



Gay & Lesbian Advocates & Defenders
30 Winter Street, Suite 800
Boston, MA 02108
Phone: 617.426.1350 or 800.455.GLAD
Fax: 617.426.3594
Website: www.glad.org

Summary of the General Accounting Office Reports on Section 3 of the Federal Defense of Marriage Act

How does the federal government discriminate against married same-sex couples?

In 2004, the General Accounting Office (GAO) reported that **there are a total of 1,138 federal statutory provisions related to marital status.** This 2004 report updated an earlier 1997 report finding 1,049 such provisions. The GAO classified these laws and programs into thirteen categories, each of which is discussed below. Some programs are consequential for nearly everyone, for example, Social Security and federal income tax, while others apply more narrowly. The examples below illustrate rights and protections associated with marriage, but also how the marital relationship may in some cases limit eligibility for a program. Some statutory provisions impose particular responsibilities on or between spouses as well as conferring rights.

Magnifying the impact of DOMA is the fact that states sometimes must enforce federal laws that are contrary to their own policies. For states that allow same-sex couples to marry, the state as employer may issue family health policies to governmental workers that cover the employees' spouses just as it would any spouse. However, because of DOMA, the state must impute the fair market value of that benefit for the spouse as extra income, which in turn is taxed by the federal government – often totaling an extra thousand dollars in federal taxes a year – even though other employees who cover their federally-recognized, different-sex spouses do not pay the extra federal tax.

Another federal tax issue is that married couples of the same sex are not allowed to file their federal income tax returns as married, or to pool deductions. They are required to separate out their family economics into two. Accordingly, they must first prepare a “dummy” federal income tax return as married and then transfer the key numbers from that “dummy” federal income tax return to their state income tax return, which they are required to file as “married.” Then they redo their federal income tax returns as single. For many, this results in both confusion and extra preparation costs.

In those states that would prefer to treat all married persons on equal terms, DOMA can force the state to act otherwise when they operate programs jointly with the federal government. When a person applies for Medicaid for long term nursing home care, their marital status matters in determining their eligibility, and also in assessing what assets and resources may be preserved for the spouse who is not institutionalized.

Since DOMA forces states to treat married same-sex couples as single, the rules don't work. Some married same-sex couples are advantaged because the person needing care has few assets in his or her name, and thus can qualify for benefits more quickly than he or she should. Others are disadvantaged because the couple may own assets jointly, in which case resources need to be depleted before care is available, and the non-institutionalized spouse does not have legal protections for assets and allowances that are available to other spouses.

The impact of DOMA also resonates in the private sector where the government's definition of "marriage" is imitated with respect to "family" policies and memberships. With respect to health insurance, for example, many employers and labor organizations rely upon the federal government's definition of "marriage" to deny family health insurance policies to employees or members married to a spouse of the same sex. In a state where same-sex couples can marry, insurance policies regulated by the state have to cover all married families equally. But many large employers are self-insured and not regulated by the state, and under a federal law known as ERISA, they may choose whether or not to extend equal coverage to same-sex spouses under their plans. For the sake of uniformity with federal law, and out of concern for conflicting with federal law, many have refused to provide coverage because of DOMA. What this means is familiar – some employees have coverage for their families, but employees with a spouse of the same-sex do not. And, if the family buys insurance on the private market, they pay some of the highest rates.

While federal recognition of same-sex spouses would confer numerous rights and responsibilities, the Congressional Budget Office (CBO) has reported that this recognition would benefit the government as well. In its 2004 report analyzing the budgetary impact of federal recognition of marriages between persons of the same sex, the CBO estimated that the federal budget's bottom line would see a net increase of approximately \$1 billion per year through at least 2014 if same-sex couples were permitted to marry nation-wide. This is because, while there would be increased outlays by the federal government in areas such as Social Security and Federal Employee Health Benefits, there would be decreased outlays in the areas of Supplemental Security Income, Medicaid and Medicare. In addition, federal revenues would increase between \$400 million a year to \$700 million per year, through the impact that federal recognition on marriages would have on both individual federal income tax and estate tax. The combined effect of changes in outlays and revenues totals approximately \$1 billion increase for the federal government. The CBO reaches this result by assuming access to equal marriage in all 50 states and the recognition of those marriages by the federal government.

Category 1: Social Security and Related Programs, Housing and Food Stamps

As of 2004, the GAO found 105 provisions of law in this area that distinguish based on marital status. This category includes the major federal health and welfare

programs, particularly those considered entitlements; “In many of these programs, recognition of the marital relationship is integral to the design of the program.”

Social Security: The Social Security program was created to provide for people in their old age, and also to ensure that a worker’s family will have money to live on if the worker dies or becomes disabled. People are eligible for these benefits only if they have paid into the system for a sufficient amount of time.

