

# PREFERENCING NONMARRIAGE IN LATER YEARS

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## INTRODUCTION

Consider the following scenario: Bill and Betty were married to other people for most of their adult lives but met two years ago at a social event organized in their community for persons of a certain vintage who share an interest in particular activities, such as international travel or local cultural performances. They have enjoyed spending time together and, without the imperatives attendant to starting a family, are pondering whether they should get married. Quite apart from their conditioned reflex to remarry, the U.S. legal system seemed to favor such arrangements, at least when Bill and Betty were much younger. But does the legal system still manifest this preference during their later years of life?

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Many older couples have concluded that it does not. A report from the Pew Research Center in 2017 found that “the number of people over 50 who cohabit with an unmarried partner jumped 75 percent from 2007 to 2016 . . . the highest increase in any age group.”<sup>1</sup> An analyst for the U.S. Census Bureau observed in 2019 that there was “a significant jump in cohabitation among older adults, particularly in the last 10 years as divorce rates went up among this group.”<sup>2</sup> The process of disentangling decades of accumulated financial and other arrangements undoubtedly encourages older people to choose cohabitation over marriage with their new companions.<sup>3</sup>

In fashioning our nation’s laws relating to personal relationships, making marriage the default arrangement for committed adults reflected a pronounced heteronormativity bias. This strong presumption favoring marriage was historically limited to opposite-sex partners but has more recently been extended to same-sex partners as well.<sup>4</sup> Today, the legal preference for marriage manifests itself in both contexts. It does so most significantly in the tax treatment of employer-provided fringe benefits, especially health insurance; eligibility for Social Security retirement and disability benefits; distribution of retirement plan payments; protection against being disinherited; and authorization to make medical decisions. Couples who are not married can receive some, but not all, of these advantages through specific legal steps, though some serious effort is often required.

This pattern does not, however, apply across all legal domains when older partners are involved. When such couples approach their later years and require assistance with activities of daily living, the law actually propagates an overwhelming preference for *nonmarriage*, an anomaly that was the original inspiration for this Article. But this Article examines the economic and legal rights of cohabitants in later life more generally. It begins by examining certain legal regimes affecting older Americans and analyzing the preferential treatment in those regimes for married persons. Among the areas examined are health insurance, Social Security benefits,

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1. Paula Span, *More Older Couples Are ‘Shacking Up’*, N.Y. TIMES, May 9, 2017, at D3 (summarizing Renee Stepler, *Number of U.S. Adults Cohabiting with a Partner Continues to Rise, Especially Among Those 50 and Older*, PEW RSCH. CTR. (Apr. 6, 2017), <https://www.pewresearch.org/fact-tank/2017/04/06/number-of-u-s-adults-cohabiting-with-a-partner-continues-to-rise-especially-among-those-50-and-older/> [https://perma.cc/BWU6-RH3K]).

2. Benjamin Gurrentz, *Unmarried Partners More Diverse than 20 Years Ago*, U.S. CENSUS BUREAU (Sept. 23, 2019), <https://www.census.gov/library/stories/2019/09/unmarried-partners-more-diverse-than-20-years-ago.html> [https://perma.cc/49YG-HXGM].

3. See Span, *supra* note 1; Melynda Dovel Wilcox, *Love & Money, Senior Style*, KIPLINGER’S PERS. FIN. MAG., Oct. 1996, at 83; Susan L. Brown, I-Fen Lin, Anna M. Hammersmith & Matthew R. Wright, *Repartnering Following Gray Divorce: The Roles of Resources and Constraints for Women and Men*, 56 DEMOGRAPHY 503 (2019), <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC6450723/pdf/nihms-1518419.pdf> [https://perma.cc/283T-T55J].

4. See *Obergefell v. Hodges*, 576 U.S. 644 (2015).

retirement plan distributions, testamentary dispositions, and health care decision-making. It then addresses the disjointed “system” of financing long-term care that currently exists in the United States and how the joint federal and state government health care program known as Medicaid treats married and unmarried couples, as well as personal indebtedness more generally. Along the way, this Article considers a very practical problem that many unmarried couples face as they get older: should they get married at all?

### I. HEALTH INSURANCE

In the United States, two principal models for financing health care expenditures predominate: employer-provided health insurance and government-financed health care programs. But these two models operate in largely distinct spheres. Employer-provided health insurance is the overwhelming platform for actively employed persons, largely attributable to changes made during World War II and then codified after that war through federal tax benefits that remain in force today.<sup>5</sup> Government-financed health care, meanwhile, is the near-exclusive platform for specific sub-groupings of Americans, including persons aged sixty-five and older,<sup>6</sup> persons with minimal financial resources,<sup>7</sup> persons who served in the United States military,<sup>8</sup> and children.<sup>9</sup>

These two models differ in many ways, but their treatment of marital status is actually quite similar. For example, employer-provided health insurance typically covers not only employees but also their current spouse. In most cases, an employer’s financial contribution toward the cost of spousal coverage is materially less than the employer’s contribution to the cost of its employees’ coverage, but it is significant nonetheless.<sup>10</sup>

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5. See Richard L. Kaplan & Dawson J. Price, *Change and Continuity in Fringe Benefit Taxation: Seeking Sense and Sensibility*, 59 N.Y.L. SCH. L. REV. 281, 288–89 (2014).

6. See 42 U.S.C. § 1395c (Medicare); see generally LAWRENCE A. FROLIK & RICHARD L. KAPLAN, *ELDER LAW IN A NUTSHELL* 55–108 (7th ed. 2019).

7. See 42 U.S.C. § 1396a(10) (Medicaid); see generally FROLIK & KAPLAN, *supra* note 6, at 109–36.

8. See 38 U.S.C. § 101 (Veterans Benefits); see generally FROLIK & KAPLAN, *supra* note 6, at 339–56.

9. See 42 U.S.C. § 1397aa (Children’s Health Insurance Program); see generally *The Children’s Health Insurance Program (CHIP)*, HEALTHCARE.GOV, <https://www.healthcare.gov/medicaid-chip/childrens-health-insurance-program/> [<https://perma.cc/3LVZ-PFKA>].

10. See Bureau of Lab. Stat., U.S. Dep’t of Lab., *Average Employee Medical Premium \$6,797 for Family Coverage in 2020*, ECON. DAILY (Oct. 2, 2020), <https://www.bls.gov/opub/ted/2020/mobile/average-employee-medical-premium-6797-dollars-for-family-coverage-in-2020.htm> [<https://perma.cc/7T6H-ZCSW>].

Furthermore, the employer's financial contribution is coupled with ready access to such insurance, usually without any medical underwriting for the spouse. In other words, a married person can get health insurance through their spouse's employer with minimal hassle. The cost of such insurance is typically more favorable than health insurance policies available from the Marketplace Exchanges created under the Affordable Care Act (ACA).<sup>11</sup> Marital status, in other words, conveys substantial benefits in securing health insurance through employer-based plans that are generally unavailable to unmarried partners.

Similarly, a person who qualifies for the federal government's Medicare program can enroll that person's current spouse<sup>12</sup> even if the current spouse has not satisfied the work requirement that Medicare generally imposes.<sup>13</sup> The dependent spouse in this situation must still meet the age requirement of age sixty-five<sup>14</sup> but need not have direct prior attachment to the compensated workforce. Indeed, Medicare allows enrollment of a Medicare beneficiary's former spouse if their marriage lasted at least ten years.<sup>15</sup> Marital status, once again, is critical to obtaining health insurance, this time via the Medicare program.

In all of these circumstances, a spouse is not obligated to obtain health insurance on the basis of their marital relationship, but it is generally very beneficial to do so. Prior to enactment of the Affordable Care Act, a spouse might find that obtaining insurance on her own was difficult or even impossible if that person had preexisting medical conditions or illnesses that might result in high medical expenditures. After enactment of the ACA, health insurance is guaranteed regardless of prior health care status, but available policies often have high monthly premiums, sizeable annual deductibles,<sup>16</sup> and severe restrictions on possible health care providers.<sup>17</sup> In other words, even when health insurance is available without regard to

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11. See 42 U.S.C. § 18031(b) (establishing American Health Benefit Exchanges, known colloquially as Marketplace Exchanges).

