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NATIONAL CENTER FOR LESBIAN RIGHTS

## *California Public Benefits Issues for Lesbian, Gay, Bisexual, and Transgender Clients: A Guide for Attorneys and Advocates*

### **Disclaimer:**

This document provides a summary and discussion of relevant California and federal law for attorneys and advocates who are assisting LGBT clients with public benefits issues in California. Our goal is to familiarize attorneys and advocates who already understand public benefits law with the unique legal issues that may arise for LGBT people seeking or receiving public benefits. Because every case is different and because laws affecting LGBT people are often unsettled and may be subject to differing interpretations by different courts, you should not rely on the information in this resource without conducting independent legal research. This document is not intended to provide and should not be relied on for legal advice about a specific case. For technical assistance with specific cases, contact the National Center for Lesbian Rights.

This guide was written and updated by the National Center for Lesbian Rights and Legal Services of Northern California, with special thanks to Ann Rubinstein.

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## INTRODUCTION

Lesbian, gay, bisexual, and transgender (LGBT) people often face hurdles because of their sexual orientation or gender identity in the already difficult process of accessing public benefits. Many benefits depend on who is considered part of the family. Because LGBT couples and their children may not be fully recognized as families under the law, this can affect their eligibility for many benefits. Some of the legal issues for LGBT people are similar to those for unmarried different-sex couples, but LGBT people also face unique issues. For example, married same-sex couples may be treated as married for some programs but not for others. Additionally, even where the law should allow LGBT people and their families to receive benefits, they may be denied because of discrimination or misunderstanding by benefits workers.

Transgender people often face additional obstacles when seeking public benefits.<sup>1</sup> California law allows a person to legally change their gender. However, some transgender people who were born in other states may not be able to amend their birth certificate, which may lead to additional scrutiny and questioning by benefits agencies. Transgender people may face difficulties in obtaining coverage for necessary healthcare services related to gender transition or other gender-specific healthcare needs. Transgender people may also face difficulties in obtaining coverage for other necessary care due to misunderstandings by benefits agencies.

Because public benefits law is extremely complex and varied, this document does not provide step-by-step instructions for applying for various public benefits. Rather, it identifies the unique issues that LGBT people face because of their sexual orientation or gender identity. This guide is intended for legal aid attorneys and advocates who are familiar with public benefits issues generally.

This is a rapidly evolving area of the law. Public benefits law generally is continually changing because of healthcare reform, new regulations, and funding crises. The laws affecting LGBT people are also rapidly changing. This guide is current as of July 2011. Please do not rely on the information in this guide without conducting independent research. For technical assistance with specific cases, please contact the National Center for Lesbian Rights.

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<sup>1</sup> The term “transgender” is used to refer to people whose gender identity does not match their assigned gender at birth.

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I. FAMILY RELATIONSHIPS

A. California Family Law

Eligibility for public benefits often depends on family relationships. Children may be eligible for certain additional benefits through a legally-recognized parent. Income eligibility depends on whose income is counted. Because married couples may receive fewer benefits than two single people in certain programs, it may be less advantageous for a same-sex couple to be recognized as married in some circumstances.

i. *Marriage and domestic partnerships*

Same-sex partners have the rights and responsibilities of marriage under California law if they are registered domestic partners or have legally married in any jurisdiction (including California during the period in which same-sex couples were able to legally marry in this state). Many same-sex couples are both married and registered as domestic partners - in this situation, they should have all the rights and obligations of marriage beginning on the date they entered the earlier union.

Married same-sex couples and registered domestic partners are not currently recognized as married by the federal government. The federal “Defense of Marriage Act” provides that in interpreting federal law, the terms “marriage” and “spouse” only refer to different-sex married couples. 1 U.S.C. § 7. However, this law has been successfully challenged as unconstitutional in several cases. *Gill v. Office of Pers. Mgmt.*, 699 F. Supp. 2d 374 (D. Mass. 2010); *Massachusetts v. U.S. Dept. of Health and Human Servs.*, 698 F. Supp. 2d 234 (D. Mass. 2010); *In re Balas*, 449 B.R. 567 (C.D. Cal. 2011) (holding that DOMA is unconstitutional as applied to prevent a same-sex married couple from filing a joint Chapter 13 bankruptcy petition). On February 23, 2011, the Attorney General announced that the Department of Justice would no longer defend DOMA in these or any of the other pending cases challenging the constitutionality of DOMA, although the federal government will continue to enforce the law until it is overturned or repealed by Congress.<sup>2</sup> For information about the current state of the law and ongoing challenges, please contact the National Center for Lesbian Rights.

➔ *Practice tip:* NCLR believes that the federal DOMA will be overturned or repealed in the foreseeable future. For clients who would be eligible for a benefit but for the

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<sup>2</sup> Statement of the Attorney General on Litigation Involving the Defense of Marriage Act (Feb. 23, 2011), available at <http://www.justice.gov/opa/pr/2011/February/11-ag-222.html>.

federal government's refusal to recognize a marriage between two people of the same-sex, we recommend that advocates file applications now for Social Security, some federal veterans' benefits, or any other benefit that could be retroactively awarded based on the date the application is filed. Filing these applications and appealing any denial will preserve the applicant's ability to receive retroactive benefits if and when DOMA is overturned.

- ➔ *Practice tip.* Although the federal government will not currently recognize a marriage or domestic partnership, registering or marrying may alert the benefits agency that the spouse/partner is a member of the household, living in the unit, or providing financial or in-kind assistance to the individual receiving benefits. This is the same issue that an unmarried different-sex couple would face if the agency learned that the benefits recipient had an unmarried partner.

*Domestic partners.* California provides registered domestic partners with all the rights and responsibilities of marriage under California law. Cal. Fam. Code § 297.5. Domestic partners must be registered with the Secretary of State to receive these rights and responsibilities.<sup>3</sup> County or city domestic partnership registries do not provide any of the state rights of marriage. Civil unions and domestic partnerships from other states that are “substantially equivalent” to California domestic partnerships are treated as registered domestic partnerships under California law. Cal. Fam. Code § 299.2. At a minimum, this includes civil unions from Connecticut, New Jersey, and Vermont; and comprehensive domestic partnerships in the District of Columbia, Nevada, Oregon, and Washington.<sup>4</sup>

*Marriages entered before November 5, 2008.* California fully recognizes all marriages between same-sex couples who legally married in any jurisdiction before November 5, 2008. *Strauss v. Horton*, 46 Cal. 4th 364, 474 (2009); Cal. Fam. Code § 308(b). This includes same-sex couples who married in California between June 16 and November 4, 2008, as well as same-sex couples who legally married in any jurisdiction before November 5, 2008.

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<sup>3</sup> If you are unsure if your client is registered with the state, you can contact the Secretary of State's office for confirmation. In situations where a registration was not properly filed, individuals who had a good faith belief that they registered as domestic partners may have a claim as a putative domestic partner. *In re Domestic Partnership of Ellis*, 162 Cal.App.4th 1000 (2008).

<sup>4</sup> This may also include domestic partnerships and other types of relationship recognition from states that provide only some of the rights and obligations of marriage. For more information about relationship recognition for same-sex couples in other states, see NCLR's publication “*Marriage, Domestic Partnerships, and Civil Unions: An Overview of Relationship Recognition for Same-Sex Couples in the United States*,” available at [www.nclrights.org](http://www.nclrights.org).

*Marriages entered on or after November 5, 2008.* Same-sex couples who married outside of California on or after November 5, 2008, are entitled to all the rights, benefits, and obligations of marriage, except for the use of the term “marriage” to describe their relationship. Cal. Fam. Code 308(c).<sup>5</sup>

*Transgender people and marriage.* California law recognizes that a person who has undergone any type of surgery related to gender transition should be legally recognized in their new gender.<sup>6</sup> A person who has undergone any transition-related surgery may petition the court for an order recognizing his or her legal gender and ordering the state to issue a new birth certificate with the corrected gender marker. It is important to note that a transgender person who has undergone transition-related surgery is legally entitled to be recognized in their new gender regardless of whether the person has obtained a court order or a new birth certificate. Nonetheless, obtaining a court order and new birth certificate is generally advisable to avoid problems or confusion. If a person has medically changed his or her gender, California recognizes that change for all purposes, including marriage. For example, if a person who was born female meets the legal standard for having changed his gender to male, he may marry a woman. Transgender people who are married to a person of a different legal sex are recognized as married for federal purposes.

If a transgender person originally married someone of a different sex, and then later went through a gender transition, the fact that the transgender person and his or her spouse are now the same gender has no effect on the validity of the marriage or on the recognition of his or her marriage by the federal government.

