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LGBT Issues and Adult Guardianship: A Comparative Perspective

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COMPARATIVE PERSPECTIVES ON GUARDIANSHIP
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LGBT Issues and Adult Guardianship

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Introduction

Guardianship reform has largely overlooked issues related to sexual orientation and gender identity. Lesbian, gay, bisexual, and transgender (LGBT) individuals, however, present a distinct set of needs and concerns due to certain unique demographic characteristics, the evolving nature of LGBT civil rights, and the stubborn persistence of anti-LGBT bias and prejudice. This chapter explores these LGBT-specific concerns and identifies the various ways that seemingly neutral guardianship laws can work to silence LGBT identities and place LGBT families at risk. It concludes that guardianship systems should incorporate safeguards that expressly acknowledge the importance of sexual orientation and gender identity. Respect for a ward's sexual orientation and gender identity is essential to the concepts of dignity and self-determination that have served as the guiding principles of guardianship reform. In the absence of appropriate safeguards, even guardianship reform driven by a "person-centered philosophy" will ultimately fall short and fail to protect the interests of LGBT individuals and LGBT families.[1]

[1] *Third National Guardianship Summit: Standards of Excellence – Guardian Standards*, Oct. 2011, Standard #1.1,

I. In re Guardianship of Atkins

The case of Patrick Atkins and Brett Conrad illustrates the potential fragility of LGBT families under guardianship law and the pernicious way that a "best interest" standard can operate to give voice to anti-LGBT bias and condemnation.[2] Patrick and Brett met in college and started dating in 1978. For twenty-five years, Patrick and Brett lived together as a committed couple in Fishers, Indiana. Patrick was the CEO of his family's business and Brett was a waiter. Brett's family was supportive of the relationship and accepted Patrick as a member of their family, but Patrick's family was vehemently opposed to his sexual orientation. Although Patrick attempted to reach out to his family, they remained steadfast in their belief that homosexuality was a grievous sin and considered Brett's family to be "evil" and "sinners" because they accepted the relationship.

In 2005, Patrick suffered a ruptured aneurysm while on a business trip to Atlanta, Georgia, at the age of forty-seven. Like many middle aged couples, Patrick and Brett had not executed estate planning documents or durable powers of attorney. Indiana is one of the states in the U.S. that prohibits same-sex marriage, which meant that Patrick and Brett resided in a state where they were considered legal strangers, and Brett had no legal standing to represent Patrick or his interests. When Patrick was hospitalized, his family immediately restricted Brett's ability to visit, eventually forbidding it completely.

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http://www.americanbar.org/content/dam/aba/uncategorized/2011/2011_aging_summit_recs_1111.authcheckdam.pdf (last visited Mar. 21, 2012).

[2] In re Guardianship of Atkins, 868 N.E.2d 878, 880 (Ind. App. 2007).

Patrick's mother explained that if her son were going to return to his life with Brett, then she would prefer that he not recover.

Brett petitioned the court to be appointed Patrick's guardian, but Patrick's parents had clear priority under the state statute, and they were convinced that continued contact with Brett was not in Patrick's "best interests."[3] The trial court agreed, appointing Patrick's parents co-guardians of his estate and person. The court further ruled that, as guardians, Patrick's parents had "the ultimate and sole responsibility . . . to determine and control visitation with and access of visitors to Patrick Atkins in his best interest."[4] The intermediate appellate court unanimously upheld the appointment of Patrick's parents as co-guardians, citing the clear mandate of the statute. The majority opinion allowed Brett visitation, however, and described the animosity that Patrick's mother expressed toward her son's relationship as "astonishing."[5] The opinion also stated that "we are extraordinarily skeptical that [Patrick's parents] are able to take care of [his] emotional needs."[6] The Indiana Supreme Court ultimately refused to review the case.[7] After three years of litigation, Patrick was left in the care of his disapproving parents,

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[3] The Indiana statute sets forth the order of priority for individuals entitled to serve as guardians. I.C. § 29-3-5-5. Courts are authorized to "pass over a person having priority and appoint a person having a lower priority or no priority" where the court finds that it would be in the ward's best interest. *Id.*

[4] Atkins, 868 N.E. 2d at 882.