12. See 42 U.S.C. § 402(b)(1), (c)(1).

13. See *id.* §§ 414(a)(2), 426(a)(2)(A), 1395c(1).

14. See *id.* § 426(a)(1).

15. See *id.* §§ 402(b)(1), (c)(1), 416(d)(1).

16. See Sara R. Collins, Munira Z. Gunja & Gabriella N. Aboulaflia, *U.S. Health Insurance Coverage in 2020: A Looming Crisis in Affordability*, COMMONWEALTH FUND 1, 7 (Aug. 2020), [https://www.commonwealthfund.org/sites/default/files/202008/Collins\\_looming\\_crisis\\_affordability\\_biennial\\_2020\\_sb.pdf](https://www.commonwealthfund.org/sites/default/files/202008/Collins_looming_crisis_affordability_biennial_2020_sb.pdf) [<https://perma.cc/2V2H-P3J9>] (“People who get coverage in the individual market and ACA marketplaces face higher deductibles, on average, relative to their incomes, than people in employer plans.”).

17. See BY Davalon, *Network Health Providers Under Obamacare*, EHEALTH (Jan. 21, 2022), <https://www.ehealthinsurance.com/resources/affordable-care-act/network-health-providers-obamacare> [<https://perma.cc/ZMX3-CJWG>] (“Many of the insurance plans that meet Obamacare standards have limited or ‘narrow’ networks of doctors and hospitals who agree to accept these lower negotiated prices.”).

marital status, the coverage options that such status conveys are often superior in terms of cost, provider choice, or both. Accordingly, marriage is not always required to obtain health insurance, but it usually enhances the choices that are available.

## II. SOCIAL SECURITY BENEFITS

There is nothing simple or direct about any aspect of the federal government's retirement benefits program called Social Security,<sup>18</sup> and its treatment of marriage is no exception. On the one hand, this program provides a spousal benefit to a spouse who is at least sixty-two years old<sup>19</sup> and has been married to the retired spouse for at least one year.<sup>20</sup> This spousal benefit is one-half of the retired person's monthly Social Security retirement benefit,<sup>21</sup> as long as that amount exceeds what the spouse would be entitled to receive based on her own work record.<sup>22</sup> For example, assume that Bill's history of wages and salaries subject to Social Security's payroll taxes over his work life entitles him to a monthly retirement benefit of \$6,000. Assume further that Bill and Betty decide to marry. If Betty's own work history entitles her to a retirement benefit of \$2,600, Betty would receive \$3,000 per month—namely, half of Bill's monthly benefit. But if Betty's work record entitles her to a retirement benefit of \$3,500, she would receive that amount instead and would get nothing from Bill's Social Security account. In effect, she would be treated as if she and Bill were not married at all. Thus, marital status *might* provide a financial benefit under the Social Security's retirement benefit calculus but not necessarily, with the actual result depending upon a person's own work record. While not assured, marital status does provide the possibility of a higher benefit calculation.

Marriage conveys additional considerations after a couple has been divorced at least two years<sup>23</sup> as long as their marriage lasted at least ten years.<sup>24</sup> In that circumstance, the former spouse is treated as if that person

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18. See 42 U.S.C. § 401; see generally FROLIK & KAPLAN, *supra* note 6, at 279–324.

19. See 42 U.S.C. § 402(b)(1)(B)(i), (c)(1)(B)(i).

20. See *id.* § 416(b)(2), (f)(2).

21. See *id.* § 402(b)(2), (c)(2). The spousal benefit is less than half of the retired person's Social Security if the spouse claims this benefit prior to that person's reaching Social Security's full "retirement age." See *id.* §§ 402(q)(1), 416(l)(1).

22. See *id.* § 402(b)(1)(D), (c)(1)(D), (k)(2)(B).

23. See *id.* § 402(b)(4)(A)(ii), (c)(4)(A)(ii).

24. 42 U.S.C. § 416(d)(1), (4). This duration requirement was twenty years when the divorced spouse benefit was first enacted. Social Security Amendments of 1965, Pub. L. No. 89-97, § 308(a)–(c),

were still married for most Social Security purposes. So, if Bill and Betty divorced after being married at least ten years, Betty could receive a divorced spouse benefit equal to half of Bill's monthly retirement benefit, assuming—once again—that her own work-record benefit was not greater. On the other hand, a divorced spouse can claim retirement benefits *before* the worker spouse files for such benefits,<sup>25</sup> while a current spouse must wait until the worker spouse also files for retirement benefits under this program.<sup>26</sup> Thus, a former spouse is not always treated the same as a current spouse.

A provision of particular importance to older divorced couples provides that a subsequent marriage does not eliminate a spouse's entitlement to a retirement benefit based on that person's former spouse's work record if the later marriage took place after the spouse was at least sixty years old.<sup>27</sup> So, if Betty in the prior example married Simon when she was sixty-two years old, Betty can still claim a spousal benefit based on Bill's work record if that amount exceeds the benefit based on Simon's work record and also exceeds Betty's own work-record benefit. In other words, Betty would get the greatest of three calculations: a spousal benefit from Bill, a spousal benefit from Simon, and her own work-record benefit. But if she married Simon before she was sixty years old, Betty would no longer be entitled to a spousal benefit based on Bill's work record. Accordingly, if Betty plans to live with a new partner whose work record would produce a lower spousal benefit than she receives as Bill's former spouse, she should *not* marry that new partner until after her 60th birthday. Nonmarriage circumvents this tricky timing issue altogether.

Finally, Social Security pays a retirement benefit to a *surviving* spouse equal to the deceased spouse's work-record benefit,<sup>28</sup> subject—once again—to the caveat about a person's own work-record benefit being lower. Thus, on the facts of the preceding example, if Bill dies before Betty, she will receive a surviving spouse benefit equal to Bill's retirement benefit of \$6,000 because that amount exceeds Betty's own work-record benefit. The

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79 Stat. 286, 375–78. It was changed in 1977 by the Social Security Amendments of 1977, Pub. L. No. 95-216, § 337(a)–(b), 91 Stat. 1509, 1548. The most recent study of first marriages found that the median duration of such marriages was eight years. See Casey E. Copen, Kimberly Daniels, Jonathan Vespa & William D. Mosher, *First Marriages in the United States: Data from the 2006-2010 National Survey of Family Growth*, 49 NAT'L HEALTH STATS. REPS. 1, 7, (Mar. 22, 2012), <https://www.cdc.gov/nchs/data/nhsr/nhsr049.pdf> [<https://perma.cc/4PDG-KFH2>].

25. See 42 U.S.C. § 402(b)(4)(A), (c)(4)(A).

26. See *id.* § 402(z)(3)(B), added by Bipartisan Budget Act of 2015, Pub. L. No. 114-74, § 831(b)(1), 129 Stat. 584, 613.

27. See 42 U.S.C. § 402(e)(3).

28. See *id.* § 402(e)(2), (f)(2). To receive this benefit, a surviving spouse must have been married to the worker spouse at least nine months before the worker spouse died. 20 C.F.R. § 404.335(a)(1) (2021).

same result would apply if Betty is Bill's surviving divorced spouse, as long as Betty did not marry someone else prior to her reaching age sixty.<sup>29</sup> But if Bill and Betty were never married, Bill's death would have no effect on Betty's Social Security benefit, because it would be based solely on her work record. After all, she was never Bill's spouse in this scenario. Thus, current marriage or former marriage might—or might not—provide an enhanced Social Security benefit when the worker spouse passes away, but nonmarriage makes the other person's death irrelevant in determining future monthly benefits from this program.

### III. INCOME TAXATION

Though the intricacies of the federal income tax are far beyond the scope of this Article, two specific issues merit attention here because they are so central to the lives of older couples: taxation of the Social Security benefits described in the preceding section and sale of a principal residence.

#### A. *Taxation of Social Security Benefits*

Social Security benefits are taxed according to a two-tiered system that depends upon a person's overall income but with thresholds that favor unmarried recipients. In the first tier, Social Security benefits are not subject to federal income tax unless a recipient's "provisional income" exceeds \$25,000 for an unmarried taxpayer and \$32,000 for married taxpayers.<sup>30</sup> The critical term "provisional income" consists of the taxpayer's (or the married couple's) "adjusted gross income" plus one-half of their Social Security benefits and all of their tax-exempt interest income received on state and local government bonds.<sup>31</sup> To the extent that this "provisional income" exceeds the applicable threshold, 50% of the excess is taxable,<sup>32</sup> but never more than 50% of that taxpayer(s)'s Social Security benefits.<sup>33</sup> This rather convoluted process is best explained through an example.