**ii. *Parentage recognition***

For purposes of any public benefits that require a legal parent-child relationship, legal parentage should be determined by California law, regardless of whether the program is governed by state or federal law.<sup>7</sup> There is no federal law addressing who is a legal parent,

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<sup>5</sup> For more information, see *SB 54 and Same-Sex Couples Who Marry Outside of California*, available at [www.nclrights.org](http://www.nclrights.org).

<sup>6</sup> Cal. Health & Safety Code § 103425 (a change of gender and name on a birth certificate after surgical treatment for gender transition). For more information on gender change petitions and how to help a transgender client change his or her identity documents, visit [www.transgenderlawcenter.org](http://www.transgenderlawcenter.org).

<sup>7</sup> See, e.g., Off. Legal Counsel, *Whether the Defense of Marriage Act Precludes the Non-Biological Child of a Member of a Vermont Civil Union From Qualifying For Child’s Insurance Benefits Under the Social Security Act*, 2007 WL 5254330 (Oct. 16, 2007), available at <http://www.usdoj.gov/olc/2007/saadomaopinion10-16-07final.pdf> (child may receive derivative benefits through biological mother’s civil union spouse because she was a legal parent under Vermont law).

and federal laws refer to the law of the state where the parent and child reside. The federal Defense of Marriage Act does not affect the federal government's recognition of legal parentage of both same-sex parents.

There are numerous ways that a person can be a parent under California law. A "natural" parent is a term of art under California law. It is not merely a synonym for "biological" parent – rather, it includes anyone who is a legal parent under California's Uniform Parentage Act. A "natural" parent includes a biological parent, a person whom a court has determined is a parent, or a presumed parent under the Uniform Parentage Act where the presumption is not rebutted.<sup>8</sup>

We will refer to a natural or adoptive parent as a legal parent throughout this document. A legal parent under California law includes:

- Biological/birth parent
- Adoptive parent
- Any person with a court order recognizing his or her parentage<sup>9</sup> or any man who has signed a properly executed voluntary declaration of paternity that has not been set aside.
- A presumed parent if the presumption is not rebutted. A presumed parent includes:
  - A legal parent's registered domestic partner or spouse if the child was born during the registered domestic partnership/marriage or within 300 days after termination or legal separation;<sup>10</sup>
  - A legal parent's registered domestic partner or spouse where a) the child was born before the registered domestic partnership and b) the RDP/spouse is on the birth certificate, the RDP/spouse made a written promise to support the child, or a court has ordered the RDP/spouse to support the child;<sup>11</sup>

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<sup>8</sup> Cal. Fam. Code § 7610 ("natural" parentage may be established through birth, adoption, or the provisions of the Uniform Parentage Act). *See also In re Nicholas H.*, 28 Cal.4th 56 (2002) (a biological relationship is not required to establish parentage under the Uniform Parentage Act).

<sup>9</sup> Cal. Fam. Code § 7636 ("judgment or order of the court determining the existence or nonexistence of the parent and child relationship is determinative for all purposes").

<sup>10</sup> Cal. Fam. Code § 7611(a). *See also* 7613(a). All provisions that relate to "marriage," "husband," "wife," or "spouse" apply equally to domestic partners. Cal. Fam. Code § 297.5 (providing registered domestic partners are subject to the same rights, protections, and benefits as spouses under all sources of law).

<sup>11</sup> Cal. Fam. Code § 7611(c).

- A person who has lived with the child and has held themselves out as a parent, regardless of the parents' gender, or marital/domestic partner status.<sup>12</sup>
- B. New IRS Filing Requirements for Domestic Partners and Same-Sex Married Couples**

Recent changes in IRS policy regarding the incomes of California registered domestic partners may render some individuals suddenly ineligible for certain benefits programs. Some public benefits programs condition eligibility upon a participant's federal Adjusted Gross Income (AGI). Because of changes in IRS policy, registered domestic partners (RDPs) and same-sex married couples in California are required to calculate their federal AGI differently beginning with the 2010 tax year.

Since 2007, registered domestic partners (RDPs) have been required to file California income tax returns as married couples. Same-sex married couples have filed California income tax returns as married since 2008. However, the IRS has not previously acknowledged the community property of same-sex couples in registered domestic partnerships or marriages for federal tax purposes, and has required individuals in these relationships to file individually listing only their own earned income.

In May of 2010, the IRS issued a Chief Counsel Advisory (CCA) and a Private Letter Ruling (PLR) stating that the IRS would acknowledge the community property treatment of RDPs' earned income. Although RDPs and same-sex married couples are still required to file federal tax returns as single individuals, the IRS now requires that RDPs and same-sex married couples in California report one-half of *all* community income, regardless of whether it was actually earned by the individual filing the return. I.R.S. CCA 201021050 (May 28, 2010); I.R.S. Priv. Ltr. Rul. 201021048 (May 28, 2010).<sup>13</sup> Both IRS rulings explicitly address only registered domestic partners. But the IRS 2010 income tax return instructions say that both domestic partners in California, Nevada, and Washington, and same-sex married couples in California must follow these rules.<sup>14</sup>

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<sup>12</sup> Cal. Fam. Code § 7611(d). Although some provisions in the Uniform Parentage Act use the term "father," it is clear that these provisions also apply to women. *Elisa B. v. Superior Court*, 37 Cal.4th 108(2005) (paternity provisions may be applied to recognize that a child can have two mothers). Cal. Fam. Code § 7650(a) (provisions of the UPA applicable to the father and child relationship apply to determinations of the mother and child relationship insofar as practicable).

<sup>13</sup> The rulings also allow RDPs to take half of the credit for taxes paid on earned income. Additionally, transfers between RDPs will not trigger federal gift tax liability.

<sup>14</sup> See IRS, 1040 Instructions 2010, p. 19, available at <http://www.irs.gov/pub/irs-pdf/i1040gi.pdf>; IRS, 1040EZ Instruction 2010, p. 10, available at <http://www.irs.gov/pub/irs-pdf/i1040ez.pdf>.

**Illustration:** Alma and Betty are RDPs. In 2010, Alma earned \$10,000 and Betty earned \$20,000. Alma and Betty must file as individuals and must each report half of the community's income, \$15,000, to the IRS on their tax returns.

These IRS rulings will change the federal AGI for RDPs and same-sex married couples where one partner earns more income than the other. This may be beneficial for some public benefits recipients who are in registered domestic partnerships or married to a person of the same sex. But others will have an increase in their AGI, which may suddenly make them ineligible for some benefits. For example, the AIDS Drug Assistance Program (ADAP) requires eligibility to be measured based the recipient's federal AGI. For some people, even a slight increase in federal income could cost them their ability to receive life-saving medication, or at a minimum decrease the amount that ADAP pays towards the drug costs.

- ➔ *Practice Tip.* If your client is potentially facing ineligibility for benefits based on their 2010 income tax returns, please contact the National Center for Lesbian Rights.
- ➔ *Practice Tip.* People receiving certain benefits may wish to consider their relative earnings before entering into a registered domestic partnership or marriage. A premarital or pre-registration agreement treating their income as separate property may be needed to prevent ineligibility for benefits. Benefits recipients who are already in a registered domestic partnership or marriage who risk losing life-saving benefits as a result of the IRS rulings may be able to enter into post-registration or nuptial agreements, although these agreements must meet strict requirements to be valid. These agreements can help prevent future earnings from being treated as community property, but there is no legal way to alter the nature of the income earned in 2010. If entering a post-registration or nuptial agreement, it is especially helpful to do so as early as possible in the year to reduce the amount of community property earned during the tax year. Please contact the National Center for Lesbian Rights for more information if you have a client facing this situation.
- ➔ *Practice Tip.* Registered domestic partners and same-sex married couples have the option of amending federal income tax filings as far back as 2007 to split their community property income. Couples with disparate incomes may be able to receive a tax refund by amending their previous tax returns and splitting their incomes. If your client received need-based benefits in those years, however, you should consider whether amendment could retroactively affect the client's eligibility by raising their federal AGI, and whether they may be required to return benefits they previously received if they amend their tax returns.

## II. SOCIAL SECURITY

The Social Security Administration (SSA) administers a number of benefits programs that provide benefits for people with disabilities who are unable to work, seniors, survivors of deceased workers and, in some cases, family members of seniors or people with disabilities.

The SSA currently does not recognize marriages entered by two people of the same sex because of the federal Defense of Marriage Act, or DOMA, (see section I-A above). However, a federal court has held that this law is unconstitutional as applied to same-sex married couples in Massachusetts, including specific claims that same-sex spouses should be recognized by the Social Security Administration. *Gill v. Office of Pers. Mgmt.*, 699 F. Supp. 2d 374 (D. Mass. 2010); *Massachusetts v. U.S. Dept. of Health and Human Servs.*, 698 F. Supp. 2d 234 (D. Mass. 2010). On February 23, 2011, the Attorney General announced that the Department of Justice would no longer defend DOMA in these or any of the other pending cases challenging the constitutionality of DOMA, although the federal government will continue to enforce the law until it is overturned or repealed by Congress.<sup>15</sup>

If you have a client who may be eligible for benefits through a same-sex spouse or registered domestic partner, NCLR recommends that you file for benefits and continue to appeal any denial. We believe that DOMA will be overturned, and applying for benefits now will preserve the right to receive retroactive benefits.

