments upon retirement. Surviving spouses of working Americans are eligible to receive Social Security payments. A surviving spouse caring for a deceased employee's minor child is also eligible for an additional support payment. Surviving spouse and surviving parent benefits are denied to gay and lesbian Americans because they cannot marry. Thus, a lesbian couple who contributes an equal amount to Social Security over their lifetime as a married couple would receive drastically unequal benefits, as set forth below.

Tax

According to the GAO report, as of 1997 there were 179 tax provisions that took marital status into account.

Tax on Employer-Provided Health Benefits to Domestic Partners

In growing numbers, both public and private employers across the country have made the business decision to provide domestic partner benefits in order to promoted fairness and equality in the workplace. For example, as of August 2003, 198 (almost forty percent) of the Fortune 500 companies and 173 state and local governments nationwide provide health insurance benefits to the domestic partners of their employees. Federal tax law has not kept up with corporate and governmental who take advantage of it are taxed inequitably.

Inequitable Treatment of Children Raised in LGBT Households

Recent data shows that at least 1 million children are being raised by same-sex couples in the United States. The Code contains competing definitions of "child." Certain provisions of the Code defining child penalize for the marital status of their parents and caregivers.

Tax on Gain from the Sale of the Taxpayer's Principal Residence

Under Internal Revenue Code §121, a single taxpayer may exclude up to $250,000 of profit due to the sale of his or her personal principal residence from taxable income. Married couples filing jointly may exclude up to $500,000 on the sale of their home. Lesbian and gay couples, who are not permitted to marry or to file jointly, are therefore taxed on all gain above $250,000, creating a large tax penalty compared to similarly situated married couples.

Estate Tax

Internal Revenue Code § 2056 exempts amounts transferred to a surviving spouse from the decedent's taxable estate. For same-sex couples who are legally barred from marriage, this exemption is not available, creating an inequity in taxation.

Taxation of Retirement Savings

Under current law, when a retirement plan participant dies, plan benefits must be distributed in a lump sum or remain in the plan to be distributed in accordance with the minimum distribution requirements of § 401(09). This problem does not exist if the beneficiary is the deceased participant's surviving spouse, because the surviving spouse may transfer plan benefits to an IRA or a retirement plan in which he or she is a participant. This entitlement is valuable because (a) it allows the surviving spouse to defer taxation of the proceeds, often until the survivor is in a lower tax bracket; and (b) it protects the surviving spouse from being forced to withdraw from an investment program when its value is depressed. Because gay and lesbian couples are treated as strangers under federal tax and pension law, they cannot transfer plan benefits without incurring significant penalties, and do not have the flexibility to withdraw funds when they choose.

Family and Medical Leave

The Family and Medical Leave Act (FMLA) guarantees family and medical leave to employees to care for parents, children or spouses. As currently interpreted, this law does not provide leave to care for a domestic partner or the domestic partner's family member. Family and medical leave should be a benefit for all American workers.

Immigration Law

Currently, U.S. immigration law does not allow lesbian and gay citizens or permanent residents to petition for their same-sex partners to immigrate. Approximately 75% of the one million green cards or immigrant visas issued each year are granted to family members of U.S. citizens and permanent residents. However, those excluded from the definition, under current immigration law of family, are not eligible to immigrate as family. Such ineligible person include (but are not limited to) same-sex partners and unmarried heterosexual couples.

Each year, current law forces thousands of lesbian and gay couples to separate or live in constant fear of deportation. In some cases, partners of lesbian and gays face prosecution by the Immigration and Naturalization Service (INS), hefty fines and deportation and U.S. citizens are sometimes left with no other choice but to migrate with their partner to a nation whose immigration laws recognize their relationship. This creates a tremendous hardship, not only for those involved, but for their friends and family, and leads to a drain of talent and productivity for our country.

Fifteen countries: Australia, Belgium, Canada, Denmark, Finland, France, Germany, Iceland, the Netherlands, New Zealand, Norway, South Africa, Sweden and the United Kingdom recognize lesbian and gay couples for the purposes of immigration.

Employee Benefits for Federal Workers

According to the GAO Report, marital status affects over 270 provisions dealing with current and retired federal employees, members of the Armed Forces, elected officials, and judges. Most significantly, under current law, domestic partners of federal employees are excluded from the Federal Employees Health Benefits Program (FEHBP). Although married couples are eligible for reimbursement for expenses incurred by a domestic partner are not reimbursable. As of August 2003, nine states and the District of Columbia and 322 local governments offer health benefits to the domestic partners of their public employees, while the nation's largest employer — the federal government — does not.