Assume that Geraldine has adjusted gross income of \$22,000 plus Social Security benefits of \$10,000 and no tax-exempt bond interest income. Her "provisional income," therefore, is her adjusted gross income of \$22,000 plus half of her \$10,000 of Social Security benefits (i.e., \$5,000), or \$27,000. This "provisional income" exceeds the applicable threshold for an

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29. See 42 U.S.C. § 402(e)(3).

30. I.R.C. § 86(b)(1)(B), (c)(1)(A)–(B).

31. *Id.* § 86(b)(1)(A)(i)–(ii), (2)(B).

32. *Id.* § 86(a)(1)(B).

33. *Id.* § 86(a)(1)(A).

unmarried taxpayer of \$25,000 by \$2,000, so half of this excess—namely, \$1,000—of her Social Security benefits is taxable. As Geraldine’s “provisional income” rises, so will its excess over the applicable threshold and more of her Social Security benefits will become taxable—up to a limit of half of her benefits, i.e., \$5,000 in this case.

In other words, a Social Security recipient pays tax on as much as half of their benefits, with the exact amount determined by how much that person’s “provisional income” exceeds the applicable threshold. These statutory thresholds, it should be noted, have not been indexed for inflation since they were first enacted, which was 1983 for the first tier<sup>34</sup> and 1993 for the second tier.<sup>35</sup> But the main point for purposes of this Article is that the applicable threshold for a married couple is *less* than twice the threshold for an unmarried person. That is, the statutory threshold for a married couple is \$32,000 rather than twice the threshold that applies to an unmarried person (i.e., \$25,000), which would be \$50,000. As a result, two unmarried Social Security benefit recipients with provisional income of \$24,000 each would owe no federal income tax on their benefit payments, because their individual incomes are below the applicable threshold of \$25,000. But if they married each other, their combined provisional income of \$48,000 would be compared to the married taxpayers’ threshold of \$32,000, and a significant portion of their Social Security benefits would be subject to federal income tax.

This implicit marriage tax penalty is made worse still by how the second tier operates. The second tier utilizes statutory thresholds of \$34,000 for unmarried taxpayers and \$44,000 for married taxpayers.<sup>36</sup> To the extent that provisional income exceeds these second thresholds, fully 85% of that excess is subject to income taxation,<sup>37</sup> but never more than 85% of the recipient(s)’s total Social Security benefits.<sup>38</sup>

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34. See Social Security Amendments of 1983, Pub. L. No. 98-21, § 121(a), (g)(1), 97 Stat. 65, 80–81, 84.

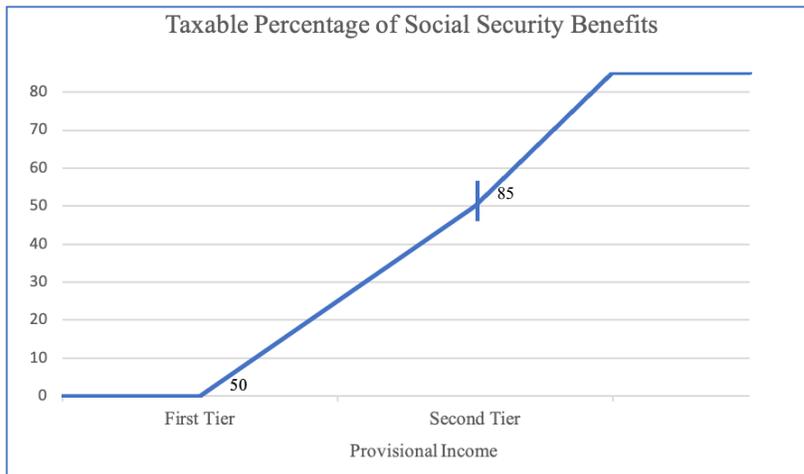
35. Omnibus Budget Reconciliation Act of 1993, Pub. L. No. 103-66, § 13215(a)(1), (b), 107 Stat. 312, 475–76.

36. I.R.C. § 86(c)(2)(A)–(B).

37. *Id.* § 86(a)(2)(A)(i).

38. *Id.* § 86(a)(2)(B). For a detailed illustration of how this second-tier component coordinates with the first-tier calculation, see FROLIK & KAPLAN, *supra* note 6, at 318–19.

This truly strange taxation scheme, bizarre even for the Internal Revenue Code, can be represented graphically as follows:



As this graph shows, there are four distinct taxation zones delineated by a Social Security recipient’s “provisional income”: (1) no income tax due on Social Security benefits until the recipient’s “provisional income” reaches the first-tier threshold, (2) 50% of the excess of “provisional income” over the first-tier threshold until the recipient’s “provisional income” reaches the second-tier threshold, (3) 85% of the excess of “provisional income” over the second-tier threshold, and (4) a maximum of 85% of a recipient’s Social Security benefits is taxable.

The most important point for purposes of this Article is that the second-tier thresholds also create a marriage tax penalty, because the threshold for married taxpayers—namely, \$44,000—is less than twice the applicable threshold for unmarried taxpayers (i.e., \$34,000), which would be \$68,000. Elsewhere, I have suggested various reforms to the taxation of Social Security benefits, including eliminating these marriage tax penalties and adjusting the statutory thresholds for inflation.<sup>39</sup> But the current income tax structure pertaining to Social Security benefits makes nonmarriage the law’s preferred status on this important and widely applicable issue.

39. See Richard L. Kaplan, *Reforming the Taxation of Retirement Income*, 32 VA. TAX REV. 327, 336–39 (2012).

### B. *Sale of a Principal Residence*

For most older couples, their principal residence is a major component of their net worth. The federal income tax law excludes from taxation gain on the sale of such residence to the extent that this gain does not exceed \$250,000 for unmarried persons<sup>40</sup> and \$500,000 for married taxpayers.<sup>41</sup> Although these thresholds—like the Social Security benefit thresholds considered above—are not adjusted for inflation, they do at least recognize that marriage involves two people by setting the applicable gain exclusion for couples at twice the exclusion for single persons.

Married couples in this situation, however, enjoy a privilege that does not extend to unmarried persons. Eligibility for this exclusion is generally limited to taxpayers who own and use a home as their principal residence for at least two years during the five years prior to its sale.<sup>42</sup> But a married couple is eligible for the full \$500,000 gain exclusion even if only one spouse owns the residence,<sup>43</sup> though both spouses must use the home as their principal residence.<sup>44</sup> For example, assume that Bill and Betty are married and have lived together for several years in a home that Bill owns in his name alone. In this circumstance, the full \$500,000 gain exclusion would be available when they sell this home. But if they had not been married, only Bill as the residence's owner would be eligible for a gain exclusion, and the applicable exclusion amount would be the \$250,000 that applies to an unmarried taxpayer. Accordingly, marriage conveys a distinct tax benefit in this situation.

The benefit of this pro-marriage provision, however, should not be overstated. To obtain the full \$500,000 gain exclusion, all that Bill and Betty in the preceding example would need to do is make Betty a co-owner of their residence. In that situation, Bill and Betty would then be able to each exclude \$250,000 of gain—i.e., total gain excluded of \$500,000—without needing to get married.

A very different situation presents itself when one homeowner passes away and the other homeowner sells their residence shortly thereafter. If the homeowners in question were married, the tax code allows the surviving spouse to exclude \$500,000 of gain, rather than \$250,000 as an unmarried person, as long as the residence is sold within two years of the deceased spouse's death.<sup>45</sup> This provision is not available to unmarried couples. The resulting nonmarriage tax penalty, however, is ameliorated in large part by

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40. I.R.C. § 121(b)(1).

41. *See id.* § 121(b)(2)(A).

42. *Id.* § 121(a).

43. *See id.* § 121(b)(2)(A)(i).

44. *See id.* § 121(b)(2)(A)(ii).

45. *Id.* § 121(b)(4).

the tax code's general rule that allows the basis of inherited property to be "stepped up" to its fair market value when the deceased owner dies.<sup>46</sup> As a result of this provision, half of the unrealized gain in the home's fair market value when the first co-owner died is excluded from taxation.