- Social Security Disability Benefits: If a worker is eligible for disability benefits, a spouse and/or a divorced spouse may qualify for up to 50% of the disabled worker’s benefit amount.
- Social Security Spousal Benefit: When two people are retired and collecting Social Security, a lower earning or non-earning spouse can increase his or her benefit by up to one half of the higher earner’s payment just because they are married. So if one spouse’s Social Security payout is \$400/month while the other spouse’s is \$1100/month, the lower earning spouse can increase his or her payment to half of the spouse’s payment. In this particular example, the former spouse’s payment would increase to \$550/month, or a difference of \$1800/year. The spouse may also qualify for Medicare at age 65 based on the other spouse’s work record.
- Social Security Benefit for Surviving Spouse: After death, an individual with a lower social security payment may receive his or her spouse’s higher benefit, instead of his or her own benefit, as long as they are 60 years of age, had been married 9 months, and are not currently married to someone else. Even a divorced spouse benefits from this protection.
- Social Security Parent Benefits: Sometimes tragedy strikes and a parent dies in his or her working years. The spouse of a deceased worker may be entitled to a benefit as a spouse in addition to social security payments for the children through age 18. Children may be 19 if still enrolled full time in primary or secondary school or 22 if diagnosed with a disability.
- Social Security One Time Death Benefit: This is a one-time lump sum payment made to the surviving spouse or, if no surviving spouse, to a minor child of the deceased insured worker.

Medicare: Medicare hospital insurance (Medicare Part A) is available to most people who are age 65 or older and have worked in order to qualify for this benefit. Anyone enrolled in both Parts A and B may then enroll in Part C which provides additional benefits. When a person receives any of the first three parts, he or she is eligible to receive prescription drug coverage under Part D by paying a monthly premium.

- Eligibility: Marriage allows an ineligible individual, who has never worked or who has not worked long enough, to qualify for free hospital insurance based on

their spouse's work record. Once a person qualifies for Part A (hospital insurance), he or she can enroll in Part B (Medical Insurance) by paying a monthly premium.

Medicaid

- Eligibility Generally: This is a joint state-federal program to provide health insurance to low income persons. Eligibility is based on income, so whenever a married person applies for benefits, states must consider the income of the spouse in determining eligibility for benefits. An unmarried person who applies for benefits will be assessed based on his or her own income alone, without consideration of whether the other spouse has income.
- Income Eligibility for Long Term Care: To qualify for long term, nursing home care, a married couple's income, assets, and resources are considered collectively in determining eligibility. As a result, a married couple must sometimes "spend down" assets before the government will step in to pay for care.
- Spousal Protections for Home, Resources and Allowances When Spouse Qualifies for Long Term Care: Even though married spouses may have to spend down assets in order for one to obtain long term, nursing home care, there are also spousal protections in the system. Legal safeguards for spouses allow the "community spouse" to stay in the family home and prevent any estate recovery on liens filed on the family home until the community spouse is deceased. These protections also allow a spouse to protect some of their assets like the family home from spend-down, and to receive monthly allowances from their own resources for ongoing expenses.

Child Enforcement: In support matters, the federal government will assist in enforcing the support obligations of parents to their children and the spouse with whom the children are living. This assistance is not available to same-sex couples seeking support from their former same-sex partner.

Category 2: Veterans Benefits

The GAO found 93 statutes in this category in 1997, and concluded that spouses "of veterans have many rights and privileges by virtue of their marital relationship." The 2004 Report changed the overall total of statutes to 104. A sampling is below.

Death Benefits: There are several spousal benefits related to the veteran's death. If the veteran's death is service connected, the surviving spouse may choose either monthly dependency and indemnity compensation payments or a death pension. Such a spouse is also entitled to a one time payment, and if there is no spouse, it is provided to the next of kin. In some instances, death pensions may be available to low income survivors of service members.

Disability Benefits: Veterans with at least a 30% disability are entitled to increased disability compensation if they have a spouse.

Other Allowances: There is an allowance for spousal benefits when a service member has disappeared.

Other Benefits: There are a variety of benefits that flow to spouses by virtue of being married to a veteran. These include:

- Burial at military cemeteries with the deceased veteran, if the veteran is eligible;
- Educational assistance for spouses, including payments for college education and training;
- Job counseling, training and placement services for the spouses of veterans;
- Employment preferences with the federal government for widows and widowers as well as certain disabled veterans; and
- Medical care from the government for spouses of certain veterans.

Category 3: Taxation

In 1997, the GAO reported 179 federal tax law provisions related to marital status. The 2004 report, however, takes both new and repealed laws into account in finding a total of 198 statutes involving marital status and taxation.

Income Taxation

- Filing Status: Marital status is a central consideration in determining filing status, as only married couples have the option to file joint or separate returns. Only married couples filing jointly may pool deductions on such a return, such as the deduction for uncompensated medical expenses that exceed a certain portion of the taxpayers' income. This matters because in a typical marital household, people comingle their finances, share expenses and jointly raise and contribute to the care of children and other dependents.
- Joint Filing as Benefit or Burden? Note that not all married couples are similarly affected when it comes to federal tax law. Some married couples pay higher taxes when they file jointly than they would if they were unmarried and filing single returns. Other married couples pay lower taxes under DOMA when filing jointly than they would if filing returns as unmarried persons.
- Workplace Benefits – Access: Employers may provide a variety of fringe benefits to employees. For example, some employers will allow an employee to use pre-tax wages to pay toward health insurance premiums, or to pay for a “flexible spending account” which reimburses certain medical costs. The only

persons for whom an employee can use such an account are “dependents” defined by law, such as a spouse, a child, and other qualifying tax dependents.