Continue Health Coverage (COBRA)

Federal law requires employers to give their former employees the opportunity to continue their employer-provided health insurance coverage by paying a premium (the requirement was part of the consolidated Omnibus Budget Reconciliation Act of 1985; hence the common name COBRA). An increasing number of employers,

including 198 of the Fortune 500, now offer their employees domestic partner benefits. Although this trend is encouraging, the Federal COBRA law does not require employers to provide domestic partners the continued coverage guaranteed to married couples. Under 29 U S C. § 1 167, an employer is only required to offer continuation coverage to the employee and to "qualified beneficiaries," defined as the employee's spouse and dependent children, regardless of whether the employee's original benefits plan covered other beneficiaries. Because of the narrow definition of "spouse" under federal law, employees are not guaranteed continued coverage for their domestic partners.

"THE MEANING OF MARRIAGE"

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Cause No. 10-16696; D.C. No. 3:09-cv-02292-VRW; *Kristin M. Perry; Sandra B. Stier; Paul T. Katami; Jeffrey J. Zarrillo v. Edmund G. Brown, Jr., in his official capacity as Governor of California*; Ninth Circuit Court of Appeals, United States

In adopting the amendment, the People simply took the designation of 'marriage' away from lifelong same-sex partnerships, and with it the State's authorization of that official status and the societal approval that comes with it.

By emphasizing Proposition 8's limited effect, we do not mean to minimize the harm that this change in the law caused to same-sex couples and their families. **To the contrary, we emphasize the extraordinary significance of the official designation of 'marriage'. That designation is important because 'marriage' is the name that society gives to the relationship that matters most between two adults.** A rose by any other name may smell as sweet, but to the couple desiring to enter into a committed lifelong relationship, a marriage by the name of 'registered domestic partnership' does not. The word 'marriage' is singular in connoting "a harmony in living," "a bilateral loyalty," and "a coming together for better or for worse, hopefully enduring, and intimate to the degree of being sacred." *Griswold v. Connecticut*, 381 U.S. 479, 486 (1965). As Proponents have admitted, "the word 'marriage' has a unique meaning," and "there is a significant symbolic disparity between domestic partnership and marriage." It is the designation of 'marriage' itself that expresses validation, by the state and the community, and that serves as a symbol, like a wedding ceremony or a wedding ring, of something profoundly important. . . .

The official, cherished status of 'marriage' is distinct from the incidents of marriage, such as those listed in the California Family Code. The incidents are both elements of the institution and manifestations of the recognition that the State affords to those who are in stable and committed lifelong relationships. We allow spouses but not siblings or roommates to file taxes jointly, for example, because we acknowledge the financial interdependence of those who have entered into an "enduring" relationship. The **incidents of marriage, standing alone, do not, however, convey the same governmental and societal recognition as does the designation of 'marriage' itself. We do** not celebrate when two people merge their bank accounts; we celebrate when a couple marries. The designation of 'marriage' is the status that we recognize. It is the principal manner in which the Slate attaches respect and dignity to the highest form of a committed relationship and to the individuals who have entered into it.

3. **IMPORTANCE OF "SPOUSE" IN HEALTHCARE AND UNDER FEDERAL AND STATE LAW.**

A. Family Medical Leave Act.

Protected Reasons for Taking FMLA Leave

The FMLA allows eligible employees to take a job-protected, unpaid leave for up to twelve workweeks per twelve month period for the following reasons:

1. Birth of a child

2. Care for a newborn child

3. Placement of a child for adoption or foster care

4. The employee is needed to care for a child, souse, or parent suffering from a serious health condition

5. The employee's own serious health condition makes him or her unable to perform the functions of the job

B. Decision Making in Times of Medical Crises.

Sec. 166.039. PROCEDURE WHEN PERSON HAS NOT EXECUTED OR ISSUED A DIRECTIVE AND IS INCOMPETENT OR INCAPABLE OF COMMUNICATION.

(a) If an adult qualified patient has not executed or issued a directive and is incompetent or otherwise mentally or physically incapable of communication, the attending physician and the patient's legal guardian or **an agent under a medical power of attorney** may make a treatment decision that may include a decision to withhold or withdraw life-sustaining treatment from the patient.

(b) If the patient does not have a legal guardian or an agent under a medical power of attorney, the attending physician and one person, if available, from one of the following categories, in the following priority, may make a treatment decision that may include a decision to withhold or withdraw life-sustaining treatment:

(1) the patient's spouse;
(2) the patient's reasonably available adult children;
(3) the patient's parents; or
(4) the patient's nearest living relative.

C. Disposition of Final Remains.

Sec. 711.002. DISPOSITION OF REMAINS; DUTY TO INTER.