To illustrate this common situation, assume that Unmarried Couple and Married Couple both have homes with unrealized appreciation of \$450,000. Assume further that one person in each Couple died and that the surviving co-owner sells the residence one year later. In both cases, the deceased co-owner's one-half share of the gain is not taxed due to the step-up-in-basis rule. When the surviving co-owner sells the residence the following year, the remaining gain of \$225,000 (i.e., half of the total appreciation of the home) would otherwise be taxable, but the residential sale exclusion of \$250,000 effectively shields this gain from taxation. Both couples are treated the same.

On the other hand, if the home's appreciation had been more substantial, say \$800,000, the results *would* vary by marital status. In this circumstance, half of the home appreciation (i.e., \$400,000) would still not be taxable when the co-owner dies, and the surviving co-owner's basis would increase accordingly. The gain realized when the home is sold one year later is \$400,000 in both situations. The surviving co-owner in the Unmarried Couple would be able to utilize the \$250,000 residential sale exclusion, but the remaining gain of \$150,000 would now be taxable. In contrast, the surviving co-owner in the Married Couple would be allowed to exclude up to \$500,000 of gain because of this special provision for married taxpayers and would owe tax on *none* of the realized gain in this example.

To summarize, unmarried co-owners will be taxed more harshly than married couples when one partner dies and the home is subsequently sold, but only if gain on the residence prior to the first homeowner's death exceeds \$500,000. In that instance, the difference between the surviving co-owner's being able to exclude \$250,000 as an unmarried co-owner and a surviving co-owner *spouse's* being able to exclude \$500,000 will matter. But if the unrealized gain on the home is less than \$500,000, the income tax circumstances of unmarried and married homeowners are exactly the same with no preference based on marital status.

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46. See *id.* § 1014(a).

## IV. EMPLOYMENT-BASED RETIREMENT PLANS

Most employment-based retirement plans are governed by the Employee Retirement Income and Security Act,<sup>47</sup> known popularly as ERISA. This statute does not apply to individually directed retirement funding schemes, such as the ubiquitous Individual Retirement Accounts (IRA) and its Roth variants, but virtually all defined-benefit and defined-contribution retirement plans are subject to ERISA's protections and constraints.

In the context of marriage, ERISA's most significant provision was added in 1984. It prevents a retiring employee in a defined benefit retirement plan from terminating his or her entire interest in the retirement plan without making some provision for that person's spouse.<sup>48</sup> More specifically, distribution of funds in these plans must take the form of a joint and survivor annuity where the survivor's portion is at least 50% of the retired employee's prospective payment.<sup>49</sup> For example, if Bill decides to withdraw the entire balance in his pension plan over his lifetime, he must select an arrangement that will pay his spouse Betty at least half what he would receive. So, a plan that would pay Bill \$6,000 a month for his life and then nothing to Betty after his death would not be allowed. Instead, Bill would need to take some lower amount, say \$5,000,<sup>50</sup> so the plan could then pay Betty \$2,500 per month after Bill dies for the remainder of her life.

To avoid this restriction, the retiring employee (Bill in this example) must obtain a waiver signed by his spouse (i.e., Betty) within ninety days prior to distribution of the employee's accumulated benefits.<sup>51</sup> Presumably, the employee's spouse obtains some financial arrangement—possibly a lump sum payment—in exchange for agreeing to the applicable waiver. But the point here is that a spouse is granted this protective leverage by virtue of the marriage relationship alone. If the two people involved were not married, there would be no legal impediment to the retiring worker's taking the entire retirement balance for himself.

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47. Pub. L. No. 93-406, 88 Stat. 829 (1974) (codified as amended in various sections of 26 and 29 U.S.C.).

48. See Retirement Equity Act of 1984, Pub. L. No. 98-397, § 103(a), 98 Stat 1426, 1429-33. A comparable provision for defined contribution retirement plans requires that a spouse receive any remaining balance in a retired worker's plan without the spouse's consent. See I.R.C. § 417(a).

49. See 29 U.S.C. § 1055(a)(1), (d)(1)(A) (2018). The U.S. Court of Appeals for the D.C. Circuit emphasized the importance of this provision by noting that "[w]ithout the spouse's written consent expressly acknowledging the effect of the waiver or new beneficiary designation, a [retirement plan] participant can neither waive nor alter the survivor annuity in any way." *VanderKam v. VanderKam*, 776 F.3d 883, 886 (D.C. Cir. 2014).

50. See 29 U.S.C. § 1055(d). Regarding the reduced amount for a joint-and-survivor annuity, see Joanna Zhang, *Marriage in the Golden Years: Revisiting Benefits and Obligations in Light of the New Individualism*, 38 N.Y.U. REV. L. & SOC. CHANGE 361, 390 (2014).

51. See 29 U.S.C. § 1055(c)(2)(A)(i), (4)(A).

## V. TESTAMENTARY PROTECTIONS

Protections similar to those described in the preceding section are provided in most state laws regarding property distributed through wills. Most “separate property” states prevent a spouse from effectively being disinherited by setting a so-called “elective share,” usually one-third of a decedent’s accumulated property. The Illinois statute is typical:

If a will is renounced by the testator’s surviving spouse, whether or not the will contains any provision for the benefit of the surviving spouse, the surviving spouse is entitled to the following share of the testator’s estate after payment of all just claims: 1/3 of the entire estate if the testator leaves a descendant or 1/2 of the entire estate if the testator leaves no descendant.<sup>52</sup>

If the decedent leaves his or her spouse with a portion that is less than the spouse’s “elective share,” this spouse is empowered by law to “take against the will” and thereby receive the statutorily designated minimum share of all property in the estate. Similarly, if no valid will is probated, the spouse of a decedent who died intestate can receive a comparable portion of the property in the estate.<sup>53</sup> In addition, the Uniform Probate Code establishes similar homestead set-asides for the surviving spouse.<sup>54</sup> But the point here is that these provisions are extended exclusively to a surviving *spouse*. Surviving unmarried partners receive no such dispensation.

Regarding testamentary transfers more generally, it should be noted that the federal estate tax allows unlimited amounts to be transferred to a decedent’s spouse without incurring any estate tax liability. A comparable provision applies to lifetime transfers as well. While unmarried partners receive no such dispensation, they are nevertheless allowed a statutory exemption that is adjusted annually for inflation and was \$12,060,000 in 2022.<sup>55</sup> Thus, the particular benefit accorded to married persons is relevant only to the very top of the wealth distribution—which has been variously calculated as the top .01% of decedents—where accumulated resources exceed the applicable exemption amount.

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52. 755 ILL. COMP. STAT. 5/2-8(a) (1975).

53. See Naomi Cahn, *The Golden Years, Gray Divorce, Pink Caretaking, and Green Money*, 52 FAM. L.Q. 57, 83 (2018); see also TRUSTS AND ESTATES: DESCENT AND DISTRIBUTION: INTESTATE SUCCESSION (STATUTES) (2018) (50-state survey).

54. See UNIF. PROB. CODE § 2-402 (2010).

55. See I.R.S. Rev. Proc. 2021-45, §3.41; 2021-48 I.R.B. 764, 771.

## VI. SURROGATE HEALTH CARE DECISION-MAKING

Under the law of every U.S. state, persons of legal age can create an advance medical directive either in the form of a living will or a durable power of attorney for health care. The first such document sets forth conditions under which certain life-sustaining medical procedures should be discontinued or terminated, while the second document simply designates a specific person to make whatever medical decisions might be necessary when the document's maker is unable to make such decisions.

These forms are marriage-neutral but what transpires when there is no advance medical directive is another matter entirely. In most U.S. jurisdictions, a so-called surrogate decision-maker is appointed for the person who cannot make medical decisions, typically from a statutorily prioritized list of possible decision-makers.<sup>56</sup> These lists, and the specific medical conditions under which they take effect, vary from state to state, but their general outlines are remarkably similar, and one of the provisions that is consistent across the various states is the priority accorded a person's spouse.<sup>57</sup>

By virtue of someone's status as the spouse of the person whose medical condition requires a designated decision-maker, that person is ranked near the very top of the applicable list. In Illinois, for example, the highest-ranked category is a court-designated guardian,<sup>58</sup> but most people have not gone through the court-based process to have a guardian appointed, so the most common designee is the next-highest category, the patient's spouse.<sup>59</sup> If there is no spouse, perhaps because the parties are not married, then other relatives are listed in the medical surrogacy statute, including adult children, parents, siblings, and grandchildren.<sup>60</sup>

The only category that a nonspouse who is not a blood relative can fit within is category #7, a "close friend."<sup>61</sup> Illinois law defines such a person as follows:

"Close friend" means any person 18 years of age or older who has exhibited special care and concern for the patient and who presents an affidavit to the attending physician stating that he or she (i) is a close friend of the patient, (ii) is willing and able to become involved

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56. See Erin S. DeMartino et al., *Who Decides When a Patient Can't? Statutes on Alternate Decision Makers*, 376 NEW ENG. J. MED. 1478, 1479–80 (2017).

