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MEDICAL RIGHTS FOR SAME-SEX COUPLES AND RAINBOW FAMILIES

*Anisa Mohanty**

I. INTRODUCTION

The present state of the law regarding medical rights for same-sex couples and their families is highly inconsistent. A handful of states permit same-sex marriage.¹ Another handful of states recognize same-sex marriages from other states, allow civil unions with state-level spousal rights for same-sex couples, or extend some or nearly all state-level spousal rights to unmarried couples in domestic partnerships.² With these widely disparate levels of recognition, it becomes difficult for same-sex couples to navigate their options and rights when a loved one—a partner or child—has a medical emergency or is in the hospital. In Part II, this Comment will examine the present state of the law regarding hospital visitation and medical decision-making for partners and non-biological parents in several states, using North Carolina, which does not have a constitutional ban against same-sex marriage,³ and Florida, which has denied recognition of same-sex marriage under all circumstances,⁴ as examples. Part III will

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1. NATIONAL CONFERENCE OF STATE LEGISLATURES, SAME SEX MARRIAGE, CIVIL UNIONS AND DOMESTIC PARTNERSHIPS (2009), <http://www.ncsl.org/default.aspx?tabid=16430> (last visited Oct. 3, 2009) (As of this writing, Massachusetts, Connecticut, Iowa, Maine, Vermont, and New Hampshire permit same-sex marriages. California recognizes same-sex marriages performed before November 4, 2008. Rhode Island, New York, and the District of Columbia recognize same-sex marriages from other states. Connecticut, Vermont, New Jersey, and New Hampshire permit civil unions, providing state-level spousal rights to same-sex couples. Four states—California, Oregon, Washington, and Nevada—provide nearly all state-level spousal rights to unmarried couples through domestic partnerships. Finally, Hawaii, Maine, the District of Columbia, and Wisconsin provide some state-level spousal rights to unmarried couples in domestic partnerships.).

2. *Id.*

3. See Mike Baker, *Poll: Half of N.C. adults oppose marriage amendment*, WRAL.COM, Mar. 23, 2009, <http://www.wral.com/news/state/story/4794291/> (last visited Oct. 3, 2009).

4. FLA. STAT. ANN. §§ 741.04, 741.212 (LexisNexis 2009).

explore the justifications and criticisms of expanded rights for such families. Part IV will examine the difficulties presented by the federal Defense of Marriage Act (“DOMA”) in creating uniform law. Finally, Part V will propose a Model Act that can ameliorate some of the uncertainty surrounding the rights for same-sex couples.

II. PRESENT STATE OF THE LAW

A. Medical Visitation

1. Partners

Legal scholarship regarding medical visitation policies is sparse. Medical visitation policies are typically defined by individual hospitals.⁵ Traditionally, visitation policies in cases of emergency permit only “immediate family” members to visit patients.⁶ While hospitals define internally who may qualify as an “immediate family member,” and there may be no inherent *legal* right of spousal visitation, protection for the spousal relationship is implied within these policies.⁷ It is unlikely that a hospital would define “immediate family” in a way that excludes spouses, and “[as] a practical matter, a spouse would only need a legal right to visit if the hospital failed to admit spouses. In our current legal and cultural reality, a spouse does not need a legal visitation right because a spouse is automatically considered family.”⁸ Even fiancé(e)s would almost certainly be allowed to visit a loved one, though no legal relationship exists.⁹

Except in the handful of states that afford full spousal legal rights and privileges to same-sex couples, same-sex couples must create rights affirmatively through legal documents,¹⁰ and even then, they may not be able to create equal rights to those afforded to heterosexual couples. A few states have explicitly intervened to permit adults to receive visits from any

5. Nancy J. Knauer, *Symposium, Abolishing Civil Marriage: A Marriage Skeptic Responds to the Pro-Marriage Proposals to Abolish Civil Marriage*, 27 *CARDOZO L. REV.* 1261, 1274 (2006).

6. *Id.*

7. *Id.*

8. *Id.*

9. Telephone Interview with Laura M. Willing, Medical Student, University of Virginia School of Medicine (Oct. 4, 2009).

10. *See generally* KAREN MOULDING, NATIONAL LAWYERS GUILD, *SEXUAL ORIENTATION AND THE LAW* 4-75 to 4-91 (National Lawyers Guild Lesbian, Gay, Bisexual Rights Committee et al., 2009) (1985) (providing forms lawyers may use in drafting powers of attorney and hospital visitation authorizations for same-sex couples).

individuals he or she desires.¹¹ A provision was added to North Carolina's Patient Bill of Rights in 2008 to allow a patient to designate visitors who shall receive the same visitation privileges as the patient's immediate family members, regardless of whether the visitors are legally related to the patient.¹² Similarly, Virginia has a provision that allows individuals to designate whomever they wish to visit them in the hospital, subject to other restrictions contained in the visitation policy, such as the number of visitors permitted in the patient's room simultaneously.¹³ Maine permits adult patients in a critical care unit to designate individuals to be considered as immediate family members for the purpose of granting visitation rights, either orally or in writing; but it is not clear whether a patient would be able to pre-designate such individuals, and if so, whether such designations would apply to a patient in emergent care situations.¹⁴ In these instances, however, the rights of a same-sex partner are not automatic, and such statutes are sparse. At this time, there appears to have been no cases in which an individual or patient has claimed a right of visitation that was denied in states that allow patients to designate visitors.