The federal DOMA does not affect whether a person is legally recognized as a parent or a child. A child should be eligible for auxiliary benefits through anyone who is recognized as a parent under California law.

### A. Social Security Insurance Spousal Benefits

Social Security Insurance benefits are available to eligible workers who have worked and paid Social Security taxes for a minimum amount of time. This includes Social Security Retirement benefits for older workers and Social Security Disability Insurance benefits for workers with disabilities.<sup>16</sup> The spouses, children, and other family members of eligible workers may also be able to receive derivative benefits under limited circumstances.

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<sup>15</sup> Statement of the Attorney General on Litigation Involving the Defense of Marriage Act (Feb. 23, 2011), available at <http://www.justice.gov/opa/pr/2011/February/11-ag-222.html>.

<sup>16</sup> Supplemental Security Income benefits (SSI) for individuals with disabilities or seniors who do not have enough work history to qualify for Social Security Insurance benefits is a separate needs-based program addressed below in section II-C.

In some circumstances, a spouse can receive “widow(er)’s” or “mother’s or father’s” benefits after a spouse passes away, or “auxiliary” benefits based on his or her spouse’s retirement or disability. 42 U.S.C. § 402. These benefits are, for the most part, only available to spouses over age 62, and will be reduced or eliminated if the spouse is entitled to his or her own Social Security benefits or earns income over the exempt amounts in 20 C.F.R. § 404.430. *See* Social Security Handbook Ch. 3, 4, 18. All surviving spouses, however, regardless of age, income, or other benefits, can be eligible for the one-time lump-sum payment of \$255. 42 U.S.C. § 402(i).

- *Widow(er)’s benefits* are only available to surviving spouses over age 62 (or age 50 with a qualifying disability), in addition to other specific requirements and limitations beyond the scope of this publication. *See* Social Security Handbook Ch. 4.
  - *“Mother’s or father’s” benefits* are available to surviving spouses who have a child under age 16 in common with the deceased. *Id.*
  - *“Auxiliary” benefits* are available to spouses of individuals receiving Social Security Retirement benefits or Social Security Disability Insurance if the spouse is over age 62 or has a child in common with the recipient who is either under age 16 or disabled and receiving child benefits through the other parent. *See* Social Security Handbook Ch. 3.
- ➔ *Practice Tip:* If you have a client who may be eligible for benefits through a same-sex spouse or registered domestic partner who wishes to challenge the SSA’s failure to recognize marriages entered by two people of the same sex, please contact NCLR for assistance.
- ➔ *Practice Tip:* Transgender people who married a person of a different legal sex are recognized as married for federal purposes. If a transgender person originally married someone of a different sex, and then later went through a gender transition, the fact that the transgender person and his or her spouse are now the same gender should have no effect on the recognition of his or her marriage by the federal government. However, Social Security policy currently directs employees to refer spousal claims involving a transgender person to Regional Counsel. Social Security Administration, Program Operations Manual GN 00305.005 (July 28, 2010).<sup>17</sup> Therefore, a transgender

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<sup>17</sup> Available at <https://secure.ssa.gov/poms.nsf/lnx/0200305005>.

spouse may face additional difficulties obtaining benefits even though he or she is eligible.

### **B. Social Security Insurance Child's Benefits**

A child whose parent receives Social Security benefits based on a disability or retirement, or whose parent has passed away, may be eligible for child's insurance benefits. 42 U.S.C. § 402; Social Security Handbook Ch. 3, 4. Who qualifies as a parent and a child for the purposes of these child benefits is determined by the law of the state where the parent lives. *See* 42 U.S.C. § 416(h)(2)(A).

Because same-sex parents can both be legal parents under California law (see section I-A above), children with same-sex parents should be eligible for child insurance benefits through either parent. It is irrelevant whether or not the child's parentage flows from a marriage or domestic partnership between same-sex parents, so long as the child would inherit intestate as a child of the parent under California law.<sup>18</sup>

➔ *Practice Tip:* Advocates should note, however, that internal Social Security policy currently requires all claims for child benefits through a non-biological and non-adoptive parent to be referred to Regional Counsel. Social Security Administration, Programs Operations Manual System, GN 00306.001(C). Therefore, children with same-sex parents may face additional difficulties obtaining benefits even though they are eligible. For a sample brief on eligibility for child's insurance benefits through a non-biological, non-adoptive parent, please contact NCLR.

*Children's benefits through a stepparent.* Children may also be eligible for benefits through a stepparent under certain circumstances. 20 C.F.R. § 404.357. The SSA does not currently recognize marriages between two persons of the same-sex, although as explained above in section II, a federal court in Massachusetts has held that DOMA is unconstitutional as applied to certain Social Security Benefits.

➔ *Practice Tip:* It is important to remember that a same-sex partner is not necessarily just a stepparent (as opposed to a parent) merely because he or she married or

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<sup>18</sup> *See* Off. Legal Counsel, Whether the Defense of Marriage Act Precludes the Non-Biological Child of a Member of a Vermont Civil Union From Qualifying For Child's Insurance Benefits Under the Social Security Act, 2007 WL 5254330 (Oct. 16, 2007), available at <http://www.usdoj.gov/olc/2007/saadomaopinion10-16-07final.pdf>. Recognizing parentage that flows from a marriage between a same-sex couple does not implicate DOMA. DOMA requires that the terms "marriage" and "spouse" mean only different-sex unions when interpreting federal law. Section 415(h)(2)(A) relies solely and directly on state intestacy law.

registered as domestic partners with the other parent after the child was born. When a child has same-sex parents, a non-biological parent is a legal parent if he or she lived with the child and held the child out as his or her own, or if there is an adoption or parentage judgment (see section I-A above). In these circumstances, child benefits should be sought based on legal parentage.

- ➔ *Practice Tip:* Transgender people who married a person of a different legal sex are recognized as married for federal purposes. If a transgender person originally married someone of a different sex, and then later went through a gender transition, the fact that the transgender person and his or her spouse are now the same gender should have no effect on the recognition of his or her marriage by the federal government.
- ➔ *Practice Tip:* If you have a client who would be eligible for stepchild benefits but for the SSA's failure to recognize marriages entered by two people of the same sex, NCLR recommends that you file for benefits and continue to appeal any denial. We believe that DOMA will be overturned, and applying for benefits now will preserve the right to receive retroactive benefits. Please contact NCLR for assistance.

*Children's benefits through a grandparent.* Under very limited circumstances, a child may receive benefits based on the death, disability, or retirement of a grandparent or step-grandparent. 42 U.S.C. § 416(e). The determination of a grandparent relationship should also be made under California law.

*Surviving parents' benefits:* In very limited circumstances, a surviving parent may be entitled to benefits when his or her child passes away – these benefits are limited to parents over age 62 who were dependent on a child who has sufficient work history to be insured through Social Security, among other specific requirements. 42 U.S.C. § 402(h). Any legal parent under California law (see section I-A, above) who meets these requirements may be eligible for these benefits.

### **C. Supplemental Security Income Benefits**

Individuals who are over age 65 or have a disability and who do not have enough work history to be insured through Social Security may be eligible to receive Supplemental Security Income (SSI) if they are very low-income and have few assets. 42 U.S.C. § 1382, *et seq.*

Unlike other Social Security benefits, SSI benefits are needs-based, and thus are reduced when the recipient receives financial or in-kind support from others. *See Social Security*

Handbook Ch. 21; 42 U.S.C. § 1382a(a); 20 C.F.R. § 416.1102. Support received from a spouse does not reduce benefits, but a spouse's income and resources are factored into the maximum amount of income and resources an SSI recipient can have in order to be eligible.

Support provided by an unmarried partner (or any person other than a spouse) affects the amount of benefits that an SSI recipient may receive. Therefore, even though the Social Security Administration does not currently recognize marriages between same-sex couples,<sup>19</sup> the value of food or housing that the recipient's same-sex spouse or partner provides may reduce the recipient's SSI benefits.

- ➔ *Practice Tip.* Any SSI recipient or person near 65 or with potentially disabling conditions, and without sufficient work history, should be cautious before registering a domestic partnership or marrying. Registering or marrying may alert the SSA to the possibility that the recipient is receiving support and maintenance from another person.

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<sup>19</sup> See Social Security Administration, Title II Regional Chief Counsel Precedents 01605.035 (Dec. 20, 2010) (SSA will not recognize a marriage between two people of the same-sex for purposes of deeming income and resources in the SSI program), available at <https://secure.ssa.gov/apps10/poms.nsf/lnx/1501605035>.