[5] *Id.*

[6] *Id.* at 884.

[7] Conrad v. Atkins, 891 N.E.2d 34 (Ind. 2008).

despite what appeared to be strong judicial misgivings regarding his emotional well being.

II. Mapping a comparative perspective: a two-force model

Although the ordeal of Patrick and Brett was widely covered by LGBT news and media outlets in the U.S., it is not possible to gauge how frequently such situations occur because there is very little research regarding the impact of guardianship laws on LGBT individuals and families. LGBT advocacy organizations have only recently begun to address these issues, along with the pressing need for LGBT-specific guardianship reform.[8] Even in the absence of broad based research findings, however, it is clear from individual reported cases and growing anecdotal evidence that guardianship systems have numerous structural gaps and blind spots that can place LGBT individuals and LGBT families at risk. *In re Guardianship of Atkins* illustrates a number of these gaps, including the ability of statutory preferences for legally recognized next of kin to separate long-time partners. It also shows how a "best interest" standard can empower hostile family members to isolate and attempt to "cure" LGBT wards.

From a comparative perspective, it is possible to identify these points of vulnerability across guardianship systems and anticipate where LGBT interests may be more likely to be threatened or compromised. These structural and legal constraints, however, should not be viewed in a vacuum because the extent to which these otherwise

[8] In the past, cases involving guardianships disputes were viewed primarily within the context of the larger struggle for marriage equality, providing yet another example of the legal disabilities imposed on same-sex couples. Cases such as *In re Sharon Kowalski* helped advance the argument in favor of recognizing same-sex relationships and underscored the importance of advance planning, but did not strike a clarion call for LGBT-specific guardianship reform. In re Guardianship of Kowalski, 382 N.W.2d 861 (Minn. App. 1986); In re Guardianship of Kowalski, 478 N.W.2d 790 (Minn. App. 1991).

“neutral” guardianship provisions can disadvantage LGBT individuals and LGBT families will depend on the relative socio-legal position of LGBT people within a given jurisdiction. Accordingly, LGBT issues and guardianship law can best be understood as a two-force model where the structural components of a given guardianship system interact with the relative level of social-legal status enjoyed by LGBT individuals. Using this model, it should be possible to develop a matrix that measures potential points of LGBT vulnerability across guardianship systems by correlating the socio-legal position of LGBT individuals in a given country with certain structural components of a country’s guardianship laws and procedures.

The remainder of the chapter maps out both sets of variables. The first section discusses the evolving socio-legal status of LGBT individuals, identifying the key characteristics that have particular relevance for LGBT guardianship reform. These characteristics include the existence of relationship recognition and equality guarantees; two factors that can either amplify or mitigate LGBT vulnerability. They also include certain demographic considerations, such as the reliance on chosen family, as well as the continuing presence of anti-LGBT bias. The second section outlines the points within a guardianship regime where LGBT individuals and LGBT families will be especially at risk, including neutral capacity standards that do not affirm respect for sexual orientation and gender identity, preferences for legal next of kin, and neutral decision making standards that either do not affirm LGBT identities or do not incorporate cultural competency measures. It concludes with a blueprint for reform designed to protect the interests of LGBT individuals and LGBT families in the guardianship system.

III. Socio-legal status of LGBT individuals

The disparate conditions under which LGBT individuals live make it exceedingly difficult to provide a comparative summary of LGBT socio-legal status across the globe. The last several decades have seen remarkable progress in the area of LGBT civil rights and increasing levels of social acceptance and political empowerment, but the change has been far from uniform. Whereas a number of industrialized and predominantly western nations have extended full marriage equality and other equality guarantees to LGBT individuals, in some countries LGBT individuals still face harsh criminal sanctions, including the death penalty.[9] Between these two extremes are a wide range of legal schemes that extend some degree of recognition and protection to LGBT individuals and families. At the same time, there remain significant reservoirs of anti-LGBT bias, and LGBT individuals continue to encounter high levels of extra-legal violence even in countries with inclusive laws and policies. Transgender persons are especially vulnerable to this sort of bias. Many older LGBT individuals also continue to be influenced by their earlier life experiences when homosexuality and gender variance were strongly proscribed.