(a) Except as provided by Subsection (l), unless a decedent has left directions in writing for the disposition of the decedent's remains as provided in Subsection (g), the following persons, in the priority listed, have the right to control the disposition, including cremation, of the decedent's remains, shall inter the remains, and are liable for the reasonable cost of interment:

(1) the person designated in a written instrument signed by the decedent;
(2) the decedent's surviving spouse;
(3) any one of the decedent's surviving adult children;
(4) either one of the decedent's surviving parents;
(5) any one of the decedent's surviving adult siblings; or
(6) any adult person in the next degree of kinship in the order named by law to inherit the estate of the decedent.

D. No Community Property Protection.

Texas does not allow "unmarried" people to assert community property claims.

- *Zaremba v. Cliburn*, 949 S.W.2d 822 (Tex.App.–Fort Worth 1997).

  The statute of frauds (Section 26.01, Texas Business and Commerce Code) requires agreements made on consideration of "nonmarital conjugal cohabitation" to be in writing and signed by the person to be charged.

  > "Because we hold Zaremba's claims that allegedly arise from the purported oral or implied partnership agreement are founded on the basis that he was entitled to recovery for any services rendered in consideration of nonmerital, conjugal cohabitation, those claims are barred by the statute of frauds and that defect could not be cured by any amendment to the pleadings"

- *Coons - Andersen v. Andersen*, 104 S.W.3d 630 (Tex.App.–Dallas 2003).

  Household services performed by LGBT partners are "presumed gratuitous".

  > The expenditures for which appellant sought reimbursement were made while she and appellee lived together as romantic partners. Under Texas law, "where persons are living together as one household, services performed for each other **are presumed to be gratuitous**, and an express contract for remuneration must be shown or that circumstances existed showing a reasonable and proper expectation that there would be compensation." *Salmon v. Salmon*, 406 S.W.2d 949,, 951 (Tex.Civ.App.–Fort Worth 1966, writ ref'd n.r.e.) (quoting *Martin v. de la Garza*, 38 S.W.2d 157 (Tex.Civ.App.–San Antonio 1931, writ dism'd)).

E. No Gay Marriage = No Gay Divorce.

4. **NO PROTECTION FROM EMPLOYMENT DISCRIMINATION.**

A. Texas is an "Employment at Will" State.

B. No LGBT Discrimination Protection, Except Gender Sterotyping.

Employment Non-Discrimination Act (ENDA)

The Employment Non-Discrimination Act (ENDA) would prohibit employment discrimination based on sexual orientation and gender identity. There is currently no federal law protecting individuals from job discrimination based on actual or perceived sexual orientation or gender identity. This means that at any time, someone can be discriminated against, fired or not hired simply because he/she is or is perceived to be gay, lesbian, bisexual, or transgender.

ENDA is modeled on the civil Rights Act of 1964, which prohibits employment discrimination based on race, religion, gender, national origin, and color. ENDA works within the boundaries of the Civil Rights Act to protect a group of people who have been historically and are currently discriminated against.

Currently, several states (not Texas) offer protection based on sexual orientation and gender identity. ENDA would ensure this type of protection across the entire country to all citizens of the United States.

C. HIV Protection Under the ADA - Title I ADA.

The Americans with Disabilities Act (ADA) gives Federal civil rights protections to individuals with disabilities similar to those provided to individuals on the basis of race, color, sex, national origin, age, and religion. It guarantees equal opportunity for individuals with disabilities in public accommodations, employment, transportation, State and local government services, and telecommunications.

An individual is considered to have a "disability" if he or she has a physical or mental impairment that substantially limits one or more major life activities, has a record of such impairment, or is regarded as having such impairment. Persons with HIV disease, either symptomatic or asymptomatic, have physical impairments that substantially limit one or more major life activities and thus are protected by the ADA.

Persons who are discriminated against because they are regarded as being HIV-positive are also protected. For example, the ADA would protect a person who is denied an occupational license or admission to a school on the basis of a rumor or assumption that he has HIV or AIDS, even if he does not.

D. HIV Protection from "Refusal to Treat" - Title III ADA.

What is public accommodation?

A public accommodation is a private entity that owns, operates, leases, or leases to a place of public accommodation. Places of public accommodation include a wide range of entities, such as restaurants, hotels, theaters, doctor's offices, dentist's offices, hospitals, retail stores, health clubs, museums, libraries, private schools, and day care centers.

Entities that meet the legal definition of a private club and those that qualify for an exemption for religious entities are not considered places of public accommodation.

What constitutes discrimination?

