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# LIVING OUTSIDE THE SAFETY NET

## LGBT FAMILIES & SOCIAL SECURITY

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# TABLE OF CONTENTS

- 5 FOREWORD**
- 7 BACKGROUND**
- 8 CHILDREN OF LGBT PARENTS**
- 10 TABLE 1**
- 11 SAME-SEX SPOUSES & PARTNERS**
- 13 TABLE 2**
- 14 OPTIONS FOR PROTECTING ALL FAMILIES**



## FOREWORD

The Social Security Act was approved by Congress in 1935 at the urging of President Franklin D. Roosevelt, to create a social insurance program that would guarantee that workers would have a source of income after they retired. In the 79 years since its inception, Social Security has become one of the federal government's most popular and essential programs. Although never intended to be the sole source of retirement income, the fact is that Social Security is still the foundation for most seniors' retirement. Without this critical safety-net program, over half of all older Americans would fall into poverty. More than any other federal program, Social Security does exactly what it was designed to do—it gives retired people a secure, basic income for as long as they live.

Congress has consistently improved and strengthened the Social Security Act to extend its reach beyond the original legislation. As a result of these changes, workers' spouses, children, and other family members are now eligible to receive benefits in their own right. The Act covers millions of additional American workers originally excluded from coverage, including domestic employees and agricultural workers.

The long tradition of improving Social Security to more effectively protect America's workers and their families has been a key to its success and continued impact. In that vein, the Human Rights Campaign Foundation and the National Committee to Preserve Social Security and Medicare Foundation have jointly authored the following report, which calls on Congress to strengthen once again the protections provided by Social Security— this time for the spouses, children, and family members of America's lesbian, gay, bisexual, and transgender (LGBT) workers.

Over the last two decades, private businesses have engaged in sustained efforts to implement policies aimed at creating safe and productive workplaces for LGBT employees. The majority of Fortune 500 companies have prohibited discrimination based on sexual orientation since 1995 and have offered partner benefits since 2006. Today a majority – 61% - prohibit discrimination based on gender identity. As more and more LGBT people “come out” and are visible to their employers and prospective employers, the need for equal access to benefits for LGBT workers and their families has become clear. For example, a majority of businesses in the Human Rights Campaign Foundation's annual Corporate Equality Index report having extended healthcare benefits to domestic partners, as well as non-healthcare retirement benefits including pension annuities, 401(k) and other survivor benefits.

The Supreme Court's decision in *U.S. v. Windsor* (2013), invalidated Section 3 of the Defense of Marriage Act (DOMA) – allowing the federal government to recognize same-sex couples as married for the purpose of federal benefits for the first time. However, the impact of this decision on same-sex married couples applying for Social Security benefits has been far from universal. Currently, only couples living in states that recognize same-sex marriage are eligible to receive spousal benefits.

Unlike most other federal benefits systems, the Social Security system has not kept pace with same-sex marriage progress. LGBT people living in states that do not recognize same-sex marriage are denied a host of benefits that are routinely provided to heterosexual couples and same-sex couples living in marriage equality states. As a result, many same-sex couples and their families continue to be excluded from all but the most basic Social Security benefits. As of June 2014, only 19 states and the District of Columbia recognize same-sex marriage—leaving thousands of same-sex spouses and their children without access to this critical safety net.

We believe that the time has come to extend the benefits the Social Security program provides to reflect the changing face and needs of the American workforce. That is why both the HRC and the NCPSSM Foundations urge Congress to revise the Social Security Act to ensure that all LGBT workers and their families have equal access to these vital benefits regardless of their zip code. This is a matter of simple fairness. Lesbian, gay, bisexual, and transgender people are vital members of the American workforce and contribute their equal share to the Social Security system with every paycheck. Now is the time to ensure equal access to benefits.