A. Relationship recognition

Much of the vulnerability experienced by LGBT individuals under guardianship law stems from the legal fragility of LGBT relationships and families. Numerous countries now recognize same-sex marriage, including Argentina, Belgium, Canada,

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[9] James D. Wilets, *From Divergence to Convergence? A Comparative and International Law Analysis of LGBTI Rights in the Context of Race and Post-Colonialism*, 21 DUKE JOUR. COMP. & INT'L LAW 631 (2011).

Iceland, the Netherlands, Norway, Portugal, South Africa, Spain, and Sweden.[10] An even greater number of countries have created an alternative form of legal recognition that grants same-sex couples rights that are either equivalent to or approximate marriage. Countries with these sorts of registered domestic partnerships or civil unions include, Austria, Brazil, Columbia, Czech Republic, Denmark, Ecuador, Finland, France, Germany, Greenland, Hungary, Ireland, New Zealand, Slovenia, Switzerland, the United Kingdom, and Uruguay.[11]

In the United States, the question of same-sex marriage remains hotly contested, producing a confusing mix of results. A number of states recognize same-sex marriage and a slightly larger number of states extend a parallel status that is equivalent to marriage.[12] Federal law prohibits same-sex marriage, which means that same-sex couples who are legally married under state law are not eligible for any federal spousal benefits.[13] In addition, the vast majority of states have enacted laws or constitutional amendments that prohibit same-sex marriage.[14] To further complicate matters,

[10] *Id.* at 644.

[11] *Id.*

[12] Human Rights Campaign, *Marriage Equality and Other Relationship Recognition Laws*, (July 6, 2011) *available at* http://www.hrc.org/resources/entry/maps-of-state-laws-policies.

[13] The Defense of Marriage Act (DOMA) (Pub. L. No. 104-199, 110 STAT. 2419, enacted Sept. 21, 1996, 1 U.S.C. § 7 (2011) and 28 U.S.C. § 1738C (2011)

[14] Human Rights Campaign, *Statewide Marriage Prohibition Laws*, (Jan. 13, 2010) *available at* http://www.hrc.org/resources/entry/maps-of-state-laws-policies

relationship recognition is rarely portable and is generally only respected by states that also extend a comparable form of recognition.[15]

Australia also presents an unusual case. Same-sex marriage is prohibited on the national level, but same-sex couples qualify for federal benefits and are considered "de facto" couples under the laws of all states and territories.[16] Civil partnerships are performed in the Australian Capital Territory and Queensland, and a number of states have domestic partnership registries, including New South Wales, Tasmania, and Victoria.[17]

B. Equality guarantees

Many countries have enacted laws that guarantee equal treatment and prohibit discrimination on the basis of sexual orientation and gender identity. Some countries have included broad guarantees in their constitutions, including South Africa and Bolivia.[18] The U.K. consolidated its anti-discrimination laws into the *Equality Act of 2010* that includes sexual orientation and "gender reassaignment," but also provides a wide conscience exception for religious organizations and certain exceptions specifically related to gender identity.[19] In the U.S., federal anti-discrimination laws do not cover

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[15] Human Rights Campaign, *Interstate Relationship Recognition*, (May 27, 2011) *available at* http://www.hrc.org/files/assets/resources/Interstate_Relationships_Recognition_Map(1).pdf.

[16] Wilets, *supra* note 8, at 646-47.

[17] *Id.*

[18] *Id.* at 671, 682.

[19] The Equality Act of 2010 (UK) *available at* http://www.legislation.gov.uk/ukpga/2010/15/contents (last visited Mar. 20, 2012).

sexual orientation or gender identity.[20] Close to half of the U.S. states provide some form of protection for sexual orientation and a smaller number also cover gender identity.[21] One important limitation is that equality guarantees are often restricted to the employment context. In order to have a meaningful impact on guardianship laws and policies, the equality guarantees must extend well beyond the workplace and include private and state service providers.

