

NOs. 75934-1, 75956-1

**SUPREME COURT OF THE STATE OF WASHINGTON**

HEATHER ANDERSEN, et al., *Respondents*

v.

KING COUNTY, et al., *Appellant*,

v.

STATE OF WASHINGTON, *Appellant*,  
and

SENATOR VAL STEVENS, et al., *Intervenor Appellants*.

Appeal From the Superior Court of King County  
The Honorable William L. Downing

CECELIA CASTLE, et al., *Respondents*,

v.

STATE OF WASHINGTON, *Appellant*.

Appeal From the Superior Court of Thurston County  
The Honorable Richard D. Hicks

**AMICUS CURIAE BRIEF OF ELDER RIGHTS  
ORGANIZATIONS IN SUPPORT OF  
RESPONDENTS/PLAINTIFFS**

Lisa Brodoff, WSBA #11454  
Seattle University School of Law  
RONALD A. PETERSON LAW CLINIC  
1112 E. Columbia  
Seattle, WA 98122-4340  
(206) 398-4145  
Attorneys for *Amicus Curiae*

Senior Services of  
Seattle/King County  
Services & Advocacy  
for Gay, Lesbian,  
Bisexual & Transgender  
Elders (SAGE)  
Rainbow Train

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## **I. IDENTITY AND INTEREST OF AMICUS CURIAE**

*Amicus Curiae* Senior Services of Seattle/King County is the largest non-profit agency serving seniors in King County. It supplies quality services that support the independence of elders by annually serving over 50,000 seniors, their families and care-givers through a variety of programs. *Amicus Curiae* Services and Advocacy for Gay, Lesbian, Bisexual & Transgender Elders (SAGE) is the world's oldest and largest national organization devoted specifically to meeting the needs of aging sexual minorities through education and advocacy on aging issues. *Amicus Curiae* Rainbow Train is a non-profit organization that trains health care and social service providers for the elderly on the unique needs of sexual and gender minorities so that providers can be appropriately responsive to those needs.

Amici believe that the distinctive interests of elder same-sex couples should be represented to the court, and that their organizations provide that perspective.

## **II. INTRODUCTION**

As couples age together, the importance of legal marriage comes into high relief. Along with wisdom, aging brings with it a greater likelihood of illness, disability, and loss, both physical and psychological. The older we are, the more we need access to health care and income

because we are less able to work, and our chances of getting sick increase. We may need help with decision making regarding our finances and medical care if we become incapacitated from dementia or other chronic illnesses. As we age, the need for nursing home or in-home long term care grows more likely. How do we pay for this expensive care without sending our partner into poverty? What happens to the relationship if one of the couple goes to a nursing facility? How do we protect the family home for our loved one when one partner needs expensive medical care or dies? We begin to plan for death. How can we best protect our family left behind when we go? Who will decide all of this if we are unable to say, or have not carefully planned for this in advance?

Aging married couples can safely rely on their status as legally married to answer these questions and ease the consequences that come with age, because the law automatically confers benefits and protections on the couple. By law, a spouse is the default decision maker for a disabled partner's choices on health care and end of life care. By law, married couples receive pension and health care benefits when one spouse dies or becomes disabled, thus protecting the other spouse from poverty. By law, if one spouse needs long term nursing home or in-home care, the other spouse can remain securely in the family home, retain income and

assets to maintain his or her household, and enjoy secure visitation and privacy rights when seeing his or her partner in the nursing facility.

These same protections and benefits disappear when the committed couple happens to be of the same gender. Elder gay and lesbian couples face great danger without the status of marriage. They may be denied visitation with their ill partner when hospitalized or placed in a nursing home. Worse, gay couples lose the right to make health care decisions for their disabled partners. Rather, the power to make these crucial decisions rests with parents and siblings who may disapprove of the homosexual relationship and retaliate against the partner and the relationship through their decision making. Protection from loss of income and healthcare when one partner becomes disabled or dies is denied to unmarried gay and lesbian couples. Perhaps most significantly, one partner may lose her health while the other loses her home, all because they are denied the benefits and protections of marriage.