### III. HEALTH INSURANCE

#### A. Medi-Cal

Medi-Cal is California's Medicaid program. It is comprehensive health insurance for people who are 1) low-income and 2) a child, pregnant, a parent or relative caretaker of a child, disabled, or elderly. People on CalWORKs and SSI automatically get Medi-Cal.

Medicaid is a federal program, and most Medi-Cal programs are controlled by federal law and funded at a rate of 50% federal and 50% state. There are a few small programs that are 100% state money – for those programs state law may be the only controlling law. Counties administer many aspects of Medi-Cal programs. Medi-Cal does not currently recognize registered domestic partners or marriages entered into by two people of the same-sex, except for programs that are funded by 100% state money. However, the Center for Medicare & Medicaid Services issued a letter to State Medicaid Directors advising them that states may provide protections to same-sex spouses or domestic partners of long-term care Medicaid beneficiaries from asset transfer penalties, estate recovery, and liens.<sup>20</sup> This letter explains that states may provide protections to same-sex spouses or domestic partners by applying the undue hardship exceptions for asset transfer and estate recovery, and exercising their discretion not to pursue liens. It is not yet known when and if this guidance will result in a change in treatment for same-sex married spouses or registered domestic partners in California.

Under the recent federal health reform, the Affordable Care Act, Medicaid will be expanded to include all adults under 138% of poverty beginning in 2014 or earlier if California chooses to adopt the changes earlier. Once California adopts these Medicaid changes, the recognition of family relationships will be much less relevant to eligibility for Medi-Cal, as all low-income adults will be eligible if they meet income requirements.

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<sup>20</sup> Department of Health & Human Services, Center for Medicare & Medicaid Services, Letter to State Medicaid Directors RE: Same Sex Partners and Medicaid Liens, Transfers of Assets, and Estate Recovery (June 10, 2011), available at <https://www.cms.gov/smdl/downloads/SMD11-006.pdf>

i. *Definitions of family relationships*

Medi-Cal definitions of family relationships are particularly relevant to LGBT people receiving or applying for Medi-Cal. Eligibility can turn on whether or not the applicant's child or a spouse is recognized by the program.

- Medi-Cal defines marriage as the state of being married. 22 CCR § 50057.<sup>21</sup>
- The Medi-Cal program defines a parent as “the natural or adoptive parent of a child.” 22 CCR § 50068. Under this definition any biological or adoptive parent is considered a parent. In addition, a “natural” parent includes anyone who is a parent under California’s Uniform Parentage Act, as explained above in section I-A.
- “Unmarried parents” are parents who are not married to each other and are living together with their common child. 22 CCR § 50069.
- A child is anyone under 21, with certain exceptions for emancipated minors and others. Medi-Cal counts a fetus as a child, solely for the purposes of determining eligibility for the mother. 22 CCR § 50030.
- Medi-Cal looks at family members living in the home to determine eligibility. Family members in the home mean any of the following actually living in the home together: “(1) A child or sibling children. (2) The parents or relative caretakers, married or unmarried, of the sibling children. (3) The stepparents of the sibling children. (4) The separate children of either unmarried parent or of the parent or stepparent. (b) If there are no children, family member means a single person or a married couple.” 22 CCR § 50041. If children, parents, or spouses are living in separate homes they are not looked at to determine eligibility.
- Disabled Adult Children who qualify for Social Security Disabled Adult Child (DAC) Benefits get full-scope no-cost Medi-Cal. 42 U.S.C. § 402(d). DAC benefits come through a parent as defined by Social Security.

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<sup>21</sup> This Medi-Cal regulation cites California Civil Code Section 4100 et seq., Chapter 2, Division 4, Part 5, Title 1 as the definition of marriage. This section has been renumbered as Family Code § 300, but the citation has not yet been updated in the Medi-Cal regulation.

ii. *All County Welfare Directors Letters addressing same-sex couples*

In 2009 the Department of Health Care Services (DHCS), which administers Medi-Cal for the State of California, released two All County Welfare Directors Letters (ACWDL) providing guidance on how counties are to determine Medi-Cal eligibility for registered domestic partners (RDPs) and same sex married couples. ACWDL 09-03, 09-04 (Feb. 9, 2009).<sup>22</sup> The letters explain that most Medi-Cal programs are funded by both the state and federal government, and for those programs RDPs and spouses of the same-sex will not be recognized as married.<sup>23</sup> RDPs and spouses with mutual children are to be treated as unmarried parents. A few programs are funded only by the state. For those programs, RDPs and same-sex spouses must be treated the same as different-sex spouses under Medi-Cal.

➔ *Practice Tip.* In ACWDL 09-03, DHCS defines parentage more narrowly than required by the California Code of Regulations, which provides that “[p]arent means the natural or adoptive parent of a child” for purposes of Medi-Cal. 22 CCR § 50068.<sup>24</sup> ACWDLs are not legally binding when they are contrary to state or federal law. Thus if you have a client who would benefit from the wider definition of parentage in the CCR, rather than the narrow definition in the ACWDL, you should advocate for the wider definition in the regulations, which includes anyone who is a legal parent under California law (see section I-A above).

iii. *Eligibility*

To qualify for Medi-Cal currently beneficiaries must be both categorically eligible and financially eligible.

As explained above on page 14, the Center for Medicare & Medicaid Services issued a letter to State Medicaid Directors advising them that states may provide protections to same-sex

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<sup>22</sup> Available at <http://www.dhcs.ca.gov/services/medi-cal/eligibility/Pages/2009ACWDLs.aspx>.

<sup>23</sup> NCLR & LSNC disagree with the basic premise of the letter that RDPs and same-sex spouses are not recognized in partially federally-funded Medi-Cal programs. Because California law requires that same-sex married couples and RDPs have the same rights as different-sex married couples, the state should be providing benefits to same-sex spouses and RDPs for every program using its own funds.

<sup>24</sup> Advocates requested that DHCS change the way they discuss parentage in the letter to follow the Medi-Cal definition in 22 CCR § 50068. The State has yet to make the changes that advocates requested.

spouses or domestic partners of long-term care Medicaid beneficiaries from asset transfer penalties, estate recovery, and liens.<sup>25</sup>

*Categorical Eligibility:*

When determining whether a household is categorically eligible, all family members living in the home are considered, although they may not all be determined eligible. 22 CCR § 50373(a)(3). Only children, pregnant women, parents or relative caretakers of children,<sup>26</sup> and the disabled or elderly are categorically eligible. In general one spouse's eligibility will not make the other spouse eligible. For example, if someone is eligible for Medi-Cal because they are over 65 or disabled, their spouse will not be eligible unless they are also over 65 or disabled.

Both parents of a child can be eligible through the child regardless of whether they are married. 22 CCR § 50373; the same would apply to the adult relative caretaker couple. For most Medi-Cal programs, stepparents who do not have their own eligible children are not themselves eligible, unless they are qualified as a caretaker relative. Another exception to this rule is the 1931(b) program, which allows stepparents to be eligible if they choose even if they do not have their own children. Medi-Cal Eligibility Procedures Manual Art. 5 p. 5S-5.

*Financial Eligibility:*

*Resources:* Most Medi-Cal programs only allow beneficiaries to have a certain amount of resources. Under most programs, for a single person the resource limit is \$2,000, and for a married couple it is \$3,000. 22 CCR § 50420. Under this rule, it can be more beneficial for a couple to be unmarried. However percentage of poverty programs for children and pregnant women do not have resource limits. In addition, the limits for the 1931(b) program are slightly different than other programs.

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<sup>25</sup> Department of Health & Human Services, Center for Medicare & Medicaid Services, Letter to State Medicaid Directors RE: Same Sex Partners and Medicaid Liens, Transfers of Assets, and Estate Recovery (June 10, 2011), available at <https://www.cms.gov/smdl/downloads/SMD11-006.pdf>

<sup>26</sup> Relatives who are within the degree of relatedness to be eligible for CalWORKs are eligible to receive Medi-Cal for themselves, when they are caretakers of minor children. 42 U.S.C. § 1396d(a)(ii); 42 C.F.R. §§ 435.301(b)(2)(ii), 435.310; CMS, State Medicaid Manual § 3612.B. See *Clemens v. Harvey*, No. S-93-898, 1994 WL 711230 (Neb., Dec. 23, 1994) (administrative elimination of medically needy coverage for caretaker relatives invalid under state separation of powers doctrine).

For programs that have a resource limit, some property is not counted towards the limit. The most notable exception is property that is used as the primary residence, and a car. 22 CCR § 50425.