Equality guarantees for transgender individuals have generally lagged behind those extended to gay men and lesbians, although this has been changing with increased awareness and advocacy on the part of LGBT organizations.[22] In addition to anti-discrimination protections, jurisdictions have increasingly enacted laws that allow an individual to change his legal gender, but these laws differ considerably in terms of eligibility.[23] There are also limitations imposed on the ability of transgender people to marry, primarily in jurisdictions that prohibit same-sex marriage. For example, the UK's *Gender Recognition Act of 2004* does not require the person requesting a legal gender change to undergo surgery, but, if the person is married, he or she must divorce prior to

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[20] The Employment Non-Discrimination Act (ENDA) has been introduced in every Congress since 1994, with the exception of the 109th Congress. It would bar discrimination in employment on the basis sexual orientation or gender identity.

[21] Human Rights Campaign, *Statewide Employment Laws & Policies Marriage Equality and Other Relationship Recognition Laws*, (Jan. 6, 2012) *available at* http://www.hrc.org/resources/entry/maps-of-state-laws-policies.

[22] Twenty-one states prohibit discrimination on account of sexual orientation, but only sixteen of those states also include protections based on gender identity. *Id*.

[23] *See generally,* Dean Spade, *Documenting Gender*, 59 HASTINGS L.J. 1 (2008).

the gender change.[24] In Japan, the law goes one step further and requires that an individual requesting a legal gender change must be unmarried and cannot have minor children.[25]

C. Transgender-specific concerns

Whenever discussing LGBT individuals, it is important to recognize that transgender individuals often confront a distinct set of challenges because issues of gender identity are not necessarily congruent with those related to sexual orientation. That being said, the two groups are not mutually exclusive because some transgender people may identify as gay or lesbian or bisexual. Moreover, anti-gay bias has long been associated with hostility towards gender variant behavior.

Despite these commonalities, the history and identity formation of transgender people presents a unique and singular story about gender and embodiment. In addition, transgender people have a different relationship with the medical profession because gender identity disorder remains a diagnosable condition that is subject to medical intervention. Although transgender people frequently choose medical intervention in the form of hormone therapy or conforming surgery, most transgender individuals do not elect "bottom surgery."[26] Transgender people in the guardianship system, therefore, raise

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[24] Gender Recognition Act of 2004 (UK) *available at* http://www.legislation.gov.uk/ukpga/2004/7/notes/contents (last visited Mar. 20, 2012).

[25] *The Violations of the Rights of Lesbian, Gay, Bisexual, and Transgender Persons in JAPAN: A Shadow Report*, Oct. 2008, *available at* http://www.globalrights.org/site/DocServer/Shadow_Report_Japan.pdf?docID=10043 (last visited Mar. 20, 2012).

[26] Nancy J. Knauer, *"Gen Silent:" Advocating for LGBT Elders*, 19 ELDER LAW JOUR. 289, 308 (2012).

pressing questions regarding a ward's right to continued medical treatment. They are also uniquely vulnerable to the prejudice and hostility of personal health aides because it is likely that the transgender ward's genitals will not conform to ward's gender expression. Advocacy surveys report that transgender individuals in long-term care facilities are routinely called by the wrong name, forced to wear gender inappropriate clothes, and required to room with members of the opposite sex.[27]

IV. Older LGBT individuals

Well-publicized guardianship disputes often involve relatively young wards who suffered a disabling injury, but the vast majority of LGBT individuals who come under the guardianship system will be older individuals attempting to navigate the challenges of aging. Older LGBT individuals are an especially vulnerable population who face an increased risk of social isolation. In the United States, they came of age at a time when homosexuality was widely criminalized and gender conformity was strictly policed. As they were growing up and well into young adulthood, LGBT individuals could be involuntary committed and subjected to a wide range of "therapeutic" interventions, such as electro-shock therapy, psychoanalysis, aversion therapy, and even lobotomy. The classification of homosexuality as a severe sociopathic personality disorder was used to justify a wide range of legal and social disabilities, as was its continued criminalization. LGBT people were disqualified from most employment and considered per se unfit parents.

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[27] NATIONAL SENIOR CITIZENS LAW CENTER, LGBT OLDER ADULTS IN LONG-TERM CARE FACILITIES: STORIES FROM THE FIELD 11 (2011) *at* http://www.lgbtlongtermcare.org/wp-content/uploads/NSCLC_LGBT_report.pdf.