Other states flatly prohibit or refuse to recognize visitation rights for same-sex partners. In Florida, the federal district court in Miami ruled that there is no legal obligation to allow visitors, including same-sex partners, in an emergency situation.¹⁵

2. Non-Biological Children

The issue of medical visitation becomes more complicated for a partner who is not the biological parent of a child in a same-sex relationship. In one case, a California hospital would not permit both mothers to stay with their child, allowing only the biological mother to stay, even though the women were registered domestic partners.¹⁶

11. N.C. GEN. STAT. §§ 131E-75; 131E-79; 131E-117; 143B-165 (2009).

12. *Id.*; see also Q-NOTES, STATE ENSURES GAY HOSPITAL VISITATION RIGHTS, Apr. 22, 2008, <http://www.q-notes.com/89/state-ensures-gay-hospital-visitation-rights/> (last visited Oct. 4, 2009) [hereinafter Q-NOTES].

13. See VA. CODE ANN. § 32.1-12, 32.1-127(15) (West 2009); see also EQUALITY VIRGINIA, HOSPITAL VISITATION AND ADVANCE MEDICAL DIRECTIVES (2009), <http://equalityvirginia.org/site/protecting-our-families/hospital-visitation-and-advanced-medical-directives.html> (last visited Oct. 3, 2009) [hereinafter EQUALITY VIRGINIA].

14. See ME. REV. STAT. ANN. tit. XXII, § 1711(D)(1) (2009).

15. Tara Parker-Pope, *No Visiting Rights for Hospital Trauma Patients*, Sept. 30, 2009, N.Y. TIMES, available at <http://well.blogs.nytimes.com/2009/09/30/no-visiting-rights-for-hospital-patients/>; LAMBDA LEGAL, LANGBEHN V. JACKSON MEMORIAL HOSPITAL (2009), <http://www.lambdalegal.org/in-court/cases/langbehn-v-jackson-memorial.html> (last visited Oct. 4, 2009).

16. Tara Parker-Pope, *How Hospitals Treat Same-Sex Couples*, May 12, 2009, N.Y. TIMES, available at

Whereas the law often affords heterosexual stepparents an easy path to adoption or another formal legal or quasi-legal relationship to stepchildren, same-sex parents are not afforded the same presumptions.¹⁷ Adoption rights for same-sex couples are severely limited in many states, and such rights are prohibited outright in a few, including Florida.¹⁸ Even where permitted, it is a complicated process that involves more than signing a few forms.¹⁹ Adoption by a same-sex parent traditionally terminates the parental rights of the biological parent, *i.e.*, when a same-sex mother adopts a child, the biological mother's rights are terminated.²⁰ In 2005, the Durham County District Court in North Carolina waived the statutory provisions that terminate the biological parent's parental rights in the case of second parent adoptions.²¹ While the permissibility of the original waiver is still in question, the North Carolina Court of Appeals held the second parent adoption to be a valid order even after the couple separated.²²

Traditionally, heterosexual stepparents have been given limited authority over stepchildren when they are in direct control or acting *in loco parentis*, even in the absence of adoption,²³ which would conceivably give them authority to remain with a child in the case of an emergency in the absence of the biological parent. Except in states that validate same-sex marriages, unions, or domestic partnerships *and* include *in loco parentis* provisions for stepparents,²⁴ there are no such protections for same-sex parents. Finally, children, unlike adults, are typically not extended the right to give whomever they wish the permission to visit them in the hospital,²⁵ and realistically, it would be extraordinarily rare that a child would have the requisite medical directives in place.

<http://well.blogs.nytimes.com/2009/05/12/how-hospitals-treat-same-sex-couples/?hp>.

17. See generally Craig W. Christensen, *If Not Marriage? On Securing Gay and Lesbian Family Values by a "Simulacrum of Marriage,"* 66 FORDHAM L. REV. 1699, 1756–84 (1998).

18. *Id.* at 1763–65 (discussing the barriers to same-sex adoption, including the heightened scrutiny of state social services agencies and judges in determining the "best interests of the child." In one case, an original adoption order was revoked after a gay couple split up.); LAMBDA LEGAL, IN YOUR STATE (2009), <http://www.lambdalegal.org/states-regions/> (last visited Oct. 4, 2009).

19. See Christensen, *supra* note 17, at 1763–66.

20. See *Boseman v. Jarrell*, 681 S.E.2d 374, 376 (N.C. App. 2009).

21. *Id.*

22. *Id.* at 381–82.