*Transfer of resources:* The rules regarding transfers of assets are very complex and most often affect people in Long-Term Care Medi-Cal. Generally, property cannot be transferred in order to become eligible for Medi-Cal, and there is a look back period for transfers for people newly applying to Long-Term Care Medi-Cal.<sup>27</sup> Married couples can transfer assets without disqualification if they have: “a written transmutation of a married couple’s nonexempt community property into equal shares of separate property through an interspousal agreement.” 22 CCR § 50408 (a)(3)(C). A recipient cannot transfer property for the purpose of becoming eligible for Medi-Cal to anyone other than a spouse. Registered domestic partners and same-sex married couples are not recognized by Medi-Cal (except for state-only programs), which means that they cannot take advantage of this exception.

*Income:* The rules about whose income is counted for Medi-Cal eligibility are complicated and vary by program. When determining income eligibility, Medi-Cal divides households into Medi-Cal Family Budget Units based on parental and marital relationships, 22 CCR § 50373, and income is deemed from one spouse to another and from parent to child. 22 CCR § 50351. Medi-Cal does not recognize domestic partnerships or marriages between same-sex spouses (except for state-only programs), so income should only be deemed based on parent-child relationships.

*Long-Term Care Medi-Cal:* Registered domestic partners and same-sex married couples likely cannot take advantage of spousal impoverishment protections except for state-only Medi-Cal. When one spouse goes into Long-Term Care and qualifies for Medi-Cal there are a variety of spousal impoverishment laws to ensure that the other spouse has enough income and property for his or her own support. 22 CCR § 50420.5; 22 CCR § 50563; ACWDL 90-89 (Oct. 9, 1990). There are specific procedures regarding community property. ACWDL 88-31 (May 2, 1988); ACWDL 88-52 (July 18, 1988). The Community Spouse Resource Allowance as of January 1, 2008 is \$104,400, the community spouse can also keep all income they earn separately and has a minimum maintenance need level of \$2,610. As explained above on page 14, the Center for Medicare & Medicaid Services has issued a letter to State Medicaid Directors advising them that states may provide protections to same-sex spouses or domestic partners of long-term care Medicaid beneficiaries from asset transfer penalties, estate

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<sup>27</sup> However, transfer of property does not result in ineligibility when adequate consideration is received, so property that is bought or sold for an adequate price does not trigger transfer rules, although the money the recipient receives may put him or her over the resource limit.

recovery, and liens. However, these protections may not be available to same-sex spouses or domestic partners until further action by the state of California.

*Estate Recovery:* The California Department of Health Care Services (DHCS) can seek reimbursement from the estate of a deceased Medi-Cal beneficiary for the amount spent by Medi-Cal on the deceased's health care after that person turned 55. ACWDL 02-35 (June 18, 2002). They can only collect up to the total amount in the deceased's estate. The most common target of estate recovery is the deceased's home because the home a beneficiary lives in is exempt from Medi-Cal resource limits and may be the only asset the recipient has not spent down to become eligible. 22 CCR § 50425. DHCS may not make an estate recovery while a spouse, child or disabled adult child is still alive. *Id.* An RDP or same-sex spouse living in the home would not qualify for this exception because it is a federal rule applying to spouses, but in practice, DHCS is not seeking reimbursement from a home occupied by a surviving same-sex spouse or partner.

**iv. *Health reform changes***

The federal health reform bill, passed in 2010, makes significant changes to the Medicaid program. Currently, Medi-Cal is only available to low-income children and low-income adults who are pregnant, a parent (or a stepparent in some circumstances), disabled, or elderly. Under health reform, Medi-Cal will expand to include all able-bodied adults with income up to 138% of the federal poverty level, and assets will not be considered. Patient Protection and Affordable Care Act, Pub L. No. 111-148 (codified as amended in sections of 42 U.S.C.).

Under health reform, Medi-Cal eligibility will not depend as heavily on family relationships because low-income adults will be eligible for Medi-Cal, regardless of whether they have children or stepchildren. Therefore, Medi-Cal's refusal to recognize RDPs and spouses of the same-sex will have less of an impact on LGBT people and their families. However, even under health reform, the old categories of Medi-Cal eligibility may continue to exist, as there will be a difference in federal matching funds depending on whether an individual is eligible under some old rules or under the new rules. 42 U.S.C. §§ 1396 *et seq.* Furthermore, whether an individual is eligible under the old rules or under the new rules may determine what Medi-Cal benefit packages they are eligible for. *Id.* In those eligibility determinations marital and stepparent status will still matter for categorical and financial eligibility.

Medicaid expansion under the Affordable Care Act will go into effect in 2014. States have the option of enacting Medicaid expansion earlier. As yet it is unclear if California will expand Medi-Cal before 2014.

**B. Medicare**

Medicare is a federal health insurance program for individuals who have worked and paid taxes for ten years who are over 65 or disabled, regardless of income. People who receive Social Security retirement benefits automatically receive Medicare. People who receive Social Security Disability Insurance (SSDI) benefits receive Medicare after two years, unless they have End Stage Renal Disease, in which case they get Medicare immediately. Medicare covers about 80% of health care costs, although it does not cover some types of health costs at all; for example it does not cover dental health. As people do not receive Medicare unless they are also receiving SSDI or Social Security retirement benefits, the rules and regulations relating to Social Security benefits are relevant to Medicare.

The federal Affordable Care Act will not change eligibility for Medicare.

**i. Definitions of family relationships**

Medicare uses the Social Security definition of spouse, 42 U.S.C. §416(a)-(b), (f), (h). (See section II above for more information on Social Security.) Because this is a federal definition, under Medicare, persons who entered into a marriage with a person of the same sex and Registered Domestic Partners (RDP) are currently treated as single individuals.

- ➔ *Practice Tip:* As explained above in section I-A, there have been federal challenges to the federal government's refusal to recognize the marriages of same-sex couples who legally marry under state law. If you have a client who is married to a person of the same sex or in a registered domestic partnership, and who could be eligible for these benefits if the relationship was recognized by the federal government, please contact NCLR for assistance.
  
- ➔ *Practice Tip:* Transgender people who married a person of a different legal sex are recognized as married for federal purposes. If a transgender person originally married someone of a different sex, and then later went through a gender transition, the fact that the transgender person and his or her spouse are now the same gender should have no effect on the recognition of his or her marriage by the federal government.

Disabled adult children who qualify for Social Security Disabled Adult Child benefits may also get Medicare.

ii. ***Eligibility***

To qualify for Medicare, beneficiaries must be both categorically eligible and quarters eligible.

*Categorical Eligibility*: Each person on Medicare has to be either over 65 or disabled under the Social Security definition of disabled, or have End Stage Renal Disease. A non-disabled spouse under 65 cannot be made eligible through their spouse who is over 65; each person must be categorically eligible themselves to receive Medicare.

*Quarters eligibility*: People who have 40 quarters of work, or 10 years, paying into Medicare receive Medicare when they turn 65 or two years after they begin receiving SSDI. People who do not have enough work quarters but are categorically eligible may qualify if their spouse has sufficient work quarter history.

Individuals who married a person of the same sex or who are registered domestic partners who do not have sufficient work history cannot currently qualify through their spouse/partner. People who are ineligible for Medicare due to insufficient work history may be able to obtain Medicare in other ways: A) If they are eligible for Medi-Cal and over age 65, they can apply for Medi-Cal and Medi-Cal will buy into Medicare for them, which saves Medi-Cal money. B) If they are not eligible for Medi-Cal, they can buy into Medicare themselves. The cost for buying Medicare varies depending on how many quarters of work history the person has, if any. There are also Medicare Savings Programs that will pay for some parts of Medicare for low-income people.

C. **County Indigent Health Programs**

Counties have an obligation to provide a health care safety net for indigent county residents. Cal. Welf. & Inst. Code § 17000. Very low-income people who are not eligible for Medi-Cal or Medicare may be eligible for their county indigent program. People on county General Assistance or General Relief programs are often automatically eligible for the county indigent program. County indigent programs are county programs and get no federal funding, so California state law applies. Registered Domestic Partners (RDP) and same-sex spouses should be considered spouses under the county indigent programs.

Counties either run their own health program, governed by its own regulations, or participate in the County Medical Services Program, which follows the County Medical

Services Program (“CMSP”) regulations.<sup>28</sup> Under all programs, spouses are responsible for each other. Thus, a RDP’s or same-sex spouse’s income will be deemed for purposes of determining income eligibility.

➔ *Practice Tip:* Advocates should check their county’s indigent health program rules to ensure that their county is properly recognizing same-sex relationships. Many counties’ indigent health program regulations have not been updated to reflect the changes in California law recognizing marriage between same-sex couples and RDPs.

**Health Reform Changes:** Health Reform greatly expands the number of people eligible for Medi-Cal. Patient Protection and Affordable Care Act, Pub L. No. 111-148 (codified as amended in sections of 42 U.S.C.). (See section III-A above) This will reduce the number of people eligible for county indigent programs.