57. See *Default Surrogate Consent Statutes*, AM. BAR ASS'N (2019), [https://www.americanbar.org/content/dam/aba/administrative/law\\_aging/2019-sept-default-surrogate-consent-statutes.pdf](https://www.americanbar.org/content/dam/aba/administrative/law_aging/2019-sept-default-surrogate-consent-statutes.pdf) [<https://perma.cc/D2G3-2X5A>].

58. See 755 ILL. COMP. STAT. 40/25(a)(1).

59. See *id.* 40/25(a)(2).

60. See *id.* 40/25(a)(3)–(6).

61. *Id.* 40/25(a)(7).

in the patient's health care, and (iii) has maintained such regular contact with the patient as to be familiar with the patient's activities, health, and religious and moral beliefs.<sup>62</sup>

According to the statutory definition, "[t]he affidavit must also state facts and circumstances that demonstrate that familiarity."<sup>63</sup> In fact, the only category of lower priority than a "close friend" is the person's "guardian of the estate,"<sup>64</sup> which is commonly denominated a conservator in other states. Usually, this is a person or financial institution that is charged with managing the patient's financial matters. Such a person often lacks exposure to the sort of intimate personal beliefs that medical decision-making typically entails.

On the other hand, an unmarried partner in this circumstance can remedy this generally untenable result by executing a durable power of attorney for health care under the appropriate statute and then naming that person's partner as the decision-maker. This practice, in fact, was widely advised to same-sex couples prior to the legalization of same-sex marriages. But the point remains that marital status by itself elevates a putative surrogate decision-maker, while an unmarried partner must affirmatively designate their partner as the preferred decision-maker. Otherwise, that partner will be ranked above only the person's accountant!

Similarly, the Health Insurance Portability and Accountability Act (HIPAA)<sup>65</sup> limits access to a person's medical records, which can be crucial when determining whether diminished capacity exists. Such determinations are usually required before certain protective legal arrangements can be implemented, such as powers of attorney for health care or for property. HIPAA does not have an access exception for a spouse, but many hospitals and doctors will regularly release medical information to a patient's spouse but not to a patient's unmarried partner.<sup>66</sup> Here again, unmarried partners can affect comparable access to medical records by signing a HIPAA authorization prior to its being needed, but the burden of making such arrangements falls on the unmarried partners involved without the benefit of the salubrious presumption accorded to married partners.

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62. *Id.* 40/10.

63. *Id.*

64. *See id.* 40/25(a)(8).

65. Pub. L. No. 104-191, 100 Stat. 2548 (1996).

66. *See* Robert C. Anderson, *Counseling the Unmarried Elder Client as to Marriage*, ELDER L. REP., Jan. 2010, at 1, 3.

## VII. LONG-TERM CARE AND MEDICAID

One of the most significant issues facing all older couples, regardless of marital status, is the emotionally fraught and potentially expensive possibility of needing long-term care. Elsewhere, I have characterized the financing of such care as “retirement planning’s greatest gap,”<sup>67</sup> but the focus here is on how present law preferences nonmarriage in its financing arrangements for long-term care. In fact, a former president of the National Academy of Elder Law Attorneys cited the potential costs of long-term care as the *main* reason that older couples avoid marriage.<sup>68</sup>

The term “long-term care,” or its more recent formulation “long-term services and supports,” refers to a continuum of services provided to persons who require assistance with their activities of daily living: eating, bathing, dressing, toileting, transferring from bed to chair, and controlling continence.<sup>69</sup> The specific settings in which such services are provided depend in large part on the intensity of the care required and range from family-provided care in a person’s own residence to a medically oriented residential center known colloquially as a nursing home. Intermediate settings along this continuum can include home health care services provided in a person’s home by agencies that specialize in such care to independent living communities to assisted living facilities, each with its own array of service options and financing mechanisms. But the focus of this Article is on the most intensive point along this continuum—namely, nursing homes—and the availability of financing through the government’s Medicaid program.

*A. Why Medicaid?*

Medicaid is a joint federal and state undertaking that covers the full panoply of medical services,<sup>70</sup> but most people who have not been poor do not generally confront Medicaid until the need for nursing home care arises. Such care is frightfully expensive and varies considerably from locality to locality, but the median cost for such care in a private room in 2021 was over \$108,000 per year.<sup>71</sup> Most Americans cannot afford to pay for such care beyond a fairly short period of time, so at some point, older couples

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67. Richard L. Kaplan, *Retirement Planning’s Greatest Gap: Funding Long-Term Care*, 11 LEWIS & CLARK L. REV. 407 (2007) [hereinafter *Greatest Gap*].

68. See Wilcox, *supra* note 3, at 84.

69. See generally *Greatest Gap*, *supra* note 67, at 410–16.

70. See FROLIK & KAPLAN, *supra* note 6, at 110–12.

71. See *Cost of Care Survey*, GENWORTH (2021), <https://www.genworth.com/aging-and-you/finances/cost-of-care.html> [<https://perma.cc/SHM4-KGZ4>] (monthly median cost of \$9,034 x 12 = \$108,408).

exhaust their financial resources and turn to Medicaid to pay for these services.

Preparing to pay for the cost of long-term care is relatively rare quite apart from the genuinely unpleasant prospect of requiring such care. There is considerable denial at play, as most retirees do not expect that they will ever need such care.<sup>72</sup> Those who do contemplate the possibility of needing long-term care are often surprised to learn that Medicare, the federal government's health care program specifically for older Americans, does not cover most forms of long-term care: home care is covered only for very short periods of post-hospitalization recuperation,<sup>73</sup> assisted living facilities are never covered, and nursing homes are covered only if "skilled nursing care"<sup>74</sup>—the most intensive level of care offered—is required on a daily basis<sup>75</sup> following near-term discharge from a hospital<sup>76</sup> for a condition medically related to the need for long-term care<sup>77</sup> and even then for no more than 100 days.<sup>78</sup> Elsewhere,<sup>79</sup> I have explored these elements at length, but the bottom line is that Medicare does not cover most episodes of long-term institutionalization.

Private long-term care insurance exists, but barely one in ten Americans aged sixty-five and older have such insurance.<sup>80</sup> It should be apparent that if older people mistakenly believe that Medicare will cover the cost of long-term care, there is no reason for them to consider obtaining such insurance on their own. But even if older people perceive a need for such insurance, they risk being declined due to preexisting medical conditions—a reality for almost a quarter of all Americans age sixty-five and older.<sup>81</sup> In this context, it should be noted that the Affordable Care Act's prohibition on denial of insurance coverage due to preexisting conditions does not apply to long-

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72. See *Greatest Gap*, *supra* note 67, at 437–38.

73. FROLIK & KAPLAN, *supra* note 6, at 71–73.

74. 42 U.S.C. § 1395f(a)(2)(B). Such care requires the skills of a licensed practical nurse, a registered nurse, a physical therapist, or some similar professional. See 42 C.F.R. § 409.31(a)(2) (2021). Examples of such care include catheters, gastronomy feedings, injections, and medical gas administration. See 42 C.F.R. § 409.33(a)–(c) (2021).

75. 42 U.S.C. § 1395f(a)(2)(B).

76. See *id.* § 1395x(i)(A).

77. See *id.* § 1395f(a)(2)(B).

78. *Id.* §§ 1395d(a)(2)(A), 1395e(a)(3).

79. See Richard L. Kaplan, *Reflections on Medicare at 50: Breaking the Chains of Path Dependency for a New Era*, 23 ELDER L.J. 1, 8–10 (2015).