23. N.C. GEN. STAT. §§ 48-1-106(c), 43-3-606(9) (2008).

24. See IOWA CODE ANN. 252A.2(2) (Supp. 1996) (establishing a duty of a stepparent to a stepchild and distinguishing between a stepchild and a legally adopted child); see also *Varnum v. Brien*, 763 N.W.2d 862, 872 (Iowa 2009).

25. See VA. CODE ANN. § 32.1-127(B)(15) (2009) (allowing for permission to be extended by adults only); see also EQUALITY VIRGINIA, *supra* note 13.

B. Medical Decision-making

1. Partners

Medical decision-making in all fifty states can be carried out by anyone who has been assigned “power of attorney,” or is the “attorney-in-fact.”²⁶ In North Carolina, for power of attorney to be “durable,” or to remain in effect when a person is incapacitated, it must be recorded.²⁷ A physician must typically sign a written statement of a person’s incapacity before power of attorney takes effect.²⁸ Assigning power of attorney is critical for same-sex couples (and unmarried heterosexual couples) in states where they are not afforded the same rights as heterosexual married couples. Without power of attorney, medical decision-making typically goes to the nearest legal relative.²⁹

Same-sex couples with valid durable powers of attorney have still faced severe discrimination. Washington State citizens Janice Langbehn, Lisa Pond, and their children went on vacation in Florida, where Pond collapsed from an aneurysm shortly before boarding a cruise ship.³⁰ Pond had taken appropriate legal precautions by designating Langbehn as her legal guardian and giving her medical power of attorney.³¹ Hospital officials refused to recognize Langbehn or their children as family, because same-sex marriages and partnerships are not recognized in Florida, and the federal court in Miami held that there was no duty or legal obligation to allow visitors in the hospital.³² Most troubling is that the hospital failed to recognize Langbehn’s power of attorney, which may be assigned to *any* competent individual regardless of familial relationship, both under Washington and Florida law.³³ Similarly, Bill Flanigan was not permitted

26. DENIS CLIFFORD ET AL., A LEGAL GUIDE FOR LESBIAN AND GAY COUPLES 131 (14th ed. 2007), available at http://books.google.com/books?id=eiSFx_Fm-FcC&dq=Hayden+Curry+%26+Denis+Clifford,+A+legal+Guide+For+Lesbian+and+Gay+Couples&printsec=frontcover&source=bl&ots=MJF341Wipf&sig=9UAn02v9dU65dCP2zmCm-9bjMoQ&hl=en&ei=2cTHSpU5D4qW8Aa858XhCA&sa=X&oi=book_result&ct=result&resnum=1#v=onepage&q=power%20of%20attorney&f=false.

27. *Id.* at 138.

28. *Id.* at 125.

29. Q-NOTES, *supra* note 12.

30. Steve Rothaus, *Lesbian’s case against Jackson Memorial Hospital tossed*, MIAMI HERALD (Fla.), Sept. 30, 2009, at B3, available at <http://www.miamiherald.com/news/nation/story/1258772.html?storylink=mirelated>.

31. Luara Figueroa, *Gay Woman Fights over Hospital Visitation Rights in Miami court*, MIAMI HERALD (Fla.), Feb. 8, 2009, at B5, available at <http://www.commondreams.org/headline/2009/02/08-4>.

32. Rothaus, *supra* note 30.

33. See WASH. REV. CODE § 11.94.010 (2009); FLA. STAT. ANN. § 709.08(2) (LexisNexis 2009).

to see his dying partner, Robert Daniel, at the University of Maryland Health Care System, even though he was assigned as Daniel's attorney-in-fact.³⁴ The hospital knowingly violated the durable power of attorney Flanigan had on behalf of Daniel, and it violated national accreditation standards for hospitals, which define "family" as individuals who play "a significant role in the individual's life," including persons "not legally related to the individual."³⁵

Despite the fact that valid durable power of attorney can address same-sex partner rights for prepared couples, people rarely plan for the worst. The presumption that persons close to patients should have access to information about the patient without explicit authorization is expressed by federal law.³⁶ Under federal health information privacy regulations promulgated under the Health Insurance Portability and Accountability Act ("HIPAA"), health care providers are permitted, but are not required, to disclose certain health information to individuals close to the patient.³⁷ Providers "may... disclose to a family member, other relative, or close personal friend of the individual, the protected health information directly relevant to such person's involvement with the individual's care or payment related to the individual's health care."³⁸ Providers may also "use or disclose protected health information to notify... a family member, a personal representative of the individual, or another person responsible for the care of the individual of the individual's location, general condition, or death."³⁹ When an individual is not present or otherwise incapacitated, a provider "may use professional judgment and its experience with common practice to make reasonable inferences of the individual's best interest in allowing a person to act on behalf of the individual to pick up filled prescriptions, medical supplies, X-rays, or other similar forms of protected health information."⁴⁰ While the regulations allow providers the discretion to keep same-sex partners apprised of an individual's medical condition and involved in some decisions regarding treatment of that individual, it does not appear to be the practice.⁴¹

34. Knauer, *supra* note 5, at 1274–75.

35. LAMBDA LEGAL, UNIVERSITY OF MARYLAND MEDICAL SYSTEM TO BE SUED WEDNESDAY BY GAY MAN PREVENTED FROM VISITING HIS DYING PARTNER AT SHOCK TRAUMA CENTER IN BALTIMORE (2002), <http://www.lambdalegal.org/news/pr/university-of-maryland.html> (last visited Oct. 4, 2009).