As the population of elder gay and lesbian couples grows in Washington State, the problems resulting from the inability to marry will only increase. For the health and welfare of all its citizens, this court should find that the benefits and protections of marriage are available to same-sex couples under Washington State's Constitution.

### III. WASHINGTON STATE HAS A LARGE AND GROWING POPULATION OF SAME-SEX ELDER COUPLES.

The only certainty about the size of the elder gay population in the United States is that it is growing rapidly. Reliable population estimates are difficult to come by, in large part because of the failure of academics and government research analysts to include questions about sexual orientation in their studies of the elderly.<sup>1</sup> The National Gay and Lesbian Task Force estimates that one to three million Americans identify as sexual minorities and are over age 65. This number is growing exponentially as the general population ages – by 2030, it calculates that there will be over four million elder gay citizens in the United States.<sup>2</sup> SAGE estimates that every year 400,000 lesbians and gay men will turn 50 years old.<sup>3</sup>

The number of same-sex elderly couples is also growing. According to the 2000 Census, more than one in 10 gay couples includes a partner 65 years old or older, and almost one in 10 couples have both members over age 65.<sup>4</sup> These relationships tend to be long term: two

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<sup>1</sup> See, National Gay and Lesbian Task Force, *The Issues: Seniors*, at [www.thetaskforce.org/theissues/issue.cfm?issueID=24](http://www.thetaskforce.org/theissues/issue.cfm?issueID=24) (last visited Jan. 4, 2005).

<sup>2</sup> *Id.*

<sup>3</sup> *Age through Ethnic Lenses*, 217 (Laura Katz Olson ed.) (2002).

<sup>4</sup> Census 2000.

thirds of these couples have lived together in the same home for over five years.<sup>5</sup>

In Washington State, the growth in the number of gay identified citizens reflects the national trend. As of 2000, there are at least 15,900 Washingtonian same-sex households, a number that has more than tripled since the 1990 census.<sup>6</sup> The Williams Project, a think tank that uses empirical research to further the understanding of sexuality-related policy, found that approximately 127,042 people in Washington identify themselves as gay or lesbian, or about 4.2 percent of the population.<sup>7</sup> While there are no available statistics for the number of elderly same-sex couples, assuming the national figure that one in 10 same-sex couples is aged 65 or older holds true here in Washington, there are at least 1600 couples in the state who are old. King County ranks 22<sup>nd</sup> of the top 50 counties in the United States where same-sex couples age 65 or older reside.<sup>8</sup> Census 2000 found that 635 same-sex senior couples live in King

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<sup>5</sup> *Id.*

<sup>6</sup> Judith Bradford et al., *The 2000 Census and Same-Sex Households: A User's Guide* 130 (New York: The National Gay and Lesbian Task Force Policy Institute, the Survey and Evaluation Research Laboratory, and The Fenway Institute) (2002), available at <http://www.thetaskforce.org/downloads/census/CensusFull.pdf> (last visited Jan. 4, 2005).

<sup>7</sup> William B. Rubenstein et al., *Some Demographic Characteristics of the Gay Community in the United States* (The Williams Project on Sexual Orientation Law and Public Policy, UCLA School of Law) (2003), available at <http://www1.law.ucla.edu/~williamsproj/publications/GayDemographics.pdf> (last visited Jan. 4, 2005).

<sup>8</sup> Lisa Bennett & Gary J. Gates, *The Cost of Marriage Inequality to Gay, Lesbian and Bisexual Seniors* 9 (Human Rights Campaign Foundation) (2004), available at

County, or 3.49 for every 1000 adults aged 65 or older.<sup>9</sup> These demographic figures demonstrate that any social and economic costs resulting from marriage inequality for gay and lesbian elderly couples are significant in Washington State.

**IV. WITHOUT MARRIAGE PROTECTION, ELDER SAME-SEX COUPLES RISK IMPOVERISHMENT AND LOSS OF THE FAMILY HOME WHEN ONE PARTNER GETS SICK.**

Perhaps the greatest injustice to elder same-sex couples resulting from the inability to marry is the loss that occurs when one partner gets sick and needs long term medical and custodial care. The tragedy of discovering that a spouse has a debilitating disease like Alzheimer's dementia, Parkinson's Disease, Emphysema, Congestive Heart Failure, or AIDS is compounded by the financial stress of paying for long term nursing home care borne by the family.