#### D. Healthy Families

Healthy Families is California’s Children’s Health Insurance Program (CHIP). Healthy Families generally covers children whose family makes too much to qualify for free Medi-Cal, up to 250% of the federal poverty level. Healthy Families only covers children and charges small premiums and co-payments. Healthy Families is funded by both state and federal money. There has been no specific Healthy Families regulation regarding Registered Domestic Partners (RDPs) or marriages between same-sex couples.

##### i. *Definitions of family relationships*

Healthy Families defines families’ relationships by regulation. A *parent* is a natural or adoptive parent of the child. 10 CCR § 2699.6500(y). Under California law, a “natural” parent is anyone who is a legal parent under the Uniform Parentage Act (see Section I-A) above.

##### ii. *Eligibility*

To qualify for Healthy Families, beneficiaries must be both categorically eligible and income eligible.

Categorical eligibility: This program is only for children, under 19, who are not eligible for free Medi-Cal.

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<sup>28</sup> The CMSP eligibility manual is located at [http://www.cmspcounties.org/pdf\\_files/ELIGMAN063009.pdf](http://www.cmspcounties.org/pdf_files/ELIGMAN063009.pdf).

Resource eligibility: Resources are not considered for the Healthy Families Program.

Income eligibility: The income of the parents is deemed to the child. A stepparent's income is disregarded "in determining income eligibility for a stepchild." 10 CCR § 2699.6607(b).

iii. ***Health reform changes***

Health Reform does not change Healthy Families' eligibility rules. However, Healthy Families may cease to exist in 2020. Children who are currently on this program who are between 100-138% of FPL will be eligible for free Medi-Cal by 2014, or earlier if California adopts health reform changes sooner.

E. **Children's Health Initiative**

Twenty nine California counties offer Children's Health Initiatives (CHI). Healthy Kids is one of the common names for CHIs. Generally, CHI programs are for children who do not qualify for Medi-Cal or Healthy Families due to income or immigration status. These are usually privately funded and do not accept everyone who qualifies. CHI programs are often funded by First 5 grants and thus have more availability for children ages 0-5. Because CHI programs are funded by county or private funds, Registered Domestic Partners (RDPs) and same-sex spouses should be recognized as married under these programs, although marital status is generally not relevant for CHI eligibility. For CHI programs, parents' income will be deemed to the child.

*Health Reform*: Health Reform may lower the number of children eligible for the program; undocumented children will still need the program.

F. **Health Insurance Coverage for Transgender People**

Transgender people may experience difficulties receiving coverage for health care that is necessary for gender transition (transition-related services). Many insurance companies exclude transition-related services from covered services. Medicare specifically excludes coverage for sex reassignment surgery. It is unclear whether all Medicare Part D plans cover long-term hormone therapy. However, Medi-Cal and Medi-Cal HMOs must cover transition-related services, including sex reassignment surgery, if they are medically necessary.<sup>29</sup>

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<sup>29</sup> For more information about Medi-Cal coverage for transgender individuals, see Transgender Law Center, *Medi-Cal and Gender Reassignment Procedures (May 2002)*, available at <http://transgenderlawcenter.org/pdf/MediCal%20Fact%20Sheet.pdf>.

Transgender patients may also be denied services that would be covered for non-transgender individuals. Sometimes insurance companies assert that a certain service is not provided to people of their gender, or an insurance company may assert that something unrelated to transitioning is a transition-related service. This can make it difficult for a transgender person to know what gender to write on their insurance forms. For example, a female-to-male transgender person may have difficulty accessing gynecological care if they are listed as “male” on their insurance forms. For Medicare patients this may be an unavoidable problem as Medicare uses the gender marker in the Social Security records.

- ➔ *Practice Tip:* Transgender people can change their gender marker in their Social Security records after transition-related surgery. Because Medicare may deny needed services because of a transgender person’s SSA gender marker, it will depend on the particular individual’s circumstances whether it is beneficial to change his or her SSA gender marker. For more information about changing SSA gender markers, contact the Transgender Law Center at [www.transgenderlawcenter.org](http://www.transgenderlawcenter.org).

A transgender person may also be considered to have a preexisting condition and not be able to find an individual insurance company that will insure him or her.

- ➔ *Practice Tip:* Coverage of health care for transgender patients is in many aspects an unsettled area of law. If your client is denied care because of gender or because services are seen by the insurance company as transition related you should consider appealing the denial even if it looks like the denial may be allowed under the plan’s Evidence of Coverage.

**Health reform changes:** Under the Affordable Care Act, states will be required to provide state-run high-risk pools from 2010 to 2014 for people who are otherwise unable to obtain insurance. This high-risk pool will insure people with preexisting conditions who have been uninsured for 6 months. 42 U.S.C. §§ 18001 *et seq.* In 2014, the Exchange will replace the high-risk pool as a place for the currently uninsurable to get insurance. *Id.*

- ➔ *Practice Tip:* Benefits packages for health plans that will be part of the Exchange, as well as for expanded Medicaid coverage are yet to be determined in detail. *See* 42 U.S.C. §§ 18021 *et seq.* This creates an opportunity to advocate for coverage of transition-related services and other care that transgender individuals are currently denied.

**IV. INCOME ASSISTANCE AND FINANCIAL PROGRAMS**

**A. General Assistance/General Relief**

California law requires each county to relieve and support its indigent residents if they are not supported by others through General Assistance (GA) or General Relief (GR). These programs are financed solely by the county's general fund, and are the programs of last resort. Section 17000.5 of the Welfare and Institutions Code provides for the base line of relief, but each county's board of supervisors is allowed some flexibility to set grant levels and program requirements for GA/GR. During times of fiscal crisis, counties will often try to scale back the safety net provided by their GA/GR programs.

**i. *Definitions of family relationships***

Each county should treat married couples of the same-sex and registered domestic partners on the same terms as different-sex married couples for the purpose of the GA/GR program. The GA/GR program originates from a California statute (Welfare & Institutions Code § 17000) and is administered by the counties. There is no federal law or statute involved. Advocates should check their county's GA/GR program rules to ensure that their county is properly recognizing same-sex relationships within its GA/GR program. Many counties' GA/GR regulations have not been updated to reflect the changes in California law recognizing marriage between same-sex couples and registered domestic partners.

Most county GA/GR programs penalize married couples. If a couple is married, they often receive a lower combined grant amount than if they were two single individuals. It is advantageous to be considered two single individuals, rather than a married couple.

**ii. *Effect of shared housing***

Most GA/GR programs penalize GA/GR recipients who are in a shared housing situation. If a same-sex couple lives together, the GA/GR grant will likely be reduced by a set percentage due to the assumption that living expenses will be lower with shared housing, even if there is no relationship or familial link. Living with someone else in a roommate situation will often reduce a recipient's GA/GR grant significantly.

**B. CalWORKs**

CalWORKs provides temporary financial assistance to very low-income families with children whose parents are unemployed or underemployed, have a disability, or are absent or

deceased. Benefits are calculated based on who is considered to be in the family Assistance Unit, so whether or not family relationships are legally recognized affects the aid a family receives. Additionally, CalWORKs requires aid adults (parents, stepparents, and aided caretaker relatives) to participate in Welfare to Work activities.

**i. *Definitions of family relationships***

CalWORKs recognizes registered domestic partnerships and marriages between two people of the same-sex. In 2009, the Department of Social Services released an All County Letter (ACL) and an errata<sup>30</sup> addressing the treatment of same-sex married couples and registered domestic partners (RDPs). ACL 09-05 (Feb. 27, 2009); ACL 09-05E (June 24, 2009).<sup>31</sup> These All County Letters state that registered domestic partners and same-sex spouses who married in California between June 16, 2008 and November 4, 2008 will be treated as married. California registered domestic partners have the same rights and responsibilities of civil marriage in California for purposes of CalWORKs. *Id.*

Same-sex couples who validly married at any time should be treated as married for CalWORKs purposes. Since the All County Letters were released, California Family Code § 308 was amended to clarify that all same-sex couples who married out of state before November 5, 2008 are also fully recognized as married under state law. Additionally, Family Code § 308(c) provides same-sex couples who married out of state after November 4, 2008 with all of the same rights and responsibilities of marriage except for the name “marriage.” (See section I-A above.)

**ii. *Eligibility: Calculating the Assistance Unit***

CalWORKs program rules create mandatory and non-mandatory members of the family Assistant Unit (AU) for purposes of determining eligibility and amount of benefits. Mandatory members of the AU must be placed in the AU. A mandatory AU member’s income and assets will be counted to determine eligibility, and the income counted against the grant level (thus reducing benefits), and they will have to participate in Welfare-to-Work activities, unless exempt.

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<sup>30</sup> All County Letters are used by the State to interpret the current status of the law for the counties’ administration. They are not binding legal authority.