- Workplace Benefits – Extra Taxation: When a married employee receives employer-provided health benefits, the value of the health insurance for the spouse, child or other qualifying tax dependent is not considered taxable compensation to the employee, and therefore, no federal income tax is owed on the value of the benefit.

If an employer covers any other person on the behalf of the employee, the fair market value of any employer-provided insurance that covers that person is considered to be extra income to the employee and the employee must pay tax on that phantom income. This is true even if the employee already had a family plan that included children and there is no additional cost to the employer in covering that person.

- Retirement Protections with “Spousal IRA”: Married couples filing jointly may fund individual retirement accounts for each spouse from the income of just one of the spouses, so that a non-working spouse can still build retirement assets. Spouses also receive preferential treatment under the laws related to retirement savings and use of retirement funds.
- Divorce Taxation: Divorce is handled by state courts only, and allows a married couple to unwind their monetary affairs with the goal of achieving an equitable distribution of property and debt. Property transferred between spouses due to a divorce is not taxable. If alimony (also known as “spousal support”) or separate maintenance payments are ordered to be paid to a former spouse, the amounts paid are deductible to the person making the payments on his or her tax returns, thereby lowering the amount of tax due. The transfer of retirement funds to a spouse or former spouse incident to a divorce and pursuant to a divorce or separation instrument is not a taxable transfer, and is also free from penalties for early distributions.

Same-sex couples who divorce under state law are sometimes impeded by federal law in doing so fairly. For example, certain retirement accounts held by one party like 401ks cannot be divided between a worker and his or her non-marital partner by way of a Qualified Domestic Relations Order, thereby taking important assets off the table for division. If a divorce court orders division of those assets, the person has to pay extra taxes and penalties. Even if a couple tried to compensate for the fact that one partner is “enriched” by retaining solely owned retirement accounts by transferring the family home to the other partner, such transfers are taxable unless linked to a divorce of spouses.

Gift and Estate Taxation

- Transfers between Spouses: Spouses have an unlimited ability to make gifts and transfer property to one another without incurring taxes. Any other persons are

limited to transfers of up to \$12,000 annually and amounts in excess of that may require filing of a gift tax return.

- Bequests to Surviving Spouses and Estate Tax: The Internal Revenue Code contains an Estate Tax Marital Deduction. This provision allows a full deduction from an individual's gross estate tax equal to the fair market value of any property passing to the decedent's spouse. This marital deduction lets married couples postpone the federal estate tax that otherwise would have to be paid on a married person's estate by deferring any tax on property that passes to the surviving spouse until the surviving spouse's death.

Category 4: Federal Military and Civilian Benefits

This category covers laws addressing the federal government as an employer in both civilian and military contexts. The 1997 GAO Report stated that 275 statutes fell into this category, that is, over one-quarter of all the federal laws taking account of marital status. Given later repeals and new provisions, in 2004, it was a total of 287 of the 1138 laws involving marital status.

As the GAO explains, many of these laws appear in Title 5 of the U.S. Code, discussed immediately below. However, there are parallel provisions in 19 other titles of the U.S. Code covering, for example, military members, Foreign Service officers, Central Intelligence Agency employees, Lighthouse Service employees and many others. The discussion below is divided into 2 sections: civilian employees and military employees.

Civilian Employment

Health Benefits – Eligibility: The Federal Employees Health Benefits Program (FEHB) is the key program providing health benefits to federal employees, retirees and their survivors. Title 5 of the United States Code, sections 8901 and following, prescribe the basic parameters of health insurance coverage for many federal employees and their families. A “member of family” is “the spouse of an employee or annuitant and an unmarried child under 22 years of age....” Under existing law and regulations, the spouse of an employee who selects “Self and Family” coverage is automatically enrolled for purposes of the FEHB program and receives health care coverage.

The same coverage rules apply with respect to dental and vision benefits, and participation in Health Care Flexible Savings Accounts.

Health Benefits – Continuation after Death and Divorce: Family health insurance through the FEHB program continues for the family as long as a spouse or dependent child receives a survivor benefit. Some divorced spouses may retain FEHB coverage indefinitely as long as they pay for the coverage, while others can retain coverage for 36 months as long as they pay the premiums and an administrative fee.

Retirement Benefits: The Federal Employees Retirement System (FERS) provides automatic coverage for employees hired starting in 1984. FERS is really a three-pronged approach to providing retirement security and includes Social Security, a “Basic Benefit Plan,” and a “Thrift Savings Plan.”