Discrimination is the failure to give a person with a disability the equal opportunity to use or enjoy the public accommodation's goods, services, or facilities. Examples of ADA violations would include:

- A dentist who categorically refused to treat all persons with HIV or AIDS.
- A moving company that refused to move the belongings of a person with AIDS, or that refused to move the belonging of a person whose neighbor had AIDS.
- A health club that charged extra fees to persons who had HIV, or that prohibited members with HIV from using the steam room or sauna, or that limited the hours during which members with HIV could use the club's facilities.
- A day care center that categorically refused admission to children with HIV or the children of mothers with HIV.
- A funeral home that refused to provide funeral services for a person who died from AIDS-related complications.
- A building owner who refused to lease space to a not-for-profit organization that provided services to persons with HIV or AIDS.

- A cosmetology school that refused to enroll a student once they learned that she had HIV.

- An overnight summary camp where children sleep in group cabins that requires a camper with HIV to sleep in the camp infirmary.

5. **ABILITY TO CONTRACT AND MAKE ESTATE PLANNING DECISIONS.**

A. Last Will and Testament.

Descent and Distribution

§ 38. Persons Who Take Upon Intestacy

(a) Intestate Leaving No Husband or Wife.

Where any person, having title to any estate, real, personal or mixed, shall die intestate, leaving no husband or wife, it shall descend and pass in parcenary to his kindred, male and female, in the following course:

1. To his children and their descendants.

2. If there be no children nor their descendants, then to his father and mother, in equal portions.

(b) Intestate Leaving Husband or Wife.

Where any person having title to any estate, real, personal or mixed, other than a community estate, shall die intestate as to such estate, and shall leave a surviving husband or wife, such estate of such intestate shall descend and pass as follows:

1. If the deceased have a child or children, or their descendants, the surviving husband or wife shall take one-third of the personal estate, and the balance of such personal estate shall go to the child or children of the deceased and their descendants. The surviving husband or wife shall also be entitled to an estate for life, in one-third of the land of the intestate, with remainder to the child or children of the intestate and their descendants.

2. If the deceased have not child or children, or their descendants, then the surviving husband or wife shall be entitled to all the personal estate, and to one-half of the lands of the intestate, without remainder to any person, and the other half shall pass and be

inherited according to the rules of descent and distribution; provided, however, that if the deceased has neither surviving father nor mother nor surviving brothers or sisters, or their descendants, then the surviving husband or wife shall be entitled to the whole of the estate of such intestate.

B. Directive to Physician.

C. Declaration of Guardian.

§ 677. Guardians of Persons Other Than Minors

(a) The Court shall appoint a guardian for a person other than a minor according to the circumstances and considering the best interests of the ward. If the court finds that two or more eligible persons are equally entitled to be appointed guardian:

(1) The ward's spouse is entitled to the guardianship in preference to any other person if the spouse is one of the eligible persons;

(2) the eligible person nearest of kin to the ward is entitled to the guardianship if the ward's spouse is not one of the eligible persons; or

(3) the court shall appoint the eligible person who is best qualified to serve as guardian if:

(A) the persons entitled to serve under Subdivisions (1) and (2) of this section refuse to serve. . .

Probate Code Section 690 requires the appointment of only one person as guardian of the person or the estate, but the court is allowed to order a joint appointment if it is a "husband and wife".

D. Medical Power of Attorney.

E. Business Power of Attorney.

F. Appointment of Agent to Handle Final Remains.

G. HIPAA Authorization.

H. Hospital Visitation.

I. Beneficiary Designations.

J. Joint Ownership Agreement.

6. **THE WHITE HOUSE TAKES ACTION.**

PRESIDENT OBAMA

THE WHITE HOUSE

Office of the Press Secretary

For Immediate Release April 15, 2010

April 15, 2010

MEMORANDUM FOR THE SECRETARY OF HEALTH AND HUMAN SERVICES

SUBJECT: Respecting the Rights of Hospital Patients to Receive Visitors and to Designate Surrogate Decision Makers for Medical Emergencies

There are few moments in our lives that call for greater compassion and companionship than when a loved one is admitted to the hospital. In these hours of need and moments of pain and anxiety, all of us would hope to have a hand to hold, a shoulder on which to lean -- a loved one to be there for us, as we would be there for them.

Yet every day, all across America, patients are denied the kindnesses and caring of a loved one at their sides -- whether in a sudden medical emergency or a prolonged hospital stay. Often, a widow or widower with no children is denied the support and comfort of a good friend. Members of religious orders are sometimes unable to choose someone other than an immediate family member to visit them and make medical decisions on their behalf. **Also uniquely affected are gay and lesbian Americans who are often barred from the bedsides of the partners with whom they may have spent decades of their lives -- unable to be there for the person they love, and unable to act as a legal surrogate if their partner is incapacitated.**

For all of these Americans, the failure to have their wishes respected concerning who may visit them or make medical decisions on their behalf has real consequences. It means that doctors and nurses do not always have the best information about patients' medications and medical histories and that friends and certain family members are unable to serve as intermediaries to help communicate patients' needs. It means that a stressful and at times terrifying experience for patients is senselessly compounded by indignity and unfairness. And it means that all too often, people are made to suffer or even to pass away alone, denied the comfort of companionship in their final moments while a loved one is left worrying and pacing down the hall.