36. *See* 45 C.F.R. § 164.510(b)(1)(i) (2009).

37. *See* 45 C.F.R. pt. 164 (2009).

38. 45 C.F.R. § 164.510(b)(1)(i) (2009).

39. *Id.* § 164.510(b)(1)(ii).

40. *Id.* § 164.510(b)(3).

41. *See generally* LAMBDA LEGAL, *supra* note 35.

2. Non-Biological Children

For same-sex parents of non-biological children, complications in medical decision-making rights are similar to those in medical visitation for non-biological same-sex parents. Some states, or jurisdictions within those states, permit joint and second parent adoptions, and these adoptions must be recognized under the Full Faith and Credit Clause of the U.S. Constitution.⁴² When joint or second parent adoptions are not available, there may be options such as an “authorization for consent to medical treatment of a minor”⁴³ or other legal guardianship arrangements. In the absence of the establishment of formal legal relationships, stepparents and same-sex non-biological parents alike have virtually no rights to make medical decisions on behalf of their children, even in case of emergencies where the biological parent may be absent.⁴⁴ This presents a difficult situation, because same-sex parent-child relationships may drastically vary in character from the typical stepparent-stepchild relationship. Parenting authority is more likely to mirror that of heterosexual parents, who are both equally qualified to speak for the child. Thus, it is possible that in the same-sex context, emergency medical decisions could ultimately be made by individuals who are less qualified to speak for the child’s best interests.

III. JUSTIFICATIONS AND CRITICISMS

A. ADDITIONAL ARGUMENTS FOR CHANGING EXISTING LAW

Same-sex couples face discrimination that cannot be justified when compared to their heterosexual counterparts. Take, for instance, a child conceived through *in vitro* fertilization or through other forms of assisted reproductive technology by a heterosexual married couple. The law makes no distinction in parental rights when a child results from artificial insemination or from natural conception of heterosexual married couples, even though circumstances are “functionally equivalent” to similarly-situated same-sex couples.⁴⁵ Gay couples must turn to second parent adoption, while the law does not penalize the heterosexual marital

42. 365GAY.COM, COURT RULES FLA. MUST HONOR GAY SECOND-PARENT ADOPTIONS, May 13, 2009, available at <http://www.365gay.com/news/court-rules-fla-must-honor-gay-second-parent-adoptions/> (last visited Oct. 4, 2009).

43. HUMAN RIGHTS CAMPAIGN, HEALTHCARE EQUALITY INDEX: WHAT IS MEANT BY SAME-SEX PARENTS? (2009), <http://www.hrc.org/issues/11348.htm> (last visited Oct. 3, 2009).

44. *Id.*

45. See generally Christensen, *supra* note 17, at 1699, 1763.

relationship; rather, it glosses over the fact that one parent is necessarily not the biological parent.

The need for uniformity in medical visitation and decision-making laws is illustrated by the *Langbehn* case.⁴⁶ Would *Langbehn* have been prohibited from visiting Pond in the Florida hospital if she had been just a friend or a distant relative with legal guardianship and medical power of attorney?

Another similarly situated story is about David Wilson and Rob Compton, same-sex partners from Massachusetts. Compton needed emergency surgery for a kidney stone while he was in Rhode Island and remarked that the Rhode Island hospital allowed Wilson to visit him: “[t]hey just smiled and they knew I was from Massachusetts and didn’t say anything.”⁴⁷ What Compton may not have realized was that Rhode Island is one of three U.S. jurisdictions that recognize same-sex marriages from other states.⁴⁸ If his emergency had occurred in a state such as Florida, or even in North Carolina where documentation of Compton’s wishes would have been required, his marital status may not have enabled Wilson to visit.⁴⁹ Compton’s implied right to visit grew out of his recognized marriage, an implied right that is largely denied by states that do not recognize same-sex marriage.⁵⁰

Both of these cases illustrate the need for uniform laws regarding medical rights. Even if a same-sex couple has taken all necessary legal precautions in the state that they reside, medical emergencies can occur in unexpected places, including across state lines. Same-sex couples may find, as *Langbehn* and Pond did, that even the rights of married same-sex partners may not be as clear-cut or simple as they assume.⁵¹ A Model Act would provide uniformity and ensure that individuals are adequately prepared by lending some predictability to these situations, and more importantly, it would ensure that visitation and treatment are carried out in accordance with the patient’s wishes.