- Social Security (as part of FERS): As described above, Social Security considers an employee’s spousal relationship in determining disability, spousal, death and survivor benefits.
- Basic Benefit Plan – Death While Working (as part of FERS): If a federal employee with at least 18 months of service dies before retirement and was married for at least 9 months, the surviving spouse receives a lump sum death benefit that will be at least one-half of his or her pay.
- Basic Benefit Plan – Death After Retirement (as part of FERS): When a married federal employee retires, his or her “annuity” payment is reduced in order to be sure that a surviving spouse will receive 50% of the overall annuity amount after the retiree’s death. When a surviving spouse is not eligible for Social Security until age 60, a surviving spouse who is under 60 years of age also receives a supplemental annuity until that age.
- Thrift Savings Plan (as part of FERS): This is a 401(k) type of retirement and savings plan for employees. The non-employee spouse has the right to consent before money is borrowed from the account, as well as to approve withdrawals. After an employee leaves the federal government, as long as the account has at least \$3500, the spouse has a right to a joint and survivor annuity so that he or she will have a 50% survivor benefit. Note also that TSP accounts may be affected by orders issued by state courts on divorce.

Retirement Benefits – Civil Service Retirement System (CSRS): This system covers all employees hired before Dec. 31, 1983 who did not transfer into the FERS. It provides only one prong of benefits: the annuity for a surviving spouse of an employee who died during employment or after retirement. As with FERS, former spouses may in some instances qualify for an annuity payment.

Certain individuals in federal service are not covered by FERS or CSRS but are covered under parallel or alternative provisions, including many U.S. Judges and Foreign Service employees.

Other Employee Protections - Family Leave: Most federal employees may use up to a total of 12 administrative workweeks of sick leave each year to care for a family member with a serious health condition. Spouses are included as family members.

Other Employee Protections – Compensation for Work-Related Injury or Death: If a federal employee becomes disabled from a work-related injury, the employee is paid 33% of his or her salary if the employee has no dependents, and 75% if the employee does

have dependents, such as a spouse. If death results from the injury, a surviving spouse receives either 50% of the deceased employee's salary, or 45% plus another 15% for each additional child.

Military Employment

Health Care: TRICARE is the name of the Department of Defense's managed health care program for active duty military, active duty service families, retirees and their families and other beneficiaries. A legal "dependent," which includes a spouse, surviving spouse and certain unremarried former spouses, is eligible for benefits when married to: active duty and retired service members of the seven uniformed services (Army, Air Force, Navy, Marine Corps, Coast Guard, Public Health Service, and National Oceanic & Atmospheric Administration), or reservists in the seven uniformed services when the reservist is on active duty for more than 30 consecutive days, or if the reservist is injured or killed; and in various other circumstances relating to retirement or death while on active duty.

Retirement: Members on active duty for 20 years or more are eligible for retirement under a number of different systems that depend on the date the retiree first entered the military. Surviving spouses generally receive 55% of the retired pay under the Uniformed Services Survivor Benefit Plan or one of its corollaries. Since 2001, members of the uniformed services also began enrolling in the TSP as a supplemental source of retirement income, and particular notice, consent and annuity rights to spouses.

Death Gratuity: A one-time non-taxable cash payment of \$100,000 is made in the event that a service member on active duty or in a variety of other circumstances dies. It is paid to survivors in a prescribed order, starting with the surviving spouse.

Housing Allowances: Service members can receive a variety of allowances for housing, depending in part on the size of their family.

Category 5: Employment Benefits and Related Laws

This category addresses employment-related laws addressing private sector employees and their spouses, and as of 2004, involved 72 statutes according to the GAO. Some of these statutes address workers' compensation benefits available to employees in certain high risk occupations and their surviving spouses.

Health Benefits: A major benefit of marriage is access to health coverage through a spouse's plan.

- Health Benefits and "ERISA Plans" -- Most large employers as well as unions and employee organizations are "self-insured," and, under present law, are exempt from state laws regulating employee benefit plans. These self-insured

entities are governed by the terms of the insurance contract itself as well as by a federal law known as ERISA (Employee Retirement Income Security Act).

Regulation of benefit plans by ERISA rather than by state law has important consequences for married same-sex couples. Self-insured plans have the discretion to provide coverage to employees with spouses of the same sex, or not to, even as they cover other employees with different-sex spouses. Accordingly, even in states where same-sex couples can marry, self insured employers and employee organizations based in those states, employing people in those states, or having members in those states, are free to provide health coverage to spouses of the same sex or not. A significant number of self-insured entities have chosen not to provide the coverage, and point to the federal definitions of “marriage” and “spouse” in DOMA as the basis for their decision.

- Plan Information: Beyond coverage issues, under ERISA plans, spouses also enjoy participant rights, including guaranteed access to plan information.
- Continuing Health Coverage: A federal law called COBRA requires private employers with 20 or more employees to offer continued coverage for a defined period of time to employees and their covered dependents under certain circumstances, including termination of employment, or when the employee’s hours are reduced, or upon the employee’s death or upon divorce from the employee.
- Open Enrollment Periods: Under “HIPPA” (Health Insurance Portability and Accountability Act), there are “special” enrollment rights, which allow dependents of a covered employee to enroll outside of a group plan’s open enrollment period. In other words, an employee can add a new spouse to a health plan without waiting for the regular open enrollment period, thereby ensuring coverage right away.

Retirement Benefits: Under ERISA, an “employee pension benefit plan” maintained by an employer or employee organization is the vehicle for retirement benefits. When ERISA applies to an employer’s pension program, the statute may provide substantive rights to spouses, including the right to (1) approve the method of distribution to the participant; (2) receive benefits in the event of the participant’s death; or (3) share in the participant’s benefits in the event of a divorce or legal separation.