7. **DEPARTMENT OF HEALTH AND HUMAN SERVICES (DHHS) CENTERS FOR MEDICARE AND MEDICAID SERVICES (CMS).**

Revised Guidelines for Hospitals and Critical Access Hospitals
Effective Date: December 2, 2011

Revisions have been made to the following guidelines:

A. Receipt of information of the "patient's rights".

B. The right to participate in the development and implementation of the patient's plan of care.

C. The right to make informed decisions regarding the patient's care.

D. The right to formulate advance directives and to have hospital staff and practitioners comply with such directives.

E. The right to have a family member or representative of his or her choice notified promptly of his or her admission to the hospital.

F. The right to have patient visitation in the hospital and an explanation of any clinically necessary or reasonable restriction or limitation on visitation rights.

- No restriction, limit or otherwise deny visitation privileges on the basis of race, color, national origin, religion, **sex, gender identity, sexual orientation or disability.**

- Ensure that all visitors enjoy full and equal visitation privileges consistent with patient preferences.

All of the above rights have had guideline revisions promulgated consistent and similar to the following:

Hospitals are expected to take reasonable steps to **determine the patient 's wishes** concerning designation of a representative to exercise the patient's right to participate in the development and implementation of the patient's plan of care unless prohibited by applicable State law:

Oral or Written Designation

- When a patient who is not incapacitated has **designated** either orally to hospital staff or in writing, another individual to be his/her representative, the hospital **must** involve the designated representative in the development and implementation of the patient's plan care. The explicit designation of a representative by the patient takes precedence over any non-designated relationship and continues throughout the patient's inpatient stay or outpatient visit, unless expressly withdrawn, either orally or in writing, by the patient.

Medical Power of Attorney

- In the case of a patient who is incapacitated, when an individual presents the hospital with an advance directive, medical power of attorney or similar document executed by the patient and designating an individual to make medical decisions for the patient when incapacitated, the hospital, **when presented with the document, must involve the designated representative** in the development and implementation of the patient's plan of care, The explicit designation of a representative takes precedence over any non-designated relationship and continues throughout the patient 's inpatient stay or outpatient visit, unless the patient ceases to be incapacitated and expressly withdraws the designation, either orally or in writing.

No Written Directive

- When a patient is incapacitated or otherwise unable to communicate his or her wishes, there is no written advance directive on file or presented, and an **individual asserts** that he or she is the patient 's spouse, domestic partner (whether or not formally established and including a same-sex domestic partner), parent (including someone who has stood in loco parentis for the patient who is a minor child) or other family member and thus is the patient 's representative, **the hospital is expected to accept this assertion, without demanding supporting documentation, and must involve the individual as the patient's representative in the development and implementation of the patient's plan of care, UNLESS:**

- More than one individual claims to be the patient 's representative. In such cases, it would be appropriate for the hospital to ask each individual for documentation supporting his or her claim to be the patient's representative. The hospital should make its determination of who is the patient 's representative based upon the hospital's determination of who the patient would most want to make decisions on his/her behalf. Examples of documentation a hospital might consider could include, but are not limited to the following: proof of a legally recognized marriage, domestic partnership, or civil union; proof of a joint household; proof of shared or co-mingled finances; and any other documentation the hospital considers evidence of a special relationship that indicates familiarity with the patient 's preferences concerning medical treatment;

- Treating the individual as the patient 's representative without requesting supporting documentation would result in the hospital violating State law. State laws, including State regulations, may specify a procedure for determining who may be may be considered to be the incapacitated patient's representative, and may specify when documentation is or is not required; or

- The hospital has reasonable cause to believe that the individual is falsely claiming to be the patient's spouse, domestic partner, parent or other family member.

Hospitals are expected to adopt policies and procedures that facilitate expeditious and non-discriminatory resolution of disputes about whether an individual is the patient 's representative, given the critical role of the representative in exercising the patient's rights.

A refusal by the hospital of an individual's request to be treated as the patient's representative, based on one of the above-specified familial relationships, must be documented in the patient 's medical record, along with the specific basis for the refusal.