The average cost of nursing home care in Washington State is currently over \$5000 per month or \$60,000 per year.<sup>10</sup> Even relatively well-off couples find this high cost prohibitive. How will the spouse at

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<http://www.hrc.org/Template.cfm?Section=Center&Template=/ContentManagement/ContentDisplay.cfm&ContentID=16569> (last visited Jan. 4, 2005).

<sup>9</sup> "Census 2000 counts of same-sex unmarried partners should not be interpreted as an actual count of either the entire gay, lesbian or bisexual population or the same-sex couple population of the United States." *Id.* at 3.

<sup>10</sup> The average daily cost of nursing home care in Washington is \$181 per day or \$66,065 per year. D.S.H.S., *Medical Overview: Long Term Care* (2004) available at <http://fortress.wa.gov/dshs/maa/Eligibility/OVERVIEW/MedicalOverviewLTC.htm> (last visited Jan. 5, 2005).

home survive financially while paying for the costly care of the sick partner? Most couples are totally uninsured for the cost of long term care.<sup>11</sup> Contrary to popular belief, Medicare pays little if any nursing home costs, covering fully only 20 days of skilled care.<sup>12</sup> The vast majority of elder married couples are forced to turn to the Medicaid Program for assistance in paying for the care of the sick spouse.<sup>13</sup> Washington State's legislature has not only chosen to participate in the Medicaid Program, it has elected to fund among the best options available for coverage of long term care in all of the 50 states, so as to protect elderly married residents from financial devastation in the face of the chronic illness of one spouse. However, these expanded spousal protections are only available to those resident couples legally married in Washington. Washingtonian same-sex couples facing the illness of one partner are denied these significant protections based solely on their inability to marry.

Medicaid is a joint state and federally funded health care program that pays for, among other things, the high cost of long term care. It is a

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<sup>11</sup> See Mike Kreidler, *Buying Long-Term Care Insurance*, at [http://www.insurance.wa.gov/factsheets/factsheet\\_detail.asp?FctShtRcdNum=11](http://www.insurance.wa.gov/factsheets/factsheet_detail.asp?FctShtRcdNum=11) (last visited Jan. 5, 2005).

<sup>12</sup> 42 U.S.C. §1395e.

<sup>13</sup> *Guide to Long-Term Care Insurance*, America's Health Insurance Plans, at <http://www.ahip.org/content/default.aspx?hc=41|329|450> (last visited Jan. 5, 2005) ("Medicaid . . . pays almost half of all nursing home costs.").

needs-based program that provides health care coverage to low-income aged, blind or disabled people.<sup>14</sup> Because the cost of institutional care is so high and the financial risks so great for married couples when one spouse becomes ill, in 1988, Congress passed “spousal impoverishment protection” legislation providing for the ability to preserve income, assets, and the family home for the well spouse.<sup>15</sup> This legislation was designed to ensure that the well spouse is able to keep enough income and assets to meet basic needs while the sick spouse is in the nursing home. Further, Congress wanted to make sure that a husband or wife was not forced out of the family home in order to pay for institutional care. These considerable protections are available only to legally married couples; unmarried partners are considered legal strangers for Medicaid purposes, even if they have lived together and become financially interdependent in exactly the same way as married couples.<sup>16</sup> Unlike married couples, same-sex couples are considered “single” and are required to spend down virtually all of their income and assets before qualifying for Medicaid coverage.<sup>17</sup> While the home is exempt from being counted as an asset, there are no allocations to cover the maintenance costs of the home (mortgage, utilities, upkeep etc.) and no protection of the home from estate

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<sup>14</sup> See 42 U.S.C. § 1396; RCW 74.09.500.

<sup>15</sup> 42 U.S.C. §1396r-5(c), (f), (h)(2).

<sup>16</sup> See WAC 388-513-1301.