## BACKGROUND

Lesbian, gay, bisexual, and transgender people live in 99.3% of all U.S. counties, work in every sector of the economy, and are raising at least 250,000 children.<sup>1</sup> These working families have experienced the impact of the recent economic downturn alongside the rest of America. However, systemic discrimination coupled with a lack of uniform relationship recognition increases the risk of poverty for same-sex couples, their children, and the growing number of LGBT older adults. Due to this discrimination, LGBT people — especially the elderly — have lower incomes and are less likely to be able to save for retirement or disability.

The Social Security system was originally designed to safeguard the nation's most vulnerable elders from slipping into poverty. Social Security has since been expanded to include benefits for workers who have become disabled, as well as their families and survivors. It remains one of the most successful, popular entitlement programs in the nation and serves about 56 million people, or about 1 in 6 Americans, annually. For many people, Social Security benefits have become a lifeline out of poverty — filling a financial gap created by disability, retirement, or death of a breadwinner. Social Security benefits are modest, but vital. Without Social Security benefits, it is estimated that half of all Americans over the age of 65 would be living below the poverty line. Every year 4.4 million children receive Social Security benefits based on a parent's work history. Without their benefits over a third of these children would live in poverty.

Social Security is the keystone of most Americans' retirement planning. Workers contribute to the program throughout their working lives, and the amount individuals or their families receive is based on individual work history. Since the inception of Social Security in the 1930s, generations of Americans have paid into the system with the understanding that they and their families will one day receive the benefits owed to them. Despite lifetime contribution to the system, however, many same-sex couples and their children are denied the benefits of Social Security. The denial of Social Security benefits to same-sex spouses and their children places this already vulnerable population at an even higher risk for poverty. The financial loss for each family, regardless of income, is real and significant.

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1 *Marriage for Same Sex Couples*, The Williams Institute, <http://williamsinstitute.law.ucla.edu/headlines/marriage-for-same-sex-couples>. (last visited June 17, 2014).

## CHILDREN OF LGBT PARENTS

Many same-sex couples use adoption to form their families. When one parent is the biological parent, or when joint adoption is not permitted under state law, second-parent or step-parent adoption is the only option that allows a same-sex partner to legally adopt his or her biological or adoptive child while leaving the rights of the “first parent” intact.<sup>2</sup> Access to adoption for same-sex parents is far from universally accessible—in fact only twenty-four states make second-parent or step-parent adoption available. In the absence of fair adoption laws, thousands of same-sex parents across the country remain legal strangers to the children they are raising.

A child becomes eligible for Social Security benefits when a parent becomes disabled, retires, or passes away. Many children with disabilities will also be determined eligible for benefits based on their parents' work history. If the disability begins prior to the child's 22nd birthday, benefits can last throughout the child's lifetime. Recognizing the power of these benefits to ensure a consistent quality of life for a family, the Social Security Administration also considers stepchildren and step-grandchildren to be eligible despite the absence of a legal, formal relationship with the working parent.

However, the children of many same-sex parents are not included within this expansive umbrella definition of “child,” and children of a parent who is not legally recognized are denied these crucial benefits. In guidance following the Windsor decision, the Social Security Administration affirmed its policy of relying on state recognition laws to determine whether a worker would be considered a step parent for purposes of Social Security.<sup>3</sup> In addition to discriminatory state marriage laws, many children of same-sex parents only have one legal parent because of the inability to access joint, step-parent or second-parent adoption. If these children lose a parent who is not tied to them biologically, through adoption, or through a recognized marriage on the state level, the Social Security system determines that they are not eligible to receive any benefit.

### CHILDREN'S BENEFITS

About 4.4 million children receive approximately \$2.5 billion each month based on their parents' Social Security record.<sup>4</sup> These child benefits are intended to help families remain financially stable after the loss of a wage earner and to provide for basic necessities until the child completes high school. Children become eligible for these payments when a working parent retires, dies, or becomes disabled.

The amount of this benefit depends upon the work history of the deceased, disabled, or retired parent. Children are eligible to receive survivor Social Security payments until they turn 18 (or 19 if they are in secondary school full time). In addition to biological children, a worker's stepchildren, grandchildren, or step grandchildren may also be eligible to receive Social Security benefits. In general, a child may receive up to one-half of the parent's full retirement or disability benefit, or 75 percent of the deceased parent's basic Social Security benefit.