<sup>31</sup> Available at: <http://www.dss.cahwnet.gov/lettersnotices/entres/getinfo/acl/2009/09-05.pdf> and <http://www.dss.cahwnet.gov/lettersnotices/entres/getinfo/acl/2009/09-05E.pdf>.

*Mandatory AU Members:* If a spouse or RDP is the “natural or adoptive parent” of a child in the AU, then they are a mandatory AU member. They must be included in the AU and all of their income will be counted to determine eligibility and grant level.

➔ *Practice Tip:* As explained more fully above in section I-A, “natural” parent is a term of art under California law. It includes anyone who is a parent under California’s Uniform Parentage Act and is not limited to only biological parents.

*Non-Mandatory AU Members (Stepparents):* If a spouse or RDP is not the legally-recognized parent of the child in the AU, then they are treated as a stepparent for eligibility and grant amount determinations. Stepparents have the ability to opt in or out of the AU.

According to the Department of Social Services Manual of Policies and Procedures, a “stepparent” means a person who is not the “biological parent,” but is either married to, or the California domestic partner of, the parent of the child. Cal. Dep’t. of Soc. Servs., Manual of Policies and Procedures § 80-301(s)(9) (MPP).<sup>32</sup>

It is important to remember that a same-sex partner is not necessarily just a stepparent (as opposed to a parent) merely because he or she married or registered as domestic partners with the other parent after the child was born. When a child has same-sex parents, a non-biological parent is a legal parent if he or she lived with the child and held the child out as his or her own, or if there is an adoption or parentage judgment (see section I-A above).

➔ *Practice Tip:* If the RDP or same-sex spouse is not a legally-recognized parent to the child, an advocate should consider whether including the RDP or spouse and their income would be beneficial to the family.

➔ *Practice Tip:* If a same-sex couple comes into your office and is contemplating entering an RDP or marriage, you should advise them that formal relationship recognition could negatively affect their CalWORKs and/or Food Stamps grants. An advocate should evaluate the couple’s financial situation and advise on what is most beneficial financially to the couple.

### iii. ***Welfare-to-Work requirements***

Parents receiving CalWORKs must complete welfare-to-work requirements unless they meet an exemption. The most common exemption is if the adult has a disability that significantly

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<sup>32</sup> Available at <http://www.dss.cahwnet.gov/ord/PG302.htm>.

impairs their ability to regularly work or participate in welfare-to-work activities. Other common exemptions are age (over 60) or caretaking for a disabled household member.

According to the All County Letter 09-05 (Feb. 27, 2009), RDPs and same-sex spouses who are not the “natural and adoptive” parent of the child are treated as stepparents, and are treated as a single parent family with a 32 hour per work participation requirement. Either parent can do the 32 hour work requirement, but it cannot be shared.

RDPs and same-sex spouses who are legally-recognized parents of the child are considered a two parent AU with a 35 hour per week participation requirement. These hours may be shared between the two spouses. MPP § 42-711.421.

Child care is provided to enable the adult(s) to work or participate in welfare-to-work, if no legally responsible adult AU member is available to provide the care. Thus, child care is available if the RDP or spouse is not recognized as a legal parent by CalWORKs, whether this person is available to care for the child or not. When the parent is recognized by CalWORKs as a natural or adoptive parent, child care is available if they are out of the home (working, participating in welfare-to-work) during the needed hours, or are not capable of caring for the child (because of an impairment, for example).

### **C. Food Stamps/CalFRESH**

Food Stamps (also known as CalFRESH) are provided to low-income households for purchasing food. The Food Stamp program is governed by federal law. Food Stamp eligibility is based on a household concept, which means individuals who customarily purchase or prepare meals together, regardless of their relationship. The general rule is that a person can self-direct who is within the household. However, there are several categories of people who must be included within the household by law under certain circumstances.

#### **i. *Eligibility: Mandatory members of the food stamp household***

*Spouses:* Spouses must be included in the Food Stamp household. The Food Stamp program defines spouse as either of two individuals who would be defined as married to each other under applicable state law or who are cohabitating and are holding themselves out to the community as husband and wife by representing themselves as such to relatives, friends, neighbors, or tradespeople. MPP § 63-102(s)(9). The U.S. Department of Agriculture’s Food and Nutrition Services has stated that the federal Defense of Marriage Act prevents same-sex spouses or registered domestic partners from being considered “spouses” for Food Stamps

purposes. See Dep't. of Agric., Supplemental Nutrition Assistance Program, Memorandum: Impact of the Defense of Marriage Act on Food Stamp Program Eligibility (May 6, 2005).<sup>33</sup>

Same-sex spouses and registered domestic partners thus have the freedom to be in or out of the Food Stamp household depending on who they prepare their food with.

➔ *Practice Tip.* The federal government does not currently recognize same-sex relationships for food stamps purposes. This allows same-sex couples to choose to be in or opt out of the household. It is often more advantageous to have separate food stamp households rather than one.

*Couples Categorically Linked Through CalWORKs or GA programs:* Registered domestic partners and same-sex spouses who are categorically linked through the CalWORKs or GA programs but who purchase/prepare their food separately may be able to argue that they should be separate Food Stamps households if this would result in higher benefits. Contact your local legal aid organization or the National Center for Lesbian Rights if you are in this situation.

*Children:* The Food Stamp program requires that children under 22 who are living with their “natural or adoptive” parent or adult caretaker be in the same food stamp household as the adult(s). MPP § 63-402.142. This is true even if 18-21 year old children have their own children.

#### **D. Energy Assistance Programs**

Low-income energy assistance programs provide monthly discounts, financial assistance on past due utility bills, and weatherization. Low-income energy assistance programs are administered through the state and federal government block grants, utility companies, and social service organizations. Each provider will have their own criteria for assistance. Most, if not all, providers base eligibility on a household concept. The provider will want to know how many people live in the household and what the total monthly income is. Many programs use the federal poverty guidelines to set eligibility standards. The use of a household concept means that the exact nature of the legal relationships in the household, including marital status or parental relationships, are not important when determining eligibility for the program.

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<sup>33</sup> Available at <http://www.fns.usda.gov/snap/rules/Memo/2005/050605.pdf>. For more information about Food Stamps, see <http://www.foodstampguide.org/>.

*Chapter 4: Income assistance and financial programs*

For additional information on low-income energy assistance programs, see U.S. Department of Health and Human Services, LIHEAP Clearinghouse website at [www.liheap.ncat.org/profiles/California.htm](http://www.liheap.ncat.org/profiles/California.htm).

V. STATE UNEMPLOYMENT, DISABILITY, AND PAID FAMILY LEAVE

A. Unemployment Insurance

Unemployment Insurance provides weekly insurance payments for unemployed workers who have lost their job through no fault of their own and who are seeking work and remain ready, able, and willing to work. Cal. Unemp. Ins. Code § 1252; 22 CCR §§ 1253(c)-1(b), 1253(e)-1(a). Benefits are also available to workers who voluntarily leave their jobs to relocate with a spouse or because of other compelling “domestic circumstances,” which can include serious illness death in the family, child care needs where there is no reasonable alternative, relocation to join a future spouse, or compelling circumstances necessary to preserve “family unity.” Cal. Unemp. Ins. Code §§ 1032(c)-(d), 1256; 22 CCR §§ 1256-9-1256-12.

In California, same-sex spouses and registered domestic partners have all the same rights as different-sex spouses for purposes of the unemployment insurance program. While unemployment insurance is based on federal law, it is executed and implemented through state law. Cal. Unemp. Ins. Code §§ 101-102.

The California Unemployment Insurance Code explicitly recognizes that domestic partners have good cause for leaving a job to accompany or join a partner in a distant place for purposes of maintaining family unity, and registered domestic partners are included in the definition of “family.” Cal. Unemp. Ins. Code §§ 1032(c), 1256; 22 CCR § 1256-9(c); Cal. Employment Dev. Dep’t., Unemployment Insurance Benefit Determination Guide, Voluntary Quit-VQ 155.<sup>34</sup> Although the regulations do not explicitly mention same-sex spouses, same-sex spouses should have all the rights of a spouse for purposes of unemployment. *Strauss v. Horton*, 46 Cal.4th 364, 474 (2009); Cal. Fam. Code § 308.

Children and grandchildren of same-sex couples should also be treated as family for unemployment insurance purposes. The definition of “family” includes children, step-children, grandchildren, and “any person with whom the claimant has had substantially the same relationship of parent-child or grandparent-grandchild.” Cal. Employment Dev. Dep’t., Unemployment Insurance Benefit Determination Guide, Voluntary Quit-VQ 155; 22 CCR § 1256-9(c) cmts.

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<sup>34</sup> Available at [http://www.edd.ca.gov/UIBDG/Voluntary\\_Quit\\_VQ\\_155.htm](http://www.edd.ca.gov/UIBDG/Voluntary_Quit_VQ_155.htm).