80. See Richard W. Johnson, *Who Is Covered by Private Long-Term Care Insurance?*, URB. INST. (2016) <https://www.urban.org/sites/default/files/publication/83146/2000881-Who-Is-Covered-by-Private-Long-Term-Care-Insurance.pdf> [<https://perma.cc/Z2AZ-RFAA>] (finding that 11% of Americans age sixty-five and older had long-term care insurance in 2014).

81. See Christopher M. Murtaugh, Peter Kemper & Brenda C. Spillman, *Risky Business: Long-Term Care Insurance Underwriting*, 32 INQUIRY 271, 277 (1995).

term care insurance.<sup>82</sup> And if older Americans manage to surmount that hurdle, they must still grapple with long-term care insurance's initial cost and confusing policy options,<sup>83</sup> legitimate fears of subsequent rate increases of 40% or more with no end in sight,<sup>84</sup> concerns over insurer solvency,<sup>85</sup> and reports of unwarranted claim-denial practices.<sup>86</sup> Small wonder, then, that most older people do not have private long-term care insurance. Consequently, if the need for long-term care eventually arises, older people often find that their only realistic financing mechanism is to apply for Medicaid benefits to cover such care.

As a general matter, Medicaid is limited to persons with minimal income and assets,<sup>87</sup> but this general imperative becomes more convoluted when people "spend down" their assets to qualify for the program. It is at that point that marital status becomes incredibly pivotal. Accordingly, this Section now considers three important aspects of Medicaid long-term care and marriage: (a) eligibility criteria, (b) asset transfers, and (c) estate recovery.

### B. Medicaid Eligibility Criteria

Qualifying for Medicaid benefits involves two separate determinations, one based on monthly income<sup>88</sup> and the other on assets owned.<sup>89</sup> Both are considered here.

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82. See 42 U.S.C. § 300gg-3(a), added by Patient Protection and Affordable Care Act, Pub. L. No. 111-148, § 1201(2)(A), 124 Stat. 119, 154 (2010). For that matter, genetic screening for long-term care insurance is not prohibited by the Genetic Information Nondiscrimination Act. See Donald H. Taylor, Jr. et al., *Genetic Testing for Alzheimer's and Long-Term Care Insurance*, 29 HEALTH AFFS. 102, 102 (2010).

83. See *Greatest Gap*, *supra* note 67, at 430-33, 438-39.

84. See, e.g., Leslie Scism, *Long-Term-Care Insurance: Is It Worth It?*, WALL ST. J., May 2, 2015, at B7 (noting recent 40% increases in policies issued by Genworth, the then-largest provider of long-term care insurance); Jennifer Levitz & Kelly Greene, *States Draw Fire for Pitching Citizens on Private Long-Term Care Insurance*, WALL ST. J., Feb. 26, 2008, at A1 (reporting a premium increase of 260% over three years); Kelly Greene & Leslie Scism, *Long-Term-Care Insurance Gap Hits Seniors*, WALL ST. J., July 2, 2013, at A1 (reporting a 77% increase in a single year).

85. See *Greatest Gap*, *supra* note 67, at 440-41.

86. See, e.g., Charles Duhigg, *Aged, Frail and Denied Care by Their Insurers*, N.Y. TIMES, Mar. 26, 2007, at A16 (quoting a former senior executive of the National Association of Insurance Commissioners saying, "[t]he bottom line is that insurance companies make money when they don't pay claims," and reporting that "nearly one in four long-term-care claims was denied" in California in one year); Levitz & Greene, *supra* note 84 (reporting that insurers overturned 70% of long-term care insurance denials after complaints were made to state regulators). On the other hand, a study published in a peer-reviewed journal found that 96% of long-term care insurance claims were approved for payment. Pamela Doty, Marc A. Cohen, Jessica Miller & Xiaomei Shi, *Private Long-Term Care Insurance: Value to Claimants and Implications for Long-Term Care Financing*, 50 GERONTOLOGIST 613, 616 (2010).

87. See 42 U.S.C. § 1396a(m)(1)(B)-(C).

88. See *id.* § 1396a(m)(1)(B); *id.* § 1382(c).

89. See *id.* § 1396a(m)(1)(C).

### 1. *Income Test*

Medicaid generally covers people whose income is insufficient to pay for necessary medical care.<sup>90</sup> In the context of nursing homes, most states require that almost all of a single person's income be paid to that facility,<sup>91</sup> and Medicaid then pays the difference between what that person paid and the facility's negotiated monthly rate. For example, assume that Bill has monthly income from Social Security, a workplace pension, and investment earnings of \$4,030. In most states, he can retain a small "personal needs allowance" of at least \$30.<sup>92</sup> Therefore, Bill can retain \$30 but must then send his remaining monthly income – namely, \$4,000 – to the nursing home. If his nursing home's monthly rate is, say \$6,500, Medicaid will pay the nursing home the remaining \$2,500 (monthly charge of \$6,500 less Bill's payment of \$4,000).

But if a Medicaid applicant is married, income is allocated to a specific spouse according to the so-called "name-on-the-check" rule.<sup>93</sup> Thus, the income of the well spouse, who is denominated the "community spouse,"<sup>94</sup> is generally disregarded in determining what the ill spouse must pay for his care.<sup>95</sup> So, if Bill in the preceding example is married, the income of his spouse Betty will generally not become part of the eligibility determination process.<sup>96</sup> The "community spouse," however, is assured of an amount denominated the Community Spouse Minimum Monthly Maintenance Needs Allowance (CSMMMNA).<sup>97</sup> This amount varies from state to state within a federally determined range<sup>98</sup> that is adjusted annually for inflation.<sup>99</sup> In 2022, this range was \$2,177.50 to \$3,435, though individual states can select numbers between those parameters.<sup>100</sup> Illinois, for example,

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90. *See id.* § 1396a(f).

91. Other states employ the "income cap" method, which limits an applicant's monthly income to three times the Supplemental Security Income Federal Benefit Rate. In 2022, that payment was \$841, so the applicable income limitation was \$2,523. *See* DANIEL TSAI, CTRS. FOR MEDICARE & MEDICAID SERVS. CMCS INFORMATIONAL BULLETIN: 2022 SSI AND SPOUSAL IMPOVERISHMENT STANDARDS, (Nov. 23, 2021), <https://www.medicaid.gov/federal-policy-guidance/downloads/cib11232021.pdf> [<https://perma.cc/EGT6-LN3P>].

92. 42 C.F.R. § 435.725(c)(1)(i) (2021).

93. *See* 42 U.S.C. § 1396r-5(b)(2)(A)(i); *Wisc. Dep't of Health & Family Servs. v. Blumer*, 534 U.S. 473, 481 (2002).

94. 42 U.S.C. § 1396r-5(h)(2).

95. *See id.* § 1396r-5(b)(1).

96. However, income that is payable to both spouses is attributed one-half to each spouse. *Id.* § 1396r-5(b)(2)(A)(ii).

97. *See id.* § 1396r-5(d)(1).

98. *Id.* § 1396r-5(d)(3)-(4).

99. *See id.* § 1396r-5(g).

100. *See* TSAI, *supra* note 91.

uses \$2,739 as the CSMMMNA.<sup>101</sup> If Betty's own income is less than the CSMMMNA for her state, she is allowed to retain enough of Bill's income to reach this level.<sup>102</sup>

But if Betty's income exceeds this minimum allowance, none of Bill's income can be retained by her. All but the "personal needs allowance" referenced previously will be paid to the nursing home. In some states, moreover, she may even owe an additional "contribution" toward his care costs. There is no consistent pattern across the states, but Illinois, to take just one example, requires that the community spouse make a monthly "contribution" equal to one percent of the spouse's annual income in excess of \$7,000.<sup>103</sup> Aside from the mechanics, the point here is that as a married person, some of Betty's income might be required to pay for Bill's nursing home bill. If Bill and Betty were not married, however, *none* of her income would be subject to this mandatory contribution requirement.

## 2. Asset Test

Medicaid's asset test provides that an applicant can retain financial assets of no more than \$2,000, a threshold that was set in 1989 and has not been adjusted for inflation since that time.<sup>104</sup> Certain assets, however, are exempted from this rather pitiful threshold—namely, a residence<sup>105</sup> if the Medicaid applicant has an "intent to return" to that home,<sup>106</sup> one automobile if it is used for the applicant's transportation,<sup>107</sup> and a prepaid burial plan effectuated through either a life insurance policy or a trust,<sup>108</sup> depending upon state law and local customs.