The average amount a child receives upon the death of a parent is \$817 per month, or \$342 per month if the parent becomes disabled.<sup>5</sup> A child whose parent received the maximum retirement benefit of \$2,642 could receive as

2 The term “first parent” is used in certain legal scenarios when one parent is considered a legal parent of the child, either biologically or through adoption, prior to their partner or “second parent” becoming the legal parent of the child. See generally *Second Parent Adoption*, Human Rights Campaign, <http://www.hrc.org/resources/entry/second-parent-adoption> (last visited June 17, 2014).

3 See *Program Operations Manual System, Determining Status as Child* GN 00306.001, Social Security Online (Oct. 21, 2008) available at: <https://secure.ssa.gov/apps10/poms.nsf/lnx/0200306001#c1>.

4 Social Security Administration, *Benefits for Children 1* (2012), available at <http://www.socialsecurity.gov/pubs/EN-05-10085.pdf>.

5 Social Security Administration, *Monthly Statistical Snapshot*; May 2014, Social Security Online (June 2014) [http://www.ssa.gov/policy/docs/quickfacts/stat\\_snapshot/](http://www.ssa.gov/policy/docs/quickfacts/stat_snapshot/).

much as \$1,321 per month.<sup>6</sup> Children whose parental relationships to a worker are not recognized for purposes of Social Security receive nothing when a parent dies, or becomes disabled, even if that parent is the primary breadwinner for the family. The average annual loss of child survivor benefits for families when a deceased parent goes unrecognized for Social Security purposes is \$9,804.<sup>7</sup> The Social Security Administration reports that nearly 65% of all recipients of these benefits are under the age of 14, and 20% of children become eligible for these benefits before the age of 9. This means that these families can experience a significant annual loss for 10 years or more. For example, if the unrecognized parent of a five year old child passes away, the loss of family income will be an average of \$9,804 annually until the child turns 18.<sup>8</sup>

In addition to survivor benefits received directly by the child, the Social Security system also provides a benefit to the surviving or former spouse of a worker who is caring for the worker's child. The child must be under the age of 16 and the Social Security regulations explicitly provide that the child must be a natural or adopted child in order to qualify. This benefit provides the surviving parent with 75% of a worker's basic benefit, or an average \$909 per month.<sup>9</sup> This benefit is only available to a spouse or former spouse. Same-sex spouses are only recognized for the purposes of this benefit if they live in a state that recognizes same-sex marriage. The exclusion of a surviving same-sex spouse raising a child from this benefit results in an average additional annual loss of \$10,908 for that family.<sup>10</sup>

### ADULT CHILD DISABILITY BENEFITS

Children who become disabled before age 22 have access to disability payments through adulthood based on their parents' work history. These individuals, referred to by the Social Security Administration as adult disabled children, become eligible for child benefits if a parent is deceased or starts receiving retirement or disability benefits. Unlike adult disability benefits, the disabled adult child benefit is available without any personal work history and the payments continue as long as the adult child remains disabled and unmarried.

Almost one million adult disabled children receive this benefit every year. It is crucial for the parents of disabled children, who will support their child financially throughout much of their lifetime, and ensures that a disabled adult relying on family support will not experience poverty when a parent leaves the workforce or passes away. Recognizing the power of these benefits to ensure a consistent quality of life both for the disabled adult child and for his or her family, the Social Security Administration also considers stepchildren and step-grandchildren to be eligible under certain circumstances.

The average monthly benefit a disabled adult child receives is \$768 or \$9,216 per year.<sup>11</sup> Because this benefit continues through adulthood, the loss to the child of a legally-unrecognized same-sex parent can be felt over decades. For example, an adult disabled child of an unrecognized parent would experience an average loss of \$276,480 over a 30 year period.<sup>12</sup>

# 30 years

Over a 30 year period, an adult disabled child of a legally-unrecognized parent would forfeit, on average, \$276,480 in Social Security benefits.