- Qualified Joint and Survivor Annuity: The only permitted method of distribution to an employee once he or she has accumulated a certain amount and has been married for a year is the joint and survivor annuity. Such an annuity provides a benefit to the retiree during his or her life, and then an annuity paid to the surviving spouse of at least 50% and not more than 100% of what the retiree received during his or her lifetime. The spouse may consent to a different form of benefit, such as a lump sum payment to the retiree. When an employee dies

before retirement, generally the surviving spouse may receive a lifetime annuity based on the benefit that had been earned when the employee died.

- Benefits Upon Divorce: As a general matter, benefits from a retirement plan that is subject to ERISA are “safe” in that they may not be pledged, attached, levied upon or even awarded by a court to another private party. One major exception applies to divorce where the retirement assets may be viewed as marital property, and federal law permits benefits to be awarded to a non-employee (former spouse) through a “Qualified Domestic Relations Order.” Such an order is a court decree that relates to child support, alimony payment or marital rights of a former spouse.

Family Medical Leave: The Family Medical Leave Act provides 12 workweeks of unpaid leave in any 12-month period to, among other things, “care for the spouse, or a son, daughter, or parent, of the employee, if such spouse, son, daughter, or parent has a serious health condition.” The employer must be of a certain size in order for FMLA leave to apply, and the employee must be at a sufficiently large work site for the leave requirement to apply.

Employee Benefits Relating to Certain Occupations: The GAO rightly noted that the federal government provides benefits to the families of employees in certain high risk occupations.

- Public Safety Officers: There are substantial death benefits payable to an eligible beneficiary of a public safety officer killed in the line of duty. A different-sex spouse is automatically eligible for this benefit, and the spouse will receive one-half of the benefit only when there are minor children. A named beneficiary may receive the payment only if there is no spouse or minor children. There are also educational benefits for surviving spouses, but not for designated beneficiaries.
- Railroad Employees: Under the Railroad Retirement Act, retirement and disability annuities are paid to railroad workers with at least 10 years of service, or 5 years of service if performed after 1995. Survivor benefit annuities are payable to spouses and divorced spouses, children and parents of deceased railroad workers.
- Agricultural Employees: Although the federal Fair Labor Standards Act generally prescribes standards for minimum wage and overtime pay for most public and private employers, its provisions do not apply for agricultural employees where the employee is the employer’s spouse.

Category 6: Immigration, Naturalization, and Aliens

The GAO had, as of January 2004, identified 50 statutory provisions in the United States Code involving marital status in this category, focusing on immigration and citizenship.

As background, it is important to know that family unification is now the one of the principal goals of arrangements for permanent immigration to the United States. As a result, in 2005, “over fifty-eight percent of all legal immigration to the United States was family-sponsored.” Family unity has been a staple of our immigration law since at least 1952.

Here are some examples of how family unity is translated into specific legal policies:

Immediate Relative Spousal Visas: A citizen of the United States may file a petition for an “immediate relative” visa for a non-citizen spouse; and the Attorney General must approve that petition if its facts are true and if the non-citizen is, in fact, a statutory “immediate relative.” Immediate relatives are not subject to any direct numerical limitations on entry visas.

Naturalization for Spouses of United States Citizens: A U.S. citizen’s spouse, who has obtained the status of lawful permanent resident, may become a United States citizen if the spouse has: (1) continuously resided in the United States for at least 3 years since being admitted for permanent residence; (2) lived “in marital union” with the citizen spouse during that 3-year period; (3) been physically present in the United States for periods totaling at least 18 months of that 3-year period; (4) continuously resided in the United States from the time of application for citizenship to admission; (5) for all relevant times been a person of good moral character; and (6) complied with all other requirements for naturalization.

Asylum Extended to Spouses: Where a person is granted asylum in the United States because, for example, her or his life or freedom is threatened on account of nationality or political opinion, his or her spouse may also be granted asylum if “accompanying” or “following to join” the person granted asylum even if the spouse is not independently eligible for asylum.

Visas for Priority Workers and Their Spouses: The United States allocates a significant number of visas annually to non-citizens who either have “extraordinary ability” or are “outstanding professors and researchers.” To facilitate our country’s access to such talent, the United States grants the exact same status and order of consideration to the spouse “accompanying or following to join” the priority worker.

Category 7: American Indians

In 1997, the GAO compiled 15 statutes involving marital status in the area concerning American Indians and updated that number to 20 in 2004.

These federal rights and responsibilities include:

Health Care: As long as an appropriate governing body of the tribe has made health services from the Indian Health Services available to all spouses of its members by an appropriate resolution, then spouses who would otherwise be ineligible must also receive such health services.

In addition, health professionals seeking positions in the Indian Health Service and their spouses may be reimbursed for actual and reasonable expenses incurred in traveling to and from their places of residence to an area in which they may be assigned, for the purpose of evaluating this area with respect to the assignment. Such a benefit is important in recruiting talented and skilled health professionals.