46. *Langbehn v. Public Health Trust of Miami-Dade County*, 661 F. Supp. 2d 1326 (S.D. Fla. 2009).

47. Deborah Feyerick & Sheila Steffen, *Same-sex marriage in Massachusetts, 4 years later*, CNN.COM, June 16, 2009, <http://www.cnn.com/2008/US/06/16/feyerick.samesex.marriage/index.html> (last visited Oct. 3, 2009).

48. See NATIONAL CONFERENCE OF STATE LEGISLATURES, *supra* note 1.

49. See FLA. STAT. ANN. § 709.08 (LexisNexis 2009); N.C. GEN. STAT. §§ 131E-75; 131E-79; 131E-117; 143B-165 (2009).

50. See NATIONAL CONFERENCE OF STATE LEGISLATURES, *supra* note 1.

51. MOULDING, *supra* note 10, at 2–7.

B. Responding to Criticisms Against Expanding the Law

1. Establishing the validity of the relationship

a. Partners

There are several criticisms to expanding medical visitation and medical decision-making rights to same-sex partners. With respect to expanding decision-making rights, perhaps the most convincing criticism is the difficulty in confirming the actual existence of a partner relationship in the absence of any legal status such as a marriage, civil union, or domestic partnership.⁵² Some states have offered a unique solution by expanding rights for unmarried couples—whether heterosexual or homosexual—if they can show “mutual interdependence” through indicia such as joint checking accounts or common property ownership.⁵³ This may ameliorate the situation, but while heterosexual couples typically do not have to offer proof of marriage by showing a marriage license, homosexual couples are required to show documentation that may not be available in an emergency,⁵⁴ and thus doing so would waste precious time even when a partner is able to successfully negotiate to stay with a hospitalized partner. An Oregon man was forced to make a case to hospital administrators before being able to stay with his dying partner, even though he was his registered domestic partner.⁵⁵

Other states, such as New York, have included “close friends” in the decision-making hierarchy, which permits same-sex partners to be recognized as legal surrogates.⁵⁶ However, such a designation comes after siblings, parents, and other adult relatives of a patient, effectively meaning a partner may not be able to exercise the right.⁵⁷

With even fiancé(e)s barred from making medical decisions without formal power of attorney,⁵⁸ it appears difficult to justify allowing same-sex

52. See Parker-Pope, *supra* note 15.

53. Associated Press, *Maryland OKs rights for gay couples*, CHICAGOFREEPRESS.COM, Mar. 18, 2008, available at <http://www.chicagofreepress.com/node/1521>.

54. See Parker-Pope, *supra* note 15.

55. *Id.*

56. Duncan Joseph Moore, *Medical Surrogacy Mediation: Expanding Patient, Family, and Physician Rights and Reformulating the Virginia Health Care Decisions Act*, 10 VA. J. SOC. POL'Y & L. 410, 426 (2001).

57. *Id.*

58. Telephone Interview with Laura M. Willing, Medical Student, University of Virginia School of Medicine (Oct. 4, 2009).

partners to make decisions. Nevertheless, with same-sex couples *unable* to establish a formal legal relationship, it offends the notions of justice and equality to make this the prerequisite for the right to make decisions.

b. Non-Biological Children

Stepparents and same-sex parents alike have no inherent legal protections or rights to speak for their non-biological children. It can be argued that both classes of non-biological parents must go through the same process of adopting the child of their partners in order to create affirmative rights, and thus no disparity exists in the treatment of same-sex and heterosexual couples.⁵⁹ However, this argument fails to take into consideration that the law has created exceptions to allow stepparents to adopt without altering the biological parent's parental rights.⁶⁰ Even surrogacy laws offer more protection for the "intended [heterosexual] parents" than for similarly situated homosexual couples.⁶¹

2. Medical Malpractice

Perhaps the most convincing argument against expanding the right of same-sex partners to make medical decisions is the threat of medical malpractice suits by blood relatives.⁶² Health care providers can ill afford to disclose health information to, or allow, the "wrong" individual to make decisions on behalf of a patient.⁶³ Providers may be subject to great financial liability and medical ethics violations for refusing a blood relative to make decisions regarding an incapacitated patient.⁶⁴ While it is tenuous whether a cause of action, upon which to sue, exists for same-sex partners who are not in a legally cognizable relationship with the patient,⁶⁵ failing to

59. Christensen, *supra* note 17, at 1763.

60. *Id.* at 1766.

61. *Id.* at 1762.

62. Telephone Interview with Laura M. Willing, Medical Student, University of Virginia School of Medicine (Oct. 4, 2009).