<sup>17</sup> WAC 388-513-1350.

recovery after the institutionalized partner dies. Only marriage equality can remedy this disparate treatment of elder same-sex couples.

Washington State participates in the Medicaid Program and has adopted the broadest spousal protections allowable under federal law. What are the specific asset, income, and home protections available in Washington for married couples that are denied same-sex elder couples?

A. *Washington State has higher asset protections for the well spouse.*

In the event of a medical crisis where one spouse in a married couple needs either long term nursing home care or expensive in home personal care, the well spouse will generally have far fewer financial worries than a similarly situated same-sex partner. The amount of assets a well spouse can retain while still qualifying the sick spouse for Medicaid coverage in Washington State is a maximum of \$97,100 or a minimum of \$42,000,<sup>18</sup> depending upon when the person's institutionalization began. Compare this to the amount allowed for an unmarried applicant for institutional Medicaid: the sick partner is allowed to retain only \$2,000.<sup>19</sup> There is no allocation of assets for the well partner in a same-sex couple. For same-sex couples who are financially interdependent and jointly own property, this means that the couple loses a minimum of \$40,000 and as

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<sup>18</sup> WAC 388-513-1350(6).

<sup>19</sup> WAC 388-513-1350(1).

much as \$95,100 in protection for the well partner, simply because they are unable to legally marry.

Married couples can shelter additional assets that put them over the Medicaid resource limit, and keep those assets to provide for the spouse at home. The primary option allowed by Washington State for married couples to both reduce their joint assets to below the \$42,000 to \$97,100 allowable amount and protect the well spouse by providing additional assets for support is an irrevocable annuity.<sup>20</sup> If the couple has too much money to qualify for Medicaid, a married couple simply takes the excess amount and puts it in an annuity for the sole benefit of the well spouse. The income from the annuity can be used for financial support without affecting the Medicaid eligibility of the sick spouse. This easy option to preserve significant additional assets for the support of the spouse at home is not available at all to same-sex couples.<sup>21</sup>

*B. Washington State has higher income protections for the well spouse.*

Legally married Medicaid applicants in Washington State are able to protect significantly more monthly income for the well spouse than similarly situated same-sex couples. The well spouse can keep any

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<sup>20</sup> See WAC 388-561-0200(8)(b).

<sup>21</sup> In fact, such a transfer conducted by a same-sex couple would be considered illegal and would disqualify the couple from Medicaid eligibility for months or years. See WAC 388-513-1364.

monthly income that comes in his/her name plus as much of the sick spouse's monthly income as will bring her/him up to a minimum of \$1562. If there are family home maintenance costs, the well spouse can keep as much as \$2378 per month from her spouse's income and still qualify for Medicaid coverage.<sup>22</sup> On the other hand, a same-sex well partner is not allowed to keep *any* of their sick partner's monthly income to help maintain basic needs and the family home. If the institutionalized partner provided the majority of the income for the family, this loss is particularly devastating. The sick partner is required by Medicaid to spend all of his/her monthly income on medical care except a \$42 per month personal needs allowance (for haircuts and other small personal items in the nursing home) before Medicaid will cover the remaining costs.<sup>23</sup> This leaves the well partner with no income to cover basic food, shelter, and clothing needs, or to pay the rent or mortgage and upkeep on their home, based solely on the couple's legal status as unmarried.

*C. Washington State preserves the family home for the well spouse.*

For elder same-sex couples who own a home together, the long term illness of one partner is not only emotionally overwhelming for the couple; it can also result in the forced homelessness of the well partner.

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<sup>22</sup> See WAC 388-513-1330.

<sup>23</sup> See WAC 388-513-1325 for income rules for single people.

Washington State Medicaid regulations allow one member of a married heterosexual couple to remain in the family home without risking the Medicaid eligibility of the sick spouse.<sup>24</sup> When the nursing home spouse dies, Washington State can recover the costs of institutional care it paid from a Medicaid recipient's remaining estate.<sup>25</sup> However, the State cannot pursue any estate recovery at all during the lifetime of the surviving spouse.<sup>26</sup> Thus, the surviving spouse can live without fear of losing her home because of the medical needs of the sick spouse once their spouse passes away.