That is it. All other assets, including retirement plans, stocks, bonds, certificates of deposit, vacation homes, and investment media of any sort, must be liquidated and then spent on a person's care before Medicaid benefits become available.

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101. *Prevention of Spousal Impoverishment*, ILL. DEP'T ON AGING (2022), [https://www2.illinois.gov/aging/CommunityServices/Pages/ccp\\_spousal-impov.aspx](https://www2.illinois.gov/aging/CommunityServices/Pages/ccp_spousal-impov.aspx) [<https://perma.cc/L7X4-XDYN>].

102. See 42 U.S.C. § 1396r-5(d)(1)(B), (d)(2).

103. See 89 Ill. Admin. Code § 103.20(a)(2) (1989); § 103, tbl.A; see also *Poindexter v. Ill. Dep't Hum. Servs.*, 890 N.E.2d 410, 415–16 (Ill. 2008), *cert. denied*, 555 U.S. 889 (2008).

104. See 42 U.S.C. § 1382(a)(3)(B).

105. See *id.* § 1382b(a)(1). The net equity of such residence is limited to an amount that is adjusted annually for inflation though states can select a higher amount, which is also adjusted annually for inflation. See *id.* § 1396p(f)(1)(A)–(C). In 2022, those amounts were \$636,000 and \$955,000, respectively. See TSAI, *supra* note 91.

106. 20 C.F.R. § 416.1212(c).

107. *Id.* § 416.1218(b)(1).

108. See 42 U.S.C. § 1382b(a)(2)(B), (d)(2).

If the Medicaid applicant is married, that person's spouse can retain the residence as long as the spouse lives there,<sup>109</sup> an automobile,<sup>110</sup> a prepaid burial plan similar to that allowed to the Medicaid applicant,<sup>111</sup> and a Community Spouse Resource Allowance (CSRA).<sup>112</sup> The CSRA is a fixed amount of other financial resources that varies from state to state within a federally determined range<sup>113</sup> that is adjusted annually for inflation.<sup>114</sup> In 2022, this amount ranged from \$27,480 to \$137,400,<sup>115</sup> although once again, states can select any number within this range.<sup>116</sup> Illinois, for example, uses \$109,560 as its CSRA.<sup>117</sup> In any case, this CSRA applies to *all* of a couple's financial resources, regardless of how they are titled.<sup>118</sup> Indeed, as one commentator noted, "Medicaid assumes that a married applicant has full access to the financial resources of his or her spouse."<sup>119</sup>

There is no concept comparable to the CSRA for couples who are not married and accordingly, there is no limit in how much an unmarried partner can keep. Assume that Bill in the preceding example has \$100,000 in financial assets beyond the "exempt resources" already described while Betty has \$600,000 of such assets. Assume further that Bill needs to apply for Medicaid long-term care benefits, so his and Betty's combined non-exempt resources are \$700,000. In this case, all of those assets would need to be spent on Bill's care until only \$137,400<sup>120</sup> (at most) remains. But if Bill and Betty were not married, Bill would be required to spend down his \$100,000 to \$2,000, while Betty's \$600,000 of financial assets would be completely unaffected. In other words, if a couple has assets in excess of the relatively low CSRA level and own disparate amounts of wealth, nonmarriage is clearly the preferred status. Little surprise, then, that some

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109. *See id.* §§ 1396r-5(c)(5)(A), 1382b(a)(1). In this circumstance, there is no net equity limit. *Id.* § 1396p(f)(2)(A). *Cf. supra* note 105.

110. *See* 42 U.S.C. §§ 1382b(a)(2)(A), 1396r-5(c)(5)(B).

111. *See id.* §§ 1382b(a)(2)(B), (d)(1), 1396r-5(c)(5)(A).

112. *Id.* § 1396r-5(f)(1)-(2).

113. *Id.* § 1396r-5(f)(2)(A)(i)-(ii).

114. *Id.* § 1396r-5(g).

115. TSAI, *supra* note 91.

116. Many states set the CSRA at half of the couple's assets within the specified range. *See* FROLIK & KAPLAN, *supra* note 6, at 126.

117. *Prevention of Spousal Impoverishment*, *supra* note 101.

118. *See* 42 U.S.C. § 1396r-5(c)(2).

119. Zhang, *supra* note 50, at 378.

120. *See* TSAI, *supra* note 91.

long-time married couples facing this conundrum seriously consider divorce as a financial strategy.<sup>121</sup>

### C. Asset Transfers

The fixed-dollar limits on assets that a Medicaid applicant can retain naturally impel some applicants to consider giving away their “excess” assets to qualify for this program. If the intended donee is a Medicaid applicant’s spouse, little is really accomplished by this stratagem, because a couple’s assets are considered without regard to whose name is on a specific asset’s title, as noted previously.<sup>122</sup> But if the intended donee is anyone other than a Medicaid applicant’s spouse, whether it is their unmarried partner or an adult child, this approach has obvious appeal—were it not, that is, for Medicaid’s asset transfer penalty.

This penalty denies Medicaid benefits for a period of time that is based on the amount given away and the cost of care at issue.<sup>123</sup> When a person applies for Medicaid benefits, the program’s administrators review all asset transfers that the Medicaid applicant made during the so-called “lookback” period. This period is generally sixty months prior to the Medicaid application.<sup>124</sup> If the putative Medicaid applicant transferred any assets during the lookback period for less than their fair market value, a period of ineligibility is calculated by dividing the uncompensated value by the average monthly cost of a nursing home bed<sup>125</sup> in the applicant’s state or county,<sup>126</sup> depending on state law. During the resulting period of ineligibility, no Medicaid benefits are payable.

To illustrate this process, assume that Suzanne applies for Medicaid assistance with her nursing home bills on November 1, 2022, but she gave stocks and mutual funds worth \$200,000 to her cohabitating partner three years previously, on November 1, 2019. This transfer falls within the 60-month lookback period, so an asset-transfer penalty will apply. Assume

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121. See Randy Cohen, *Get a Divorce*, N.Y. TIMES MAG., July 28, 2002, at E14 (designated “ethics” columnist advises a couple who married late in life that “it is through divorce, paradoxical as it sounds, that you can best honor your marriage vow to cleave to your husband for better or worse”); Eve Kaplan, *Divorce Due to Medical Bills? Sometimes It Makes Sense*, FORBES (Aug. 21, 2014, 10:57 AM), <https://www.forbes.com/sites/feeonlyplanner/2014/08/21/divorce-due-to-medical-bills-sometimes-it-makes-sense/?sh=4d18cd0374b8> [<https://perma.cc/6MRG-MRTK>]; John A. Miller, *Medicaid Spend Down, Estate Recovery and Divorce: Doctrine, Planning and Policy*, 23 ELDER L.J. 41, 43–44 (2015). See generally Michael Farley, *When “I Do” Becomes “I Don’t”*: *Eliminating the Divorce Loophole to Medicaid Eligibility*, 9 ELDER L.J. 27 (2001).

122. See 42 U.S.C. § 1396r–5(c)(2).

123. See *id.* § 1396p(c)(1)(A). Transfers of a residence to specific persons, such as a spouse, a minor child, or a co-owning sibling, are exempt from this penalty. *Id.* § 1396p(c)(2)(A)(i)–(iv).

124. *Id.* § 1396p(c)(1)(B)(i).

125. *Id.* § 1396p(c)(1)(E)(i)(I)–(II).

126. *Id.* § 1396p(c)(1)(E)(i)(II).

further that Suzanne lives in a state that uses the average monthly care cost in that state, which is \$8,000. The penalty period therefore is the uncompensated value of the assets transferred (i.e., \$200,000) divided by the state's average monthly care cost of \$8,000, or 25 months. Accordingly, Suzanne is ineligible for Medicaid benefits for 25 months,<sup>127</sup> beginning when she would be otherwise eligible for benefits, which typically is when a person has entered a nursing home and has no assets beyond the applicable statutory exemptions.<sup>128</sup>

The bottom line is that Medicaid's rather draconian penalty for asset transfers effectively precludes such dispositions to unmarried recipients. Consequently, the difference in how transfers are treated within married and unmarried couples is largely meaningless. Neither status is better than the other in this context.