63. *Id.*

64. See JOHN E. SNYDER ET AL., EVIDENCE-BASED MEDICAL ETHICS: CASES FOR PRACTICE-BASED LEARNING 19 (Humana Press) (2008), available at

http://books.google.com/books?id=93y_6FFm8ikC&printsec=frontcover&source=gbs_navlinks_s#v=onepage&q=&f=false (in the absence of medical power of attorney, common law and state statutes permit these decisions to be made by family members: legal guardian, spouse, and a majority of first degree relatives (parents and children); these individuals would presumably have a cause of action if their decision-making rights are breached); see 45 C.F.R. §§ 164.104 *et seq.* (2009).

65. See Langbehn v. Public Health Trust of Miami-Dade County, 661 F. Supp. 2d 1326, 1336–37 (S.D. Fla. 2009); Complaint, Flanigan v. Univ. of Md. Med. Sys. Corp. (Md. Cir. Ct. Feb. 27, 2002), available at <http://data.lambdalegal.org/pdf/118.pdf>.

provide access and rights to same-sex partners is likely to result in continued litigation.

3. Federal Regulations

When 45 C.F.R. Part 164 was promulgated, the Department of Health and Human Services (“Department”) clarified:

We continue to allow covered entities to use their discretion to disclose certain protected health information to family members, relatives, close friends, and other persons assisting in the care of an individual, in accordance with [45 C.F.R.] § 164.510(b). We recognize that many health care decisions take place on an informal basis, and we permit disclosures in certain circumstance to permit this practice to continue. Health care providers may continue to use their discretion to address these informal situations.⁶⁶

The Department intended to and did leave substantial discretion to practitioners to determine who may or may not be appropriate parties to receive confidential health information.⁶⁷

However, one commenter “sought clarification that ‘close personal friend’ was intended to include domestic partners and same-sex couples in committed relationships.”⁶⁸ The Department responded:

As discussed in the preamble of the final rule, this provision allows disclosures to domestic partners and others in same-sex relationships when such individuals are involved in an individual’s care or are the point of contact for notification in a disaster. We do not intend to change current practices with respect to involvement of others in an individual’s treatment decisions; informal information-sharing among persons involved; or the sharing of protected health information during a disaster. As noted above, *a power of attorney or other legal relationship to an individual is not necessary for these informal discussions*

66. 65 Fed. Reg. 82,462, 82,501 (Dec. 28, 2000).

67. *Id.*

68. *Id.* at 82,665.

*about the individual for the purpose of assisting in or providing a service related to the individual's care.*⁶⁹

While the Department left substantial discretion to practitioners, it clearly did not intend to actively exclude same-sex partners from medical decision-making.⁷⁰ Similarly, a “personal representative” for an unemancipated minor child “may include a parent, guardian, or person acting *in loco parentis*,”⁷¹ which allows non-biological same-sex parents (and stepparents) to speak for the child, particularly in cases of emergency where the biological parent may not be available.

4. Opening the Door to Gay Marriage

Opponents of gay marriage posit that the present law affords enough protections for same-sex couples with respect to medical visitation and medical decision-making. They suggest the idea that denying a same-sex partner the right to visit their loved ones in hospitals is “incredulous,” and that granting a health care proxy to a partner can preclude the exclusion of a partner in making health care decisions for an unconscious or mentally incapacitated patient.⁷² However, a number of cases have demonstrated that same-sex partners are routinely denied visitation rights, and even with the requisite legal documentation, are denied the right to have whom they choose to make decisions for them.⁷³ Greater burdens must be placed on physicians to honor patients’ wishes.

All of these “snowball effect” arguments also overlook several key points. The first is the right of patient dignity. In the case of Robert Daniel, Bill Flanigan was not able to consult with doctors or tell surgeons about Daniel’s wish to forgo life-prolonging measures, and by the time Flanigan was able to see Daniel, he was no longer conscious and had been intubated against his wishes.⁷⁴ Additionally, expanded protections would provide rights to a range of nontraditional families—same-sex couples, stepparents, long-term heterosexual partners, and fiancé(e)s—in which the traditional decision-making hierarchy is not best suited to intervene. Physicians would

69. *Id.* (emphasis added).

70. *See id.*

71. *Id.* at 82,500.

72. PETER SPRIG, FAMILY RESEARCH COUNCIL, QUESTIONS AND ANSWERS: WHAT’S WRONG WITH LETTING SAME-SEX COUPLES “MARRY?,” FAMILY RESEARCH COUNCIL, <http://www.frc.org/get.cfm?i=if03h01> (last visited Oct. 4, 2009).

73. *See e.g.*, *Langbehn v. Public Health Trust of Miami-Dade County*, 661 F. Supp. 2d 1326, 1331–33 (S.D. Fla. 2009); Complaint at 4–9, *Flanigan v. Univ. of Md. Med. Sys. Corp.* (Md. Cir. Ct. Feb. 27, 2002).

74. Complaint at 8–11, *Flanigan*.

be able to apply their best judgment for the patient's interest without fear of malpractice judgments.