**B. State Disability & Paid Family Leave Insurance**

California's Employment Development Department (EDD) administers two short term disability programs for workers: State Disability Insurance (SDI) and Paid Family Leave (PFL) Insurance.

**i. *State Disability Insurance***

State Disability Insurance (SDI) is a partial wage replacement program for workers unable to work due to a disability. Disability is defined as any physical or mental illness or injury which prevents a worker from performing regular or customary work, including pregnancy. Cal. Unemp. Ins. Code § 2626.

➔ *Practice Tip.* Advocates should thoroughly review a worker's reason for discontinuing work before advising. LGBT workers can often be the victims of workplace harassment that damages their mental health, forcing them to seek medical intervention.

**ii. *Paid Family Leave Insurance***

Paid Family Leave (PFL) extends disability compensation to cover individuals who take time off of work to care for a seriously ill child, spouse, parent, or registered domestic partner, or to bond with a new child. Senate Bill 1661 established the Paid Family Leave insurance program, also known as Family Temporary Disability Insurance program, to be administered by the State Disability Insurance program. For California workers covered by SDI, Paid Family Leave insurance provides up to six weeks of benefits for individuals who must take time off to care for a seriously ill child, spouse, parent, or registered domestic partner, or to bond with a new child.

PFL provides compensation to bond with a new child if within 12 months of the child's birth. PFL allows same-sex couples to bond with the employee's new child or the new child of the employee's spouse or registered domestic partner; or to bond with a child in connection with the adoption or foster care placement of the child with the employee or the employee's spouse or registered domestic partner.

## VI. VETERANS BENEFITS

### A. Federal VA Benefits

The Department of Veteran Affairs (VA) is a federal agency that controls the most valuable benefits provided to veterans and their families. The VA administers important programs for veterans and surviving spouses and children, including: disability compensation, pension, burial allowances, and health care. The Department of Veteran's Affairs does not currently recognize marriage between same-sex couples or registered domestic partners. Federal VA benefits are only available to surviving different-sex spouses (often there is a requirement that the spouse has not remarried) and children of the veteran who are under the age of 18, but up to age 23 if they are enrolled in school or the child has not married.

- ➔ *Practice Tip.* NCLR believes that the federal DOMA will be overturned or repealed in the foreseeable future. For clients who would be eligible for a benefit but for the federal government's refusal to recognize a marriage between two people of the same-sex, we recommend that advocates file applications now any federal veterans' benefits that could be retroactively awarded based on the date the application is filed. Filing these applications and appealing any denial will preserve the applicant's ability to receive retroactive benefits if and when DOMA is overturned.
- ➔ *Practice Tip.* Transgender people who married a person of a different legal sex are recognized as married for federal purposes. If a transgender person originally married someone of a different sex, and then later went through a gender transition, the fact that the transgender person and his or her spouse are now the same gender should have no effect on the recognition of his or her marriage by the federal government.
- ➔ *Practice Tip.* For over two decades, federal law has prevented lesbian, gay, and bisexual people from serving openly in the military. This policy was repealed in 2010, but the policy will not formally end until September 20, 2011. Unfortunately, this repeal only applies to the ban on open service by lesbian, gay, and bisexual servicemembers. Transgender servicemembers are still barred from service under restrictive medical and conduct regulations. For more information about the rights of servicemembers and veterans who are LGBT, visit [www.sldn.org](http://www.sldn.org).

i. *Eligibility for children of veterans*

Generally, children of veterans receive benefits based on two eligibility factors: (1) whether the benefit program allows for payment for or to children and (2) whether the veteran's relationship to the child can be proven.<sup>35</sup> The VA separates “children” into four large categories: legitimate, illegitimate, adopted, and stepchildren. 38 C.F.R. 3.210.

- *Legitimate child:* a veteran must show a valid marriage to the mother of the child or show that the child is otherwise legitimate by State laws together with evidence of birth.
  - *Illegitimate child:* a veteran must show sufficient evidence proof of the relationship. Sufficient evidence can be an acknowledgement in writing, judicial decree for child support, or secondary evidence (public record of birth or baptism or statements from people or agencies documenting that the veteran accepted this child as his own).
  - *Adopted child:* a veteran must bring in the adoption decree or a revised birth certificate.
  - *Stepchild:* a veteran must show proof of birth, evidence of a valid marriage between the veteran and legally recognized parent, and evidence that the child was a member of the veteran’s household.
- ➔ *Practice Tip:* Federal law generally looks to state law to determine the legal parent-child relationship. Children of non-biological parents who are recognized as legal parents under California law should be able to obtain all the same benefits as other children (see section I-A above), although it may be necessary to apply for benefits as an “illegitimate child” of the veteran.
- ➔ *Practice Tip:* The VA regulations allow most spouses and children of veterans to verbally report evidence of age and relationship. The VA requires other evidence only when the claimant does not reside within a state; the claimant’s statement on its face raises a question of validity; the claimant’s statement conflicts with other evidence of record; or there is a reasonable indication of fraud or misrepresentation. 38 C.F.R. § 3.204.

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<sup>35</sup> The regulations defining who is a child of a veteran for veterans benefits purposes are found in 38 C.F.R. § 3.57, 3.58, and 3.210.

ii. ***Most common federal VA benefits***

*Disability compensation* is a benefit paid to a veteran because of injuries or diseases that happened while on active duty, or were made worse by active military service. It is also paid to certain veterans disabled from VA health care. The benefits are tax-free. A veteran may be eligible for disability compensation if he or she has a service-related disability and was discharged under other than dishonorable conditions. To prove relationships for spouse and child-related benefits, the veteran must attach dependency records (marriage & children's birth certificates) to the application.

*Death Pension Benefits* are payments available to a surviving and unremarried spouse or an unmarried child (under 23 years old if in school) of the deceased veteran.

*Health Care* for veterans is administered under the Civilian Health and Medical Program of the Department of Veterans Affairs (CHAMPVA). Certain dependents and survivors can receive reimbursement for most medical expenses – inpatient, outpatient, mental health, prescription medication, skilled nursing care and durable medical equipment. To be eligible you must be the spouse or child of a Veteran whom VA has rated permanently and totally disabled due to a service-connected disability; the surviving spouse or child of a Veteran who died from a VA-rated service-connected disability, or who, at the time of death, was rated permanently and totally disabled; or the surviving spouse or child of a Veteran who died on active duty service and in the line of duty, not due to misconduct. However, in most of these cases, these family members are eligible for TRICARE, the primarily military healthcare system, not CHAMPVA.

iii. ***Healthcare for transgender veterans***

The Veterans Health Administration recently issued a Directive to all of its facilities establishing a policy of non-discrimination in the treatment of transgender veterans.<sup>36</sup> The Directive mandates that VA personnel and staff are required to provide care to transgender patients “without discrimination in a manner consistent with care and management of all Veteran patients.” Other than sex reassignment surgery, all medically necessary, transition-related medical and mental healthcare needs are to be provided to transgender patients. This includes hormone therapy, mental healthcare, preoperative evaluation, post-operative long-term care, and any and all routine health screenings (such as breast, prostate, or cervical cancer screenings).

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<sup>36</sup> Department of Veterans Affairs, *Providing Health Care for Transgender and Intersex Veterans*, Veterans Health Administration Directive 2011-024 (June 9, 2011), available at [www.va.gov/vhapublications/ViewPublication.asp?pub\\_ID=2416](http://www.va.gov/vhapublications/ViewPublication.asp?pub_ID=2416).

**B. California VA Benefits**

California Department of Veterans' Affairs administers several state-funded programs offered exclusively to Californian veterans and their families. Registered domestic partners (RDPs) and same-sex spouses of veterans are recognized by the California Department of Veterans' Affairs. In a 2009 California Attorney General Legal Opinion (No. 08-801<sup>37</sup>), California clarified that all RDPs of eligible military veterans residing in California are entitled to all state-funded military benefits available to spouses of eligible military veterans. Some of the state programs include:

*Veterans Dependents Educational Assistance* allows a dependent child, spouse/RDP or unmarried surviving spouse/RDP of a service connected disabled or deceased veteran entitlement to tuition and fee waiver benefits at any campus of the California State University system, University of California or a California Community College. Children, spouses and domestic partners must provide proof of the student's relationship to the veteran such as a copy of a birth, marriage or domestic partnership certificate.

*California Veteran Housing Program* provides low-cost residential, assisted living, or medical care facility placement throughout California. The program can provide home or farm loans to veterans and their families.

*California Financial Assistance Benefits* are property tax exemptions for lower-income disabled veterans and their families. It extends to unmarried surviving spouses and registered domestic partners who are receiving service connected death benefits.

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<sup>37</sup> Available at [http://ag.ca.gov/cms\\_attachments/opinions/pdfs/o545\\_08-801.pdf](http://ag.ca.gov/cms_attachments/opinions/pdfs/o545_08-801.pdf).