#### *D. Estate Recovery*

One of the more unusual aspects of Medicaid compared to other means-tested governmental programs like food stamps is that a Medicaid recipient must repay any benefits received during their lifetime after they die.<sup>129</sup> This "estate recovery" process applies to any unmarried Medicaid beneficiary and affects all assets remaining after that person passes away.<sup>130</sup> Unlike the initial eligibility criteria, in other words, Medicaid's estate recovery program does not recognize exemptions for a personal residence or an automobile. This program can also reach, for example, inheritances that a Medicaid recipient received from a brother or sister who passed away after the Medicaid applicant qualified for Medicaid benefits.

Although Medicaid was enacted in 1965,<sup>131</sup> this estate recovery provision did not become a mandatory component of a state's participation in Medicaid until 1993<sup>132</sup> and did not become fully operative in all states until several years later. A report issued in April 2021 by several advocacy organizations, including the National Academy of Elder Law Attorneys and

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127. *See id.* § 1396p(c)(1)(E)(i).

128. *See id.* § 1396p(c)(1)(D)(ii).

129. *See id.* § 1396p(b)(1).

130. *See id.* §1396p(b)(4)(A) (including all real and personal property in the "estate" for this purpose). States may also elect to include property held in joint tenancy, life estates, living trusts, or "other arrangement" in the "estate" for purposes of this benefit recovery process. *Id.* § 1396p(b)(4)(B). *See generally* Kristine J. Williams, *The Future of Estate Recovery: An Analysis of Different State Approaches and Changes*, 16 NAELA J. 17, 18–19 (2020).

131. Social Security Amendments of 1965, Pub. L. No. 89-97, § 121(a), 79 Stat. 286, 343–52.

132. *See* Omnibus Budget Reconciliation Act of 1993, Pub. L. No. 103-66, § 13612(a), 107 Stat. 312, 627–28.

Justice in Aging, asserted that Medicaid estate recovery “conflicts with national efforts to promote affordable housing and repair equity and income disparities. [It] offers a minimal benefit for state Medicaid budgets, while significantly harming low-income families and communities. Consequently, federal law should be amended to eliminate estate claims.”<sup>133</sup> Be that as it may, Medicaid estate recovery is current law.

For married couples, this provision is particularly troublesome if a Medicaid applicant dies when the “community spouse” is still alive, which is often the case. Federal law provides that Medicaid must obtain reimbursement for the deceased spouse’s nursing home bills from the surviving spouse’s estate but not until that person has died.<sup>134</sup> To ensure eventual repayment, state Medicaid agencies are authorized to impose liens on the applicant spouse’s property,<sup>135</sup> and such liens are frequently placed on that person’s residence.

Curiously, it is not so clear what will happen when the surviving spouse passes away. In some states, the Medicaid agency collects the benefits they provided to the predeceasing Medicaid applicant from the surviving spouse’s estate.<sup>136</sup> In other states, however, including Illinois,<sup>137</sup> the Medicaid agency is precluded from collecting these benefits from the surviving spouse’s estate, usually by order of the state Supreme Court.<sup>138</sup> Certiorari was sought to have the United States Supreme Court resolve this conflict between the states, but the Court denied the writ of certiorari in 2013,<sup>139</sup> and that is where matters stand presently.

In states that recover Medicaid benefits from the estate of a surviving spouse, a very clear distinction arises between such persons and partners who are not married. Unmarried partners do not face the potential liability of reimbursing the state for nursing home benefits that their deceased partner received from the Medicaid program. This disparate treatment can spell the difference between an estate that is unencumbered and available to prospective heirs and one that faces diminution by several thousands of

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133. JUST. IN AGING ET AL., *MEDICAID ESTATE CLAIMS: PERPETUATING POVERTY & INEQUALITY FOR A MINIMAL RETURN* 5 (2021), <https://justiceinaging.org/wp-content/uploads/2021/04/Medicaid-Estate-Claims.pdf> [<https://perma.cc/2BH7-P3CX>]. *See also* Stop Unfair Medicaid Recoveries Act of 2022, H.R. 6698, 117th Cong. § 2(b)(2) (2022) (repealing requirement that states recover Medicaid Benefits from estates of Medicaid recipients).

134. *See* 42 U.S.C. § 1396p(b)(2).

135. *Id.* § 1396p(a)(1).

136. *See High Court Asked to Settle Question of Pre-Death Transfers*, ELDERLAW REP., Jan. 2013, at 4 (Idaho, North Dakota).

137. *See Hines v. Dep’t of Pub. Aid*, 850 N.E.2d 148, 153–55 (Ill. 2006).

138. *See Williams, supra* note 130, at 22, 24 (identifying Minnesota, Tennessee, and Wisconsin as states where Medicaid is forbidden from recovering against the surviving spouse’s estate).

139. *McCormick v. Idaho Dep’t of Health & Welfare*, 568 U.S. 1249 (2013).

dollars or much more. A clearer legal preference in favor of nonmarriage would be difficult to find!

#### VIII. GENERAL INDEBTEDNESS

A variation on the theme explored in the last section relates to a person's general indebtedness. Whether such indebtedness arises from home mortgages or student loans of a person's children (or even grandchildren), married spouses are generally liable for each other's debts while unmarried partners are not. This difference is becoming increasingly important as *The New York Times* recently observed that “[o]lder adults have more debt than previous generations.”<sup>140</sup>

Similarly, married couples who sign joint income tax returns assume responsibility for any tax liability shown on those returns,<sup>141</sup> subject to a spouse's ability to prove that they were an “innocent spouse” regarding specific transactions at issue.<sup>142</sup> To secure that status, the requesting spouse must affirmatively prove that by dint of his or her education and experience, they were unaware, did not understand, and received no benefit from the financial transactions in question.<sup>143</sup> Failure to carry this burden means that the spouse remains liable for the tax liability shown on the joint return. In contrast, unmarried partners cannot file joint income tax returns and are therefore not responsible for each other's tax liabilities.

#### CONCLUSION

In this Article's opening example, Bill and Betty are considering whether their later-in-life relationship should follow their accustomed practice to marriage. But as this Article has shown, marriage has a profound and pervasive impact on numerous U.S. legal regimes, especially those affecting Americans as they get older. In many instances, marriage is clearly preferred by the applicable statute, but that pattern does not hold in every circumstance. Older couples like Bill and Betty must consider each of the particular legal regimes to determine whether and to what extent they apply

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140. See Span, *supra* note 1.

141. See I.R.C. § 6013(d)(3).

142. See *id.* § 6015(b).

143. See BORIS I. BITTKER, MARTIN J. MCMAHON & LAWRENCE ZELENAK, FEDERAL INCOME TAXATION OF INDIVIDUALS ch. 48.09[2][a] (3d ed. 2002); See generally INTERNAL REVENUE SERV., INNOCENT SPOUSE RELIEF (2022), <https://www.irs.gov/businesses/small-businesses-self-employed/innocent-spouse-relief> [<https://perma.cc/ZAX9-W6AX>]; KIP DELLINGER, INNOCENT SPOUSE RELIEF: INSIGHTS AND STRATEGIES (2001).

to their specific situation. Though general prescriptions are difficult to formulate, the main point here is that older age brings several new variables into the decision-making matrix.

Without minimizing all other considerations, if either partner anticipates a need to access Medicaid benefits to finance long-term care,<sup>144</sup> nonmarriage is probably the preferred status. Indeed, the impact of this variable alone will often be so significant financially that other marriage-preferencing laws are effectively negated or rendered moot. While both partners in a marriage face serious potential exposure on this issue, older women are at especially heightened risk if they conform to general societal patterns of marrying older men and living longer than men of the same age.<sup>145</sup> They may well want to follow Professor John Miller's trenchant advice to late-in-life couples: "avoid marriage."<sup>146</sup>

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144. See *How Much Care Will You Need?*, U.S. DEP'T HEALTH & HUM. SERVS. (2017), [<https://perma.cc/M7MN-6DVZ>] (providing statistics on the "average" length of time that long-term care services are needed at home and in facilities).

145. See Nancy E. Shurtz, *Tax, Class, Women, and Elder Care*, 43 SEATTLE U. L. REV. 223, 260 (2019).

146. Miller, *supra* note 121, at 71.