Survey Procedures 082.13(4(1)

- Does the hospital have policies and procedures to involve the patient or the patient's representative (as appropriate) in the development and implementation of his/her inpatient treatment/care plan, outpatient treatment/care plan, discharge plan, and pain management plan?

- Review records and interview staff and patients, or patients's representative as appropriate), to determine how the hospital involves the patient or the patient's representative (as appropriate) in the development and implementation of his/her plan of care?

- Does the hospital's policy provide for determining when a patient has a representative who may exercise the patient's right to participate in developing and implementing his/her plan of care, and who that representative is, consistent with this guidance and State law?

- Is there evidence that the patient or the patient's representative was included or proactively involved in the development and implementation of the patient's plan of care?

- Were revisions in the plan of care explained to the patient and/or the patient's representative (when appropriate)?

8. **BALANCING LGBT RIGHTS AND LGBT CONFIDENTIALITY.**

A. HIPAA Rights.

The *Standards for Privacy of Individually Identifiable Health Information* ("Privacy Rule") establishes, for the first time, a set of national standards for the protection of certain health information. The U.S. Department of Health and Human Services ("HHS") issued the Privacy Rule to implement the requirement of the Health Insurance Portability and Accountability Act of 1996 ("HIPAA"). The Privacy Rule standards address the use and disclosure of individuals' health information—called "protected health information" by organizations subject to the Privacy Rule — called "covered entities," as well as standards for individuals' privacy rights to understand and control how their health information is used. Within HHS, the Office for Civil Rights ("OCR") has responsibility for implementing and enforcing the Privacy Rule with respect to voluntary compliance activities and civil money penalties.

A major goal of the Privacy Rule is to assure that individuals' health information is properly protected while allowing the flow of health information needed to provide and promote high quality health care and to protect the public's health and well being. The Rule strikes a balance that permits important uses of information, while protecting the privacy of people who seek care and healing. Given that the health care marketplace is diverse, the Rule is designed to be flexible and comprehensive to cover the variety of uses and disclosures that need to be addressed.

Protected Health Information

The Privacy Rule protects all *"individually identifiable health information"* held or transmitted by a covered entity or its business associate, in any form or media, whether electronic, paper, or oral. The Privacy Rule calls this information "protected health information (PHI)."

"Individually identifiable health information" is information, including demographic data, that relates to:

- the individual's past, present or future physical or mental health or condition,
- the provision of health care to the individual, or
- the past, present, or future payment for the provision of health care to the individual,

and that identifies the individual or for which there is a reasonable basis to believe it can be used to identify the individual. Individually identifiable health information includes many common identifiers (e.g., name, address, birth date, Social Security Number).

Enforcement and Penalties for Noncompliance

Compliance

The Standards for Privacy of Individually Identifiable Health Information (Privacy Rule) establishes a set of national standards for the use and disclosure of an individual's health information — called protected health information — by covered entities, as well as standards for providing individuals with privacy rights to understand and control how their health information is used. The Department of Health and Human Services, Office for Civil Rights (OCR) is responsible for administering and enforcing these standards and may conduct complaint investigations and compliance reviews.

Consistent with the principles for achieving compliance provided in the Privacy Rule, OCR will seek the cooperation of covered entities and may provide technical assistance to help them comply voluntarily with the Privacy Rule. Covered entities that fail to comply voluntarily with the standards may be subject to civil money penalties. In addition, certain violations of the Privacy Rule may be subject to criminal prosecution. These penalty provisions are explained below.

Civil Money Penalties

OCR may impose a penalty on a covered entity for a failure to comply with a requirement of the Privacy Rule. Penalties will vary significantly depending on factors such as the date of the violation, whether the covered entity knew or should have known of the failure to comply, or whether the covered entity's failure to comply was due to willful neglect. Penalties may not exceed a calendar year cap for multiple violations of the same requirement.

Penalty Amount	$100 to $50,000 or more per violation
Calendar Year Cap	$1,500,000

A penalty will not be imposed for violations in certain circumstances, such as if:

- **the failure to comply was not due to willful neglect, and was corrected during a 30-day period after the entity knew or should have known the failure to comply had occurred (unless the period is extended at the discretion of OCR)**; or

- the Department of Justice has imposed a criminal penalty for the failure to comply (see below).

In addition, OCR may choose to reduce a penalty if the failure to comply was due to reasonable cause and the penalty would be excessive given the nature and extent of the noncompliance.

Before OCR imposes a penalty, it will notify the covered entity and provide the covered entity with an opportunity to provide written evidence of those circumstances that would reduce or bar a penalty. This evidence must be submitted to OCR within 30 days of receipt of the notice. In addition, if OCR states that it intends to impose a penalty, a covered entity has the right to request an administrative hearing to appeal the proposed penalty.