IV. DIFFICULTIES UNDER DOMA

Perhaps the greatest barrier to respecting same-sex relationships and patient's wishes is the federal Defense of Marriage Act ("DOMA").⁷⁵ DOMA states:

No State, territory, or possession of the United States, or Indian tribe, shall be required to give effect to any public act, record, or judicial proceeding of any other State, territory, possession, or tribe respecting a relationship between persons of the same sex that is treated as a marriage under the laws of such other State, territory, possession, or tribe, or a right or claim arising from such relationship.⁷⁶

In short, no state is obligated to recognize the legal relationship—marriage, civil union, or registered domestic partnership—granted by another state to a same-sex couple.⁷⁷ Therefore, the absence of legal documentation such as power of attorney, a same-sex couple legally married in Massachusetts and afforded full and equal protections to heterosexual married couples could still face the same problems in a state that affords lesser protections.⁷⁸ A Model Act would have no effect unless it was adopted by all 50 states, because DOMA overrides the effect of the Full Faith and Credit Clause⁷⁹ as applied to marriage. DOMA allows "states not only to refuse to recognize same-sex marriages, but also any rights arising out of such marriages."⁸⁰ Nevertheless, allowing same-sex couples the full right to medical visitation, and even medical decision-making, would not threaten the underlying justifications for DOMA in allowing states to defend the institution of marriage,⁸¹ and determine the marital status of its domiciles.⁸² Additionally, DOMA has been misapplied

75. See Defense of Marriage Act, Pub. L. No. 104-199, 110 Stat. 2419 (codified as amended at 1 U.S.C. § 7 and 28 U.S.C. § 1738C (2006)).

76. Defense of Marriage Act, § 2, 28 U.S.C. § 1738C (2006).

77. *Id.*

78. *See id.*

79. U.S. CONST. art. IV, § 1; Defense of Marriage Act § 2.

80. Roderick T. Chen & Alexandra K. Glazier, *Can Same-Sex Partners Consent to Organ Donation?*, 29 AM. J. L. & MED. 31, 38 (2003).

81. *Id.* at 39–40.

82. *Id.* at 37.

to justify denial of full faith and credit in circumstances not intended by the Act. In *Langbehn*, the federal district court in Miami appears to have confused typical, full faith and credit provided by power of attorney, with other rights that the state is not federally obligated to recognize because they are intertwined with same-sex partner status.⁸³

VI. MODEL ACT

With the recognition that true parity cannot exist for same-sex couples where same-sex marriages or same-sex unions are not recognized or afforded equal rights to that of heterosexual marriages, a Model Act would address many of the challenges faced by same-sex couples when a loved one is unexpectedly in the hospital. It would also address situations in which state legislatures have not clearly addressed whether full rights and privileges are afforded to same-sex couple. However, same-sex couples would still carry the burden of affirmatively creating rights, as the onus remains on the couple to complete the necessary paperwork to ensure their access to partners and children. Couples living near another jurisdiction in which they are not domiciled should check the laws of that state to determine if they need to take additional legal precautions. Same-sex couples who have created certain affirmative rights in their own state should take similar precautions when traveling to another state, in addition to traveling with appropriate documentation.

Adoption of a Model Act would also reinforce that, while DOMA controls a state's choice to recognize same-sex marriage and rights created out of that marriage,⁸⁴ DOMA does not control where another primary source of authority governs and dictates whether states should honor valid contractual agreements and provisions made by same-sex couples.

Outlined below are key provisions that should be included in such an Act:

83. See *Langbehn v. Public Health Trust of Miami-Dade County*, 661 F. Supp. 2d 1326, 1336–37 (S.D. Fla. 2009).

84. See *supra* notes 78–84 and accompanying text.

**MODEL MEDICAL VISITATION AND DECISION-MAKING ACT
("MMVDMA")**

Section 1. Definitions

A. Eligible same-sex couple. "Eligible same-sex couple" shall be defined as a same-sex couple who can demonstrate that they are committed. Accepted documentation to prove eligibility includes: joint checking accounts, shared credit cards, joint homeownership, joint leaseholders, children conceived or adopted through mutual decision, guardianship authorizations for the couple's children, engagement to be married, designation as insurance beneficiary, and exchanging of rings. This list is not intended to be exhaustive, and determination of whether a couple is committed is based on the totality of the circumstances.⁸⁵

B. Eligible same-sex partner. "Eligible same-sex partner" shall be defined as a same-sex partner who can demonstrate that he or she is committed under subsection A of this section.⁸⁶

C. Eligible heterosexual couple. "Eligible heterosexual couple" shall be defined as a couple who can demonstrate they are committed. Accepted documentation to prove eligibility includes: joint checking accounts, shared credit cards, joint homeownership, joint leaseholders, children conceived or adopted through mutual decision, guardianship authorizations for the couple's children, engagement to be married, designation as insurance beneficiary, and exchanging of rings. This list is not intended to be exhaustive, and determination of whether a couple is committed is based on the totality of the circumstances.