6 Social Security Administration, *Maximum Social Security Retirement Benefit*, Social Security Online (last updated May 19, 2014), <https://iaq.ssa.gov/link/portal/34011/34019/Article/1798/What-is-the-maximum-monthly-Social-Security-retirement-benefit>. This figure is based on a worker retiring at full retirement age in 2014 after earning the maximum taxable amount for every year after age 21.

7 Based on the average received by a child following the death of a parent, \$817, for twelve months. See supra note 5.

8 Social Security Administration, supra note 5. See Christopher R. Tamborini et al., *A Profile of Social Security Child Beneficiaries and their Families: Sociodemographic and Economic Characteristics* 6 (2004), available at <http://www.ssa.gov/policy/docs/ssb/v71n1/v71n1p1.pdf>.

9 The average widowed mother/father benefit is \$909/month. See Social Security Administration, supra note 5.

10 Id. Based on the average received by a parent caring for a child following the death of a parent, \$909 for twelve months.

11 Social Security Administration, *Annual Statistical Report on the Social Security and Disability Insurance Program, 2012* at 19 (2013) available at [http://www.ssa.gov/policy/docs/statcomps/di\\_asr/2012/di\\_asr12.pdf](http://www.ssa.gov/policy/docs/statcomps/di_asr/2012/di_asr12.pdf).

12 Based on receipt of average annual amount of \$9,216 for 30 years. See id.

The following example illustrates the unfavorable outcomes for a family's Social Security benefits where the only variable is whether a couple's marital or family relationship is recognized for purposes of benefit eligibility.

The 40 year old primary breadwinner for a family with two school age children passes away. The breadwinner's basic benefit is \$1,046.

<b>DIFFERENT SEX, MARRIED</b>	<b>SAME-SEX, UNRECOGNIZED PARENT</b>	<b>SAME-SEX, RECOGNIZED AS PARENT</b>
<p>Each child receives 75% of deceased parent's basic benefit (\$1,046) which is \$785.*</p> <p>Total of \$1,570 in child survivor benefits would be payable.</p> <p>Spouse raising children under 16 years old receives 75% of basic benefit, which is \$785.</p> <p>Total surviving spouse benefits of \$785.*</p> <p>Total income would be \$2,355, but the family maximum benefit allowed will be \$1,882.<sup>13</sup></p>	<p>Children of a same-sex parent go unrecognized.</p> <p>Total child survivor benefits would be \$0.</p> <p>Same-sex spouse raising children under 16 benefits would be \$0.</p>	<p>Each child receives 75% of deceased parent's basic benefit (\$1,046) which is \$785.</p> <p>Total of \$1,570 in child survivor benefits would be payable.</p> <p>Total benefits for a same-sex spouse raising a child would be \$0.</p>
<p><b>TOTAL</b> \$1,882/month \$22,593/year</p>	<p><b>TOTAL</b> \$0/month \$0/year</p> <p><b>DIFFERENCE</b> -\$22,593/year</p>	<p><b>TOTAL</b> \$1,570/month \$18,840/year</p> <p><b>DIFFERENCE</b> -\$312/month -\$3,744/year</p>

\* indicates amount before adjustment for the family maximum benefit

## SAME-SEX SPOUSES AND PARTNERS

The Social Security Administration currently is not processing applications from same-sex spouses living in states that do not recognize same-sex marriage. This policy is based on a long-standing interpretation of the Social Security Act, which determines the validity of a marriage based on the state in which the couple is domiciled.<sup>14</sup> In June 2014, the Department of Justice published a report detailing administrative implementation of the Windsor decision across the federal government and affirming this interpretation. Until this statutory requirement is revised, thousands of same-sex couples and their families will be excluded from accessing lifeline benefits based on where they live. Unless the policy is revised, this will result in inconsistent and shifting eligibility status for families who relocate to a state with different relationship recognition laws than their home state.