In addition, married couples can completely and legally avoid any estate recovery at all by Washington State by simply putting the home and any other assets held by the nursing home spouse in the sole name of the well spouse. Doing so leaves no assets in the estate of the Medicaid recipient from which the State can collect. This spousal protection design is not only perfectly legal in Washington -- it is exactly what the state anticipates and encourages married couples to do. Unlike the rules for unmarried couples, spouses can freely transfer the home and other assets to each other without any penalty.<sup>27</sup> Therefore, the couple can legally avoid the Medicaid lien by putting the home in the well spouse's name

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<sup>24</sup> WAC 388-475-0350(b).

<sup>25</sup> See RCW 43.20B.080.

<sup>26</sup> WAC 388-527-2737(1).

<sup>27</sup> WAC 388-513-1364(1)(d)(i).

while the sick spouse is alive. By allowing married couples to preserve the family home for the spouse that has just lost their life partner, Washington State has made a humane and reasoned choice for its elder citizens that prevents homelessness at the time of greatest vulnerability for the surviving spouse.

Yet, elder same-sex couples have none of the protections and humanity provided to all other married Washingtonians by the state, even if they have spent their entire adult lives living together in the same home.<sup>28</sup> This inequity forces same-sex couples to make an unimaginable choice between either preserving their family home or forfeiting the home and an entire life's savings to pay the high cost of long term medical care.

**V. WITHOUT MARRIAGE PROTECTION, ELDER SAME-SEX COUPLES ARE AT GREATER RISK OF LOSING THEIR PHYSICAL AND PSYCHOLOGICAL HEALTH.**

The number one health risk for lesbians and gay men is the fear of seeking medical care.<sup>29</sup> This reluctance to seek needed preventive and remedial care is explained, in large part, by the fear of coming out to providers and because of previous negative experiences with providers,

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<sup>28</sup> In Massachusetts, where marriage equality is a reality after *Goodridge v. Dept. of Public Health*, 440 Mass. 309, 798 N.E.2d 941 (2003), Medicaid spousal protections are provided equally to same-sex and opposite-sex married couples, despite the federal Defense of Marriage Act (DOMA), 1 U.S.C. § 7. See, Mass. Regs. Code tit. 130, § 515.001 (defining spouse for Medicaid purposes as "a person married to the applicant or member according to the laws of the Commonwealth of Massachusetts").

<sup>29</sup> Jacalyn Claes & Wayne Moore, *Caring for Gay and Lesbian Elderly* 224 (2001), (citing Davison and Friedman, 1981; Robb, 1996; Robertson and Schacter, 1981; and Harrison, 1996).

including health care workers' failure to recognize the patient's partner in the same way they would a legal spouse. Even routine medical care is often avoided, resulting in serious health consequences.<sup>30</sup> This reality is compounded for older gays and lesbians who, as a group, have a higher likelihood of needing medical treatment. Studies show that when medical treatment is sought by older gays and lesbians, it is frequently only in the later stages of illness.<sup>31</sup> Gay elders' fear of losing capacity is compounded by the possibility of entering a medical institution that is "insensitive, antagonistic, and discriminatory towards them and their needs."<sup>32</sup> Washington State's legal recognition of marriage for same-sex couples would go a long way towards relieving the stress of medical treatment for elder same-sex couples by fostering greater public awareness and acceptance of homosexuality in general and of the equal status of their marital relationships.

*A. Marriage protects physical access to the spouse.*

A further reason elder same-sex couples may forgo medical care is for fear that they will be denied contact with and access to their partners:

Hospitals, nursing facilities, in-patient hospice programs, retirement homes, assisted living facilities, and adult day-care programs may directly or indirectly seek to create barriers between life partners, thus adding greater stress

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<sup>30</sup> *Id.* at 225.

<sup>31</sup> *Id.* at 224-225 (Citations to studies omitted).