Criminal Penalties

A person who knowingly obtains or discloses individually identifiable health information in violation of the Privacy Rule may face a criminal penalty of up to $50,000 and up to one-year imprisonment. The criminal penalties increase to $100,000 and up to five years imprisonment if the wrongful conduct involves false pretenses, and to $250,000 and up to 10 years imprisonment if the wrongful conduct involves the intent to sell, transfer, or use identifiable health information for commercial advantage, personal gain or malicious harm. The Department of Justice is responsible for criminal prosecutions under the Privacy Rule.

B. **Specific State Laws**.

- Medical

  Effective September 2, 2012, the Texas Medical Records Privacy Act provides you with additional protections regarding your rights to:

- set limits on who gets to see your personal information
- be told how your medical provider will use your personal information
- be told to whom your personal health information has been given
- review and correct information in your medical records
- file a complaint with state agencies that regulate medical providers and with the Texas Attorney General

For more information about the Texas Medical Records Privacy Act see the Texas Health and Safety Code - Chapter 181 Medical Records Privacy.

- Insurance

- Counseling

Texas Board of Examiners of Professional Counselors - Code of Ethics

§ 681.45 Confidentiality and Required Reporting

(a) Communication between a licensee and client and the client's records, however created or stored, are confidential under the provisions of the Texas Health and Safety Code, Chapter 611 and other state or federal statutes or rules where such statutes or rules apply to a licensee's practice.

(b) A licensee shall not disclose any communication, record, or identity of a client except as provided in Texas Health and Safety Co0de, Chapter 611 or other state or federal statutes or rules.

- HIV

81.103. CONFIDENTIALITY; CRIMINAL PENALTY.

(a) A test result is confidential. A person that possesses or has knowledge of a test result may not release or disclose the test result or allow the test result to become known except as provided by this section.

(b) A test result may be released to:
(1) the department under this chapter;
(2) a local health authority if reporting is required under this chapter;
(3) the Centers for Disease Control of the United States Public Health

Service if reporting is required by federal law or regulation;

(4) the physician or other person authorized by law who ordered the test;

(5) a physician, nurse, or other health care personnel who have a legitimate need to know the test result in order to provide for their protection and to provide for the patient's health and welfare;

(6) the person tested or a person legally authorized to consent to the test on the person's behalf;

(7) the spouse of the person tested if the person tests positive for AIDS or HIV infection, antibodies to HIV, or infection with any other probable causative agent of AIDS;

(8) a person authorized to receive test results under Article 21.31, Code of Criminal Procedure, concerning a person who is tested as required or authorized under that article; and

(9) a person exposed to HIV infection as provided by Section 81.050.

C. Proper HIV Release Procedures.

ADVANCING EFFECTIVE COMMUNICATION, CULTURAL COMPETENCE, AND PATIENT AND FAMILY-CENTERED CARE FOR THE LESBIAN, GAY, BISEXUAL AND TRANSGENDER (LGBT) COMMUNITY

BY

THE JOINT COMMISSION
www.jointcommission.org/lgbt/

The Joint Commission

Founded in 1951, The Joint Commission seeks to continuously improve health care for the public, in collaboration with other stakeholders, by evaluating health care organizations and inspiring them to excel in providing safe and effective care of the highest quality and value. The Joint Commission evaluates and accredits more than 20,000 health care organizations and programs in the United States. An independent, not-for-profit organization, The Joint Commission is the nation's oldest and largest standards-setting and accrediting body in health care. To earn and maintain The Joint Commission's Gold Seal of Approval, an organization must undergo an on-site survey by a Joint Commission survey team at least every three years. (Laboratories must br surveyed every two years.)

Introduction

Like many other populations identified as at-risk or disadvantaged, research has demonstrated that LGBT individuals experience disparities not only in the prevalence of certain physical and mental health concerns, but also in care due to a variety of factors, including experiences of stigma, lack of awareness, and insensitivity to their unique needs. These disparities include the following:

- Less access to insurance and health care services, including preventative care (such as cancer screenings)
- Lower overall health status
- Higher rates of smoking, alcohol, and substance abuse
- Higher risk for mental heal illnesses, such as anxiety and depression
- Higher rates of sexually transmitted diseases, including HIV infection
- Increased incidence of some cancers

In addition, LGBT patients face other barriers to equitable care, such as refusals of care, delayed or substandard care, mistreatment, inequitable policies and practices, little or no inclusion in health outreach or education, and inappropriate restrictions or limits on visitation. These inequalities may be even more pronounced for LGBT people from racial/ethnic minorities or due to other characteristics such as education level, income, geographic location, language, immigration status, and cultural beliefs. Experiences of discrimination and mistreatment have, in many cases, contributed to a long-standing distrust of the health care system by many in the LGBT community and have affected their health in profound ways.