The Social Security Act also provides spousal recognition for individuals who, although not in a legally recognized marriage, may inherit under the laws of the state in which they live.<sup>15</sup> Same-sex partners living in states that recognize their intestate rights as domestic partners or individuals in civil unions are currently eligible to receive Social Security benefits.

The exclusion of same-sex spouses from Social Security benefits has a long-term, life changing economic impact on couples and families across the country. Social Security spousal benefits provide much needed financial support for families when a worker retires, becomes disabled, or passes away. Social Security spousal benefits are also available for divorced spouses if the marriage lasted at least 10 years. There is no limit to the number of former spouses that can be eligible for benefits based on one worker's Social Security history.

Under the current policy, legally married couples are considered strangers for the purposes of Social Security if they reside in a state that does not recognize their marriage. This results in the denial of all benefits regardless of the length of the relationship, the number of children in the household, or the legal recognition of the marriage for other federal purposes. For example, a same-sex couple married in Massachusetts but living in Texas would be considered legally married for federal tax purposes and could receive federal employee spousal health care benefits, but would not be eligible to receive Social Security spousal benefits. This financial loss is compounded for families in which both same-sex partners or spouses are not recognized as legal parents. As the baby boomer generation ages over the next ten years, the number of LGBT older adults is also expected to continue to grow. The denial of federal protections and benefits to many same-sex couples and their children will put this vulnerable population at a greater risk of isolation and poverty.

### SPOUSAL SURVIVOR BENEFITS

The Social Security system recognizes that the death of a spouse is a financial as well as emotional loss for a family. Social Security benefits are designed to supplement families' incomes and to provide surviving spouses with some

A legally-unrecognized child of a deceased same-sex parent could forfeit as much \$15,852 annually in survivor income or as much as \$269,484 before they reach 18 years old.

**\$269,484**  
before they reach age 18.

<sup>14</sup> 42 U.S.C. §416 (h)(1)(A)(i).

<sup>15</sup> Id. at §416(h)(1)(A)(ii).

level of financial stability. A surviving spouse is eligible to receive benefits on the decedent's Social Security record when he or she reaches retirement age or if he or she becomes disabled after age 50, or is raising the worker's child. On average, a retirement-age surviving spouse receives \$1,215 monthly.<sup>16</sup> For many survivors and their children, Social Security benefits ensure that they can remain in a family home.

Surviving same-sex spouses and their children are too often faced with the financial free-fall that these safety-net benefits were designed to prevent. A surviving spouse who is retirement age is often entitled to 100% of the deceased spouse's benefit. In order to maximize benefits, a surviving spouse with his or her own work history may choose to receive a benefit based on either his or her own history or that of his or her deceased spouse. Same-sex surviving spouses living in states that do not recognize their marriage are denied this option, potentially reducing the household income substantially, especially if the surviving spouse was not the primary breadwinner.

### **SPOUSAL DISABILITY AND RETIREMENT BENEFITS**

Disability benefits can be provided either through Social Security or through the supplemental security income (SSI) program. The Social Security Administration estimates that 25% of all workers will become disabled before reaching age 62. This often-sudden decrease in household income can be devastating for a family. A spouse or former spouse of a disabled worker becomes eligible to receive benefits when he or she reaches retirement age, or at any time if he or she is raising the couple's child.

Retirement benefits are also available for a retired worker's spouse. These benefits provide a spouse up to one half of the retired worker's full retirement benefit. As discussed above, when the retired worker passes away the surviving spouse then becomes eligible to receive benefits on the worker's Social Security record.

A same-sex spouse of a deceased or disabled worker who is not legally recognized by their state is not eligible to receive any of these benefits. The average monthly retirement benefit for a worker who retired at full retirement age is around \$1,560.<sup>17</sup> For single-wage-earning same-sex households, the non-working spouse would have little or no personal work history and would be considered ineligible to receive spousal benefits if living in a state that does not recognize same-sex marriage. On average, this would result in a \$780 monthly loss or \$9,360 annual household loss — often for a decade or more.