<sup>32</sup> *Id.* at 218.

and anxiety to a person's already overwhelmed psychological and emotional state. Holding hands or hugging may be comforting gestures of reassurance during times of distress; yet staff workers often discourage or obstruct outward signs of affection through their comments, indirect communications, or "policies."<sup>33</sup>

Unlike same-sex couples, legally married opposite-sex couples have access to each other guaranteed by law when one spouse is hospitalized or needs institutional care. "Even though hospitals may readily make arrangements for husbands or wives to spend the night in the patient's room, lesbian and gay men may encounter indifference or downright hostility from the hospital staff when they ask if such accommodations can be arranged for them."<sup>34</sup>

Under Washington law, a nursing home or long term care facility resident is only guaranteed access to and privacy with a legal spouse, not a domestic partner. If both spouses need residential care, the facility must allow them to share a room.<sup>35</sup> The privacy and promise of shared rooms legally mandated for married couples is good policy because it provides for the psychological needs of older couples when one or both are ill and need long term care. Marriage equality for same-sex couples would

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<sup>33</sup> *Id.* at 226.

<sup>34</sup> *Id.*

<sup>35</sup> RCW 74.42.070 states: "Married residents shall be given privacy during visits with their spouses. If both husband and wife are residents of the facility, the facility shall permit the husband and wife to share a room, unless medically contraindicated" *See also* RCW 70.129.140(6); WAC 388-97-07065(1)(a).

require medical facilities to respect equally the rights of elder gays and lesbians when faced with a medical crisis.

*B. Marriage allows a spouse to make better informed health care decisions for an incapacitated partner.*

In Washington State, legally married spouses are automatically granted health care decision making power for their husbands or wives who are too ill and incapable of making decisions for themselves. Under Washington's Informed Consent Statute,<sup>36</sup> patients unable to make their own medical decisions who do not have an appointed guardian or durable power of attorney for healthcare can have those critical and personal decisions made for them by their spouse; adult children; parents; and, finally, adult brothers and sisters, in that order. The life partner of a gay or lesbian patient is completely left out of these medical decisions by law, in favor of children, parents, and siblings who are less likely to know the patient's medical needs and desires.

Ironically, one of the major purposes of this proxy medical decision making statute is to preserve the patient's autonomy by authorizing the individual who is most likely to know the kinds of medical choices the patient would make if competent.<sup>37</sup> The legal family is considered to be the most generally knowledgeable about the patient's

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<sup>36</sup> RCW 7.70.065

<sup>37</sup> Adrienne E. Quinn, Comment, *Who Should Make Medical Decisions for Incompetent Adults? A Critique of RCW 7.70.065*, 20 Seattle U. L. Rev. 573, 578 (1997).

“goals, preferences, and values.”<sup>38</sup> In *In re Hamlin*, the Washington State Supreme Court held that the family should be recognized as an important social unit and decision maker in matters that intimately affect its members.<sup>39</sup>

However, the life partner in a same-sex couple, who is just as likely as a legal spouse to know the patient’s values and medical decision priorities, is entirely excluded by law from making these choices. In this way, marriage inequality poses great danger to the physical health of same-sex couples because the most knowledgeable proxy decision maker is cut out of the process entirely.<sup>40</sup> For elder same-sex couples, this danger is compounded by the fact that there is a greater probability of needing medical care as we age, and older homosexual men and women are more likely to be in the closet or even estranged from the siblings, parents, and adult children who by law trump their life partner’s ability to make these decisions.<sup>41</sup> The legal proxy decision makers in Washington State may well end up being the least familiar with the patient’s desires,

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<sup>38</sup> Paul B. Solnick, *Proxy Consent for Incompetent Non-Terminally Ill Adult Patients*, 6 J. Legal Med. 1, 19-20 (1985) (citing President's Commission, *Making Health Care Decisions* 182-83 (1982)).

<sup>39</sup> 102 Wn.2d 810, 818, 689 P.2d 1372, 1377 (1984).

<sup>40</sup> Judith Areen, *The Legal Status of Consent Obtained From Families of Adult Patients to Withhold or Withdraw Treatment*, 258 J. Am. Med. Ass'n 229, 233-234 (1987).

<sup>41</sup> Claes & Moore, *supra*, at 225-226.

and the most hostile to the patient's sexual orientation and choice of partner.