Probate and Descent Rules: While each tribe may normally adopt its own rules of descent and distribution of property located within the tribe's reservation or jurisdiction, federal law protects the right of a surviving spouse devisee to reserve a life estate in the property of his or her deceased spouse.

In addition, in the absence of an applicable tribal probate code, federal law sets up default federal rules regarding the devise or descent of trust or restricted property, which protects a surviving spouse's interest.

Category 8: Trade, Commerce, and Intellectual Property

In 1997, the GAO compiled 44 statutes in the area of trade, commerce and intellectual property involving marital status, and updated that number to 54 in 2004.

These federal rights and protections include:

Bankruptcy: Bankruptcy law allows recognized married couples to file for bankruptcy jointly. The ability to file jointly benefits both creditors and debtors. A joint bankruptcy petition allows creditors to file only one claim and the couple to pay only one filing fee. A former spouse of the debtor making a claim in a bankruptcy proceeding for payments required as part of a divorce or separation agreement is given a higher priority than some other creditors. Also, a debtor cannot discharge through bankruptcy the obligation to pay alimony or debts to spouses arising from property settlements in divorce or separation proceedings.

National Housing Act: The National Housing Act regulates banks use of "due-on-sale" clauses in mortgage agreements, which allow them to require repayment of the loan in

the case where the borrower sells all or part of the property without the bank's prior written consent. As part of the federal regulation of these contractual agreements, however, the federal government forbids a lender from exercising its option pursuant to a due-on-sale clause upon a transfer where the spouse becomes an owner of the property.

Consumer Credit Protection: The Consumer Credit Protection Act regulates aspects of garnishment of wages, which is a legal or equitable procedure through which the earnings of any individual are required to be withheld for payment of any debt. Generally, the act allows up to 25% of a person's disposable weekly earnings to be subject to garnishment. However, if the purpose of the garnishment of wages is to enforce an order for the support of any person (including a spouse or former spouse), the maximum is 60% or, if the wage earner is supporting a spouse (not the former spouse for whose benefit the support order was issued), 50%.

Copyright Law: The Copyright Act gives renewal rights and termination rights, in some circumstances, to the widow or widower of the creator of a copyrighted work. The law defines "widow or widower" as the creator's surviving spouse under the law of the creator's domicile at the time of his or her death, whether or not the spouse subsequently remarries. The widow or widower owns the creator's entire termination of interest in any copyright or right under copyright that has been transferred or licensed, unless there are any surviving children, in which case the widow or widower owns one-half. A widow or widower is also entitled to the renewal and extension of a copyright for a further term of 67 years.

Category 9: Financial Disclosure and Conflict of Interest

As of January 23, 2004, the GAO has identified 31 statutory provisions in the United States Code that relate to marital status within this category. Laws in this category impose obligations on employees or officers of the federal government, aimed at preventing actual or apparent conflicts of interest. This is achieved through laws restricting nepotism in hiring and appointments and through laws requiring public disclosure of certain gifts, monetary interests, and transactions.

Several examples of such laws and how they involve marital status follow below:

Government Employees: Restrictions on Employment of Relatives: Public officials with hiring or supervisory authority are barred from appointing, employing, promoting or advancing their own relatives to positions within governmental agencies. A "relative" is defined as anyone related to the public official by birth or marriage as "father, mother, son, daughter, brother, sister, uncle, aunt, first cousin, nephew, niece, husband, wife, father-in-law, mother-in-law, son-in-law, daughter-in-law, brother-in-law, sister-in-law, stepfather, stepmother, stepson, stepdaughter, stepbrother, stepsister, half brother, or half-sister."

Senate Restrictions on Accepting Gifts also Extend to Spouses: Senators, employees or officers of the Senate, and their spouses and children, are barred from accepting any gift of more than \$250 from any organization, corporation, or individual, with limited exceptions. Paying travel expenses for a Senator or for his or her employees, spouses, or dependents is considered a gift under this law and is therefore strictly barred. There are exceptions such as for meals consumed or enjoyed, and for spouses who may receive gifts of recognition from their own employers. There are narrow exceptions to the travel-related gift ban, including for participation in educational program sponsored by a foreign government.

Federal Judges Barred from Appointing Relatives to any Job within Same Court: This law bars United States judges from appointing or employing anyone who is related by affinity or consanguinity (within the degree of first cousin) to any justice or judge of the same court. The same court means the entire judicial district, in the case of a district court, or the entire circuit, in the case of a court of appeals.

Federal Judges: Anti-Nepotism Rule in Appointment of Receivers or Trustees: In making appointments as receiver, or as trustee, any United States judge who appoints a person related to himself by consanguinity, or affinity, within the fourth degree, can be imprisoned for up to 5 years.

Conflicts of Interest in Certifying Agricultural Loans: The U.S. Department of Agriculture administers its many programs through Farm Service Agency county committees. County committee members operate under federal regulations to make key decisions about agricultural matters in their local area. Because of their important role, county committee members are subject to conflict of interest rules. For example, it is a crime for any member of a county committee to certify a loan for the purchase of land – or to join in the certification of such a loan – if either the loan applicant, or any person who may acquire an interest in the loan, is related to him within the second degree of consanguinity or affinity. Violating this rule can lead to a fine of up to \$2,000 or two years of imprisonment, or both.