### **DEATH BENEFITS**

Recognizing the financial burden of burial and final illness, the Social Security system awards a one-time payment of \$255 to partially offset costs. This payment can be made only to a spouse or child. LGBT families who go unrecognized by Social Security are denied this benefit.

**\$780**  
**monthly**

On average, a full retirement age same-sex household with one wage-earner forfeits \$780 monthly or \$9,360 annually in lost spousal retirement benefits

16 Social Security Administration, *Social Security: Understanding the Benefits 22* (2014), available at <http://www.ssa.gov/pubs/EN-05-10024.pdf>.

17 Social Security Administration, *Annual Statistical Supplement to the Social Security Bulletin*, 2011 at 5.21 tbl.5.B2 (2012), available at <http://www.ssa.gov/policy/docs/statcomps/supplement/2011/supplement11.pdf>.

The following example illustrates the inequities that result when the marriage of a same-sex couple is not recognized for purposes of determining Social Security benefits for the couple.

Spouse 1 retires at the full retirement age, is the primary breadwinner, and is considered to be a maximum earner with a basic benefit of \$2,642. Spouse 2 is considered to be a scaled low earner with a basic benefit of \$1,002 and retires at age 66.

DIFFERENT SEX, MARRIED	SAME-SEX, MARRIED IN NON-RECOGNITION STATE
Spouse 1 receives a benefit of \$2,642/month Spouse 2 can opt to receive a total benefit that is equal to ½ of Spouse 1’s benefit in lieu of his/her own and receives \$1,321/month.	Spouse 1 receives a benefit of \$2,642/month. Spouse 2 receives a benefit of \$1,002/month.
<b>TOTAL INCOME:</b> \$3,963/month \$47,556/year	<b>TOTAL INCOME:</b> \$3,644/month \$43,728/year

In the above scenario if Spouse 1 predeceases Spouse 2:

DIFFERENT SEX, MARRIED	SAME-SEX, MARRIED IN NON-RECOGNITION STATE
Spouse 2 receives a combined benefit that is equal to 100% of Spouse 1’s benefit of \$2,642/month.	Spouse 2 receives only his/her individual benefit of \$1,002.
<b>TOTAL INCOME:</b> \$2,642/month \$31,704/year, which is 66% of original post-retirement household income.	<b>TOTAL INCOME:</b> \$1,002/month \$12,024/year, which is 27% of original post-retirement household income

## OPTIONS FOR PROTECTING ALL FAMILIES

The Social Security system was designed to protect against poverty and hardship when families are faced with retirement, disability, or death of a spouse or parent. However, the system has failed to keep up with the changing face of the American family. At a time when more and more states and the vast majority of federal agencies are formally recognizing same-sex marriages, the current Social Security policies fail to consistently provide every LGBT family with the protection they need and deserve. The time has come to end this pernicious form of discrimination. Congress must take steps to address these inequalities by ensuring that every lawful marriage between same-sex couples is recognized by the Social Security Administration, and that LGBT families are equally supported by vital Social Security safeguards regardless of where they live.

### AMEND THE SOCIAL SECURITY ACT

#### EXPAND ACCESS TO SPOUSAL BENEFITS

The Social Security Act currently provides benefits for spouses of deceased, disabled, or retired workers. However, narrow statutory language inhibits the Social Security Administration from recognizing every lawfully married same-sex couple for purposes of these benefits. Congress should amend the Social Security Act to ensure all same-sex spouses, regardless of where they live, are eligible to receive equal benefits following the death, retirement, or disability of their loved one.

#### EXPAND ACCESS TO CHILD BENEFITS

Currently, the Social Security Act defines “child” for eligibility purposes as the “child or legally adopted child” or “step child” of a worker. This definition has been interpreted in such a way as to exclude many children being raised by same-sex couples who are unable to both serve as legal parents due to state law restrictions. Congress should include language within the Social Security Act’s definition of “child” that reflects the permanent relationship between a legally-unrecognized same-sex parent and his or her child.

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