The appointment of a same-sex partner as medical durable power of attorney under RCW 11.94.010 may not solve this problem for elder couples. First, most people do not have this document – only between nine and 23 percent have executed any form of advance medical directive in this country.<sup>42</sup> It is unfair to require elder gay and lesbian couples to be both familiar with Washington's law and to go forward to do this advance planning when most others do not. Second, getting the appropriate legal advice and planning to avoid a medical crisis is time consuming and expensive for most couples. Finally, even if same-sex couples do go forward with this advance planning, there is no guarantee that hospitals will honor the durable power of attorney over the objection of complaining parents, siblings or adult children when a medical emergency occurs.<sup>43</sup>

#### **VI. WITHOUT MARRIAGE PROTECTION, ELDER SAME-SEX COUPLES LOSE ACCESS TO PENSION BENEFITS AT THE DEATH OF A PARTNER.**

A myriad of additional benefits and protections are automatically available to legally married elder couples when one spouse retires,

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<sup>42</sup> Robert A. Pearlman et al., *Advance Care Planning: Eliciting Patient Preferences for Life-Sustaining Treatment*, 26 Patient Educ. & Counseling 353, 355 (1995).

<sup>43</sup> Claes & Moore. *supra*, at 226.

becomes disabled, or dies. For example, the Social Security Program protects spouses from loss of income by entitling husbands and wives who have not worked to collect from the account of their insured spouse. Upon the retirement of the worker spouse, the household gets the worker's Social Security amount plus an additional half that amount for the other spouse. Upon the death of the worker spouse, the widow receives the entire Social Security check of the deceased.<sup>44</sup> These retirement and survivor benefits are denied to same-sex couples, causing a significant loss of income to the household. The Human Rights Campaign Fund estimates that the loss of Social Security survivor benefits alone to surviving partners amounts to an average yearly loss of \$5,528 in income.<sup>45</sup>

Lesbian and gay surviving partners of Washington State employees suffer additional losses when one member of the couple dies leaving a state retirement account. All of the Washington State public employee<sup>46</sup> retirement plans contain provisions automatically nominating the employee's spouse as the recipient of the pension in the event the employee should die before retirement.<sup>47</sup> A similar provision applies when

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<sup>44</sup> 42 U.S.C. § 402.

<sup>45</sup> Bennett & Gates, *supra*, at 4.

<sup>46</sup> See also RCW 2.10.140 (judges), 28B.10.400 (higher education employees), 41.18.040 (firefighters), 41.20.80, 41.32.520 (teachers).

<sup>47</sup> RCW 41.40.270, 660, 835.

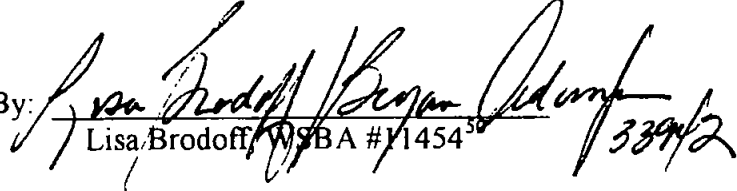
the employee dies after retirement.<sup>48</sup> As an additional protection, spousal consent is required for the selection of certain retirement options.<sup>49</sup> Simply having the legal status of marriage entitles couples in Washington State to these protections without any forethought or legal maneuvering. There are no such guarantees upon the death of a life partner for same-sex couples.

## VII. CONCLUSION

Marriage can protect elderly couples from poverty, loss of the family home, and uninformed and insensitive health care. All of these benefits and protections can only be secured for elder same-sex couples by finding that marriage equality is required by Washington's Constitution.

Respectfully submitted this 31<sup>st</sup> day of January, 2005

Seattle University School of Law  
RONALD A. PETERSON LAW CLINIC  
Attorneys for *Amicus Curiae*  
Senior Services of Washington  
SAGE  
Rainbow Train

By:   
Lisa Brodoff, WSBA #11454<sup>50</sup> 339/2

<sup>48</sup> RCW 41.40.188, 660 *but see* RCW 41.40.845.

<sup>49</sup> RCW 41.40.188(2)(a), 660(2)(a), 845(2)(a).

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