Category 10: Crimes and Family Violence

As of January 23, 2004, the GAO has identified 44 statutory provisions in the United States Code that relate to marital status within this category. This category includes laws that implicate marriage in connection with criminal justice or family violence.

Here are several examples of the interplay between marital status and certain federal crimes:

Retaliation against Federal Officials by Threatening or Injuring a Family Member: It is a serious crime to assault, kidnap, murder or to threaten to assault, kidnap or murder the immediate family member of a United States official, a United States judge or any

Federal law enforcement officer with the intent to intimidate or retaliate against that official, judge or law enforcement officer in connection with the performance of his or her official duties.

This law defines “immediate family members” of United States officials, judges or law enforcement officers to mean “spouse, parent, brother or sister, child or person to whom he stands in loco parentis; or, any other person living in his household and related to him by blood or marriage.”

Bribery, Graft and Conflicts of Interest: Any officer or employee of the United States executive branch, or of the Federal Reserve Bank, or of the District of Columbia, or of any independent agency of the United States, who personally and substantially participates in deciding any matter where either he, his spouse, his minor child, his business partner, or any organization with whom he is negotiating prospective employment, has a financial interest, shall be criminally liable.

Civil Forfeiture Proceedings: When the federal government brings civil forfeiture proceedings in order to seize property that was used to commit or facilitate a crime, there are several variations of an “innocent owner defense” available under the statute, which can prevent the forfeiture if the owner can meet the burden of proof. One way an owner can show innocence is if he or she acquired the property after the crime that gave rise to the forfeiture took place, had no reason to believe the property was subject to forfeiture, and if instead of purchasing it, he or she acquired the property “through marriage, divorce, or legal separation” or because he or she was the “legal spouse or dependent of a person whose death resulted in the transfer through inheritance.”

United States Secret Service Protection: The United States Secret Service is authorized to protect the President, the Vice-President, President-elect, and the Vice President-elect, and their immediate family members. Additionally, former Presidents and their spouses are protected for their lifetimes, with certain exceptions. Visiting heads of foreign states and other distinguished foreign visitors can also receive such protections, along with their visiting family members. Within 120 days of the Presidential election, “major” presidential and vice-presidential candidates and their spouses are entitled to Secret Service protection. Finally, former Vice Presidents, their spouses, and their minor children receive Secret Service protection for six months after the former Vice President leaves office.

Category 11: Loans, Guarantees, and Payments in Agriculture

In January 2004, the GAO identified 34 statutory provisions that implicated marital status in determining eligibility under a variety of federal loan programs as well as in determining the amount of federal assistance or the repayment schedule. The GAO included in this category education loan programs, housing loan programs for veterans and agricultural price supports and loan programs. Here are some examples:

Education Loans

- The Free Application for Federal Student Aid (“FAFSA”): Need and eligibility for all federal financial assistance for education begins with the FAFSA reporting form. FAFSA requires identification of the applicant’s marital status and the ultimate determination of “expected family contribution” considers “data elements” including available income, assets and additional expenses of the student’s spouse.
- Status of the Student: Dependent or Independent: While a dependent student’s application for assistance relies upon an expected family contribution from a parent or parents, an independent student’s application relies upon his or her family which can be simply the student alone or the student and his or her spouse and/or any dependents of the student. A student is “independent” simply by virtue of being “a married individual.”
- Status of a Parent: Part of the Calculus of Aid or Not: As a baseline, the expected family contribution for any dependent student includes the consideration of both parents’ income and assets. If the student’s parents are divorced or separated, parental contribution includes only the income and assets of one of the parents as determined by a specific formula. Parents who are not married (and parents of the same-sex who are married) are treated under the same formula as divorced parents.
- Income Contingent Repayment of Loans: Various federal student loans may be eligible for income contingent repayment. If the borrower is married, the repayment schedule is based upon the adjusted gross income of the borrower and, “if the borrower is married and files a Federal income tax return jointly with the borrower’s spouse, on the adjusted gross income of the borrower and the borrower’s spouse.”

Home Loan Guarantees for Veterans

- VA Guaranteed Loans, the Basics: These loans assist eligible veterans in the purchase of a home by protecting private lenders against loss if the veteran fails to repay the mortgage loan. In effect, “[t]he guaranty replaces the protection the lender normally receives by requiring a down payment allowing [the veteran] to obtain favorable financing terms.” The guaranty requires that the veteran certify an intent to occupy the property, but if the veteran is in active duty status and unable to occupy, the veteran’s spouse can fulfill the occupancy requirement.
- VA Guaranteed Loans and Spouses: The home loan benefit extends to the unmarried surviving spouse of a veteran who died on active duty or as the result of a service-connected disability. In addition, the benefit extends to surviving spouses who remarry on or after attaining the age of 57. Further, the benefit is available to spouses of members of the Armed Forces on active duty who are

listed as “missing in action,” “captured in the line of duty by a hostile force” or “forcibly detained or interned” by a foreign government or power.