85. *Cf. In re Kowalski*, 478 N.W.2d 790, 792–93 (Minn. Ct. App. 1991) (requiring that the appointment of a guardian be someone who would operate in "the best interests of the ward," and considering factors such as the reasonable preference of the ward, if able to form a preference; the interaction between the proposed guardian in promoting the welfare of the ward; and kinship, although not as conclusive (citing MINN. STAT. §§ 525.539(7), 525.551(5) (1990)); *Irizarry v. Bd. of Educ. of Chicago*, 251 F.3d 604, 606 (7th Cir. 2001) (stating conditions a partner must satisfy to qualify for partner benefits, including being the sole domestic partner; living together for at least one year; jointly owning their home; jointly owning other property of specified kinds; or being the primary beneficiary of the partner's will); HUMAN RES. SERVS. UNIVERSITY OF RICHMOND, SAME-SEX DOMESTIC PARTNER BENEFITS POLICY (2008), <http://hr.richmond.edu/guidelines/samesex.htm> (last visited Oct. 24, 2009) (requiring an employee who seeks same-sex benefits for a domestic partner to complete an affidavit attesting, among other things, that the partners consider each other to be life partners; that neither is married to another individual; that the partners are each other's sole domestic partners and intend to continue as such indefinitely; that the partners have shared a common household for at least six months immediately prior to the date of the affidavit and intend to do so indefinitely; and that the partners are "financially interdependent, share common necessities of life and are jointly responsible for the common welfare and shared financial obligations of each other").

86. Substantially similar factors can be used to determine eligibility of heterosexual partners. *See supra* note 87 and accompanying text.

D. Eligible heterosexual partner. “Eligible heterosexual partner” shall be defined as a heterosexual partner who can demonstrate that he or she is committed under subsection C of this section.

E. Unmarried couple. “Unmarried couple” includes eligible same-sex and eligible heterosexual couples who can demonstrate they are committed under subsections A or B of this section. It shall also include couples who are legally married, in a common law marriage, civil union, or domestic partnership in their state of origin.

Section 2. Forms

State should provide forms or forms substantially similar to those found in Appendix A for the creation of

- (A) Durable (medical) power of attorney;
- (B) Medical visitation rights; and
- (C) Guardianship arrangements for children

made available on the Internet and in print through the State’s department of health or social services. If duly authorized, witnessed, and notarized, these forms shall be honored by the State, regardless of the state of origin.

Section 3. Unmarried Couples

A. Medical Visitation. State shall permit eligible same-sex partners and eligible heterosexual partners, as defined by subsections B and D of section 1, to qualify as immediate family members for the purposes of hospital visitation. At minimum, State must recognize valid medical visitation authorizations prepared by the eligible couple.

B. Medical Decisions. State shall permit eligible same-sex partners and eligible heterosexual partners, as defined by subsections B and D of section 1, to make both minor and major medical decisions for their partners. At minimum, State must recognize valid durable power of attorney prepared by the eligible couple.

Section 4. Non-Biological Children

A. Medical Visitation. Where joint or second parent adoption has not occurred or is not available, State recognizes stepparents and same-sex non-biological parents as standing *in loco parentis* for the purposes of accompanying a child to the hospital or for the purposes of hospital visitation in case of medical emergency. At minimum, State must recognize a valid guardianship arrangement prepared by the biological and non-biological parent of the child.

B. Minor Medical Decisions. Where joint or second parent adoption has not occurred or is not available, State recognizes stepparents and same-sex non-biological parents are authorized to make minor medical decisions in the absence of the biological parent. Biological parents must be consulted with before making major medical decisions such as the authorization of non-life saving medical procedures or discontinuing life support.

APPENDIX A – Forms

VI. CONCLUSION

As long as same-sex partnerships are not given the same level of protection in all fifty states, or until DOMA is repealed, there may be no perfect solution to ensuring that same-sex partners will be able to choose who visits or speaks for them in cases of medical emergencies. Further, until DOMA is repealed, partners will face difficulties in being recognized as individuals with full legal standing to bring suit on behalf of breach of their rights and on behalf of their partners' rights.⁸⁷

Congress and the courts should make it clear, however, that DOMA's application is limited to the recognition of marital status and rights thereunder, and that it cannot be used as a justification to deny other established legal rights. It must ensure that assigned medical rights are fully recognized as designations unaffiliated with marital status.

Meanwhile, same-sex couples must ensure they have created all the affirmative rights they are able to under existing law by properly designating durable powers of attorney, granting medical visitation, and establishing legal guardianships with non-biological children, including seeking second parent or joint parent adoptions where feasible.⁸⁸ They must prepare for the worst, and sadly, should consider the extent to which their rights will be recognized or compromised if they cross state lines.

87. See *supra* Part II.A.1.

88. See *supra* Part II.B.