Leadership

***Leadership**: Leaders must clearly articulate a hospital's commitment to meet the unique needs of its patients, and establish an organizational culture that value effective communication, cultural competence, and patient- and family-centered care.*

- Integrate unique LGBT patient needs into new policies or modify existing policies.
- Demonstrate ongoing leadership commitment to inclusivity for LGBT patients and families.

Provision of Care, Treatment, and Services

Provision of care, treatment, and services: *The health care organization, in striving to meet the individual needs of each patient, must embed the concepts of effective communication, cultural competence, and patient- and family-centered care into the core activities of its care delivery system. The needs of the lesbian, gay, bisexual, and transgender (LGBT) community as a whole, and the needs of each subpopulation (lesbians, gay men, bisexual men and women, and transgender people), must be considered in the provision of care, treatment and services.*

- Create a welcoming environment that is inclusive of LGBT patients.
- Avoid assumptions about sexual orientation and gender identity.
- Facilitate disclosure of sexual orientation and gender identity but be aware that this disclosure or "coming out" is an individual process.
- Provide information and guidance for the specific health concerns facing lesbian and bisexual women, gay and bisexual men, and transgender people.

Workforce

Workforce: *The hospital and its staff, including the medical staff, must commit to meeting the needs of the diverse patients.*

- Ensure equitable treatment and inclusion for LGBT employees.
- Demonstrate commitment to LGBT equity and inclusion in recruitment and hiring.
- Educate staff on LGBT employee concerns.
- Incorporate LGBT patient care information in new or existing employee and staff training.
- Support staff development initiatives to maximize equity and inclusion for LGBT employees.

Data Collection and Use

***Data Collection and Use**: The health care organization must define what type of sexual orientation and gender identity data to collect, how to efficiently collect and protect these data, and how to use these data for service planning, quality improvement, and resource allocation.*

- Identify opportunities to collect LGBT relevant data and information during the health care encounter.

- Use available population-level data to help determine the needs of the surrounding community.

Patient, Family, and Community Engagement

***Patient, Family, and Community Engagements**: The health care organization must be prepared to respond to the changing needs and demographics of the patients, families, and community served. The health care organization can identify the need for new or modified services by being involved and engaged with patients, families, and the community.*

- Collect feedback from LGBT patients and families and the surrounding LGBT community.

- Ensure that communications and community outreach activities reflect a commitment to the LGBT community.

- Offer educational opportunities that address LGBT health issues.

LGBT Youth Education

Many LGBT youth live with bullying as a part of their daily lives at school. Bullying puts their mental health and education at risk, not to mention their physical well-being. Gay, lesbian, and bisexual youth are up to four times more likely to attempt suicide than their heterosexual counterparts. By educating school staff and students, a health care organization can act as a leader and a catalyst in creating a welcoming environment at school.

9. **THE FUTURE OF MARRIAGE EQUALITY**.

Lawrence v. Texas
Dissenting Opinion
June 26, 2003

. . . At the end of its opinion – after having laid waste the foundations of our rational-basis jurisprudence – the Court says that the present case "does not involve whether the government must give formal recognition to any relationship that homosexual persons seek to enter." *Ante*, at 17. Do not believe it. More illuminating that this bald, unreasoned disclaimer is the progression of thought displayed by an earlier passage in the Court's opinion, which notes the constitutional protections afforded to "personal decisions relating to marriage, procreation, contraception, family relationships, child rearing, and education," and then declares that "[p]ersons in a homosexual relationship may seek autonomy for these purposes, just as heterosexual persons do." *Ante*, at 13 (emphasis added). Today's opinion dismantles the structure of constitutional law that has permitted a distinction to be made between heterosexual and homosexual unions, insofar as formal recognition in marriage is concerned. If moral disapprobation of homosexual conduct is "no legitimate state interest" for purposes of proscribing that conduct, *ante*, at 18; and if, as the Court coos (casting aside all pretense of neutrality), "[w]hen sexuality finds overt expression in intimate conduct with another person, the conduct can be but one element in a personal bond that is more enduring," *ante*, at 6; what justification could there possibly be for denying the benefits of marriage to homosexual couples exercising "[t]he liberty protected by the Constitution," *ibid.*? Surely not the encouragement of procreation, since the sterile and the elderly are allowed to marry. This case "does not involve" the issue of homosexual marriage only if one entertains the belief that principle and logic have nothing to do with the decisions of this Court. Many will hope that, as the Court comfortingly assures us, this is so. . .

Justice Scalia