Agricultural Loans

- Real Estate Loans, Operating Loans and Emergency Loans: The Department of Agriculture makes ownership, operating and emergency loans to farmers and ranchers. In each case, eligibility generally requires that the borrowers, whether individuals or entities, operate nothing larger than a “family farm.” Exceptions exist when ownership of a larger farming entity is held by a majority or greater ownership of “individuals who are related by blood or marriage.” In making or guaranteeing a loan for the purchase of a farm or ranch, preference is given to a person “who has a dependent family.”
- Homestead Protection: Where a farmer or rancher has received a loan from the Department of Agriculture or the Small Business Administration and there has been a foreclosure, bankruptcy or liquidation, the individual may be entitled to maintain his or her principal residence and adjoining property for a three to five year period. Eligibility includes the requirement that at least 60% of gross annual income of the borrower “and any spouse of the borrower-owner” in at least 2 years of the preceding 6 years must have come from the farming or ranching operation. Both the borrow-owner and “a member of the immediate family” have the right of first refusal to reacquire the property, and the rights of the borrower-owner are transferable to a spouse upon death or incompetency of the borrower-owner.

Category 12: Federal Natural Resources and Related Laws

In January 2004, the GAO identified 63 statutory provisions that implicated marital status in this category involving transactions concerning federal lands and other federal property. Here are some examples:

Government Purchases of Land for National Monuments, Etc.: When the federal government purchases land for national monuments, battlefields, seashores and parks, *e.g.*, American Revolution sites in Massachusetts, it commonly allows the owner of private property to retain a right of use and occupancy of the property until the “death of the owner or the owner’s spouse, whichever is later.”

Mining Claim Maintenance Fees: Holders of mining claims, mills or tunnel sites are subject to a yearly claim maintenance fee of \$100 per claim or site. Those fees may be waived but only if the claimant and “all related parties,” which includes a spouse and dependent children, hold a combination of no more than 10 claims, mills or sites.

Surface Coal Mining Leases and Negotiation: Any lease for surface mining of federal coal deposits requires written consent of the “surface owner,” who is the person who

owns title to the land surface; has their principal residence or personal farming or ranching operation on the land; and has met these conditions for at least 3 years prior to granting the consent. The 3-year requirement may be satisfied by “a relative of such person by blood or marriage.”

Reclamation Projects and Irrigation Water: The general rule under federal reclamation laws limits federal irrigation water deliveries to parcels no larger than 160 acres in private individual ownership, and any “excess land” must be appraised and subject to a contract of sale under terms acceptable to the Secretary of the Interior. However, water can continue to be delivered “where the death of a husband or wife causes lands in private ownership to become excess lands”; and this exception from the contract requirement unless and until there is a “remarriage of the surviving spouse.”

Category 13: Miscellaneous

In 1997 the GAO compiled 79 statutes involving marital status that did not fall into any other category, and updated that number to 72 in 2004.

These federal rights and protections include:

Patriotic Societies: Federal law charters patriotic societies, such as the Marine Corp League, the Veterans of Foreign Wars, and the Legion of Valor, which have as one of their purposes the providing of aid and assistance to the surviving spouses of marines and former marines. One such society, the National Fallen Firefighters Foundation, provides scholarships and other financial assistance for educational purposes and job training for the spouses and children of fallen firefighters.

Federal Financing of Presidential Elections: Federal presidential election financing rules allows federal funding to a presidential candidate who has met certain requirements. However, in receiving such funding, the candidate agrees that he or she will not knowingly make expenditures from his or her personal funds, or the personal funds of immediately family members, which includes the candidate’s spouse, in excess of \$50,000.

Adult Care Food Programs: As part of the federal School Lunch Program, the Secretary of Health and Human Services can assist states through federal funding of food service programs at adult day care centers that serve persons 60 years of age or older or chronically impaired disabled persons. Individual income eligibility for such nutritional programs must take into account the income of any eligible person’s spouse in order to qualify for federal funding.

Federally Funded Substance Abuse Programs: The Secretary of Health and Human Services may make grants to public and nonprofit private entities that provide services to families in which a member is a substance abuser, provided that certain delineated

services, such as counseling, child care, and parenting education, are provided to the family members, including spouses, of the substance abuse.

Federally Funded HIV/AIDS Services: The Secretary of Health and Human Services is authorized to make grants to states to improve the quality, availability and organization of health care and support services for individuals and families with HIV/AIDS, provided that such state ensures that there is a good faith effort made to notify the spouse of a known HIV-infected person that he or she may have been exposed to HIV and should seek testing.

Guano Island Act: The Guano Island Act of 1856 enabled citizens of the United States to take possession of islands containing guano deposits, which are the excrements of seabirds, bats and seals and were highly valued as an agricultural fertilizer, so long as the island was not occupied or within the jurisdiction of another government. The discoverer of such an island could, with the permission of Congress, obtain the exclusive right of occupying the island for purposes of obtaining, delivering and selling the guano back to the United States, so long as such discoverer had furnished satisfactory evidence to the State Department that such island was not, at the time of discovery, occupied or in the possession of another government. Should the discoverer die before perfecting proof of his discovery, his widow, among others, would be entitled to the benefits of such discovery.