As a cohort, older LGBT individuals have experienced high levels of anti-LGBT violence, harassment, and discrimination, and studies suggest that their life experiences continue to inform their behavior, specifically their relationship to the medical profession and their willingness to use the closet as an adaptive strategy. In terms of demographics, U.S. data shows that older LGBT individuals are more likely to be single and to be estranged from their family of origin than their non-LGBT peers. They are also less likely to have children. They struggle disproportionately with financial insecurity and report greater levels of disability. In the U.S., older same-sex couples are geographically diverse, living in 97 percent of counties across the country.[28]

A. Next of kin and "chosen family"

LGBT individuals often rely on what anthropologists refer to as "chosen family" for friendship and support.[29] The reliance on chosen family reflects the fact that many LGBT individuals, especially older LGBT individuals, are estranged from their family of origin due to the stress of homophobia and transphobia. Although chosen family structures represent a creative way to form relationships and community in the face of a hostile society and disapproving family, they also have two major drawbacks. First, chosen family members are not generally recognized as next of kin under the law and,

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[28] Gary Gates, *Gay and Lesbian Families in the Census: Gay and Lesbian Seniors*, The Urban Inst. (May 30, 2003), http://www.urban.org/UploadedPDF/900627_Checkpoints_Seniors.pdf. Partnered same-sex couples live in 99.3% of the counties in the United States. David M. Smith & Gary J. Gates, Human Rights Campaign, *Gay and Lesbian Families in the United States: Same-Sex Unmarried Partner Households* 3 (2001), *available at* http://www.urban.org/uploadedPDF/1000491_gl_partner_households.pdf.

[29] KATH WESTON, FAMILIES WE CHOOSE: LESBIANS, GAYS, KINSHIP 24 (1991)

therefore, they have no legal standing in terms of decision making authority. Moreover, chosen family networks are at a significant disadvantage when it comes to caregiving in later life because they tend to be comprised of individuals who are in the same age cohort and aging policies typically assume a multi-generational support system. In the U.S., for example, eighty percent of all long-term care is provided by unpaid carers, who tend to be spouses or younger relatives.[30] The members of a chosen family are more likely to experience reciprocal and overlapping responsibilities because they age in unison, thereby straining resources and increasing the likelihood that they will require outside assistance. On the other hand, a chosen family can also serve as a ready-made support network for supported-decision making alternatives to guardianship, such as the British Columbia Representation Agreement discussed below.[31]

B. Anti-LGBT bias and the closet

Increasing acceptance of LGBT individuals and LGBT families has decreased the number of LGBT individuals who feel compelled to remain "closeted" and hide their identity and basic facts about their lives from family, friends, and service providers. That being said, many individuals still choose to remain "closeted" in at least some areas of their life because they fear encountering anti-LGBT bias. This is especially true of older LGBT individuals. In the United States, studies reveal that some members of the older generation never fully embraced the new levels of openness that began after the sexual revolution of the late 1960s and early 1970s. Many remained closeted and estranged

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[30] Knauer, *supra* note 25, at 306.

[31] Leslie Salzman, *Rethinking Guardianship (Again): Substituted Decision Making as a Violation of the Integration Mandate of Title II of the Americans With Disabilities Act*, 81 COLO. L. REV. 157, 237-39 (2010).

from relatives and friends and were only "out" with members of their close knit chosen family. Some members of this generation were only "out" to their partners. Studies indicate that older LGBT individuals who are "out" feel increasing pressure to go back into the closet as they age because they fear encountering anti-LGBT bias on the part of the medical professionals, home health aides, and other service providers. Reflecting on his future, one older gay man explained, "as strong as I am today . . . when I am in front of the gate of the nursing home, the closet door is going to slam shut behind me."[32]

The closet requires an intense level of information management. A closeted individual must carefully guard facts about her life and her past. Some older LGBT people in long-term care facilities report that they create an alternate set of memories to share with the other residents. They change the facts so that a partner becomes a cousin or a best friend. In addition to the isolating nature of the closet, it is also clear that the closet can have a negative impact on an individual's health. As Dr. Melinda Lantz, chief of geriatric psychiatry at Beth Israel Medical Center in New York explains, closeted older LGBT people face "a faster pathway to depression, failure to thrive and even premature death." She notes that "there is something special about having to hide this part of your identity at a time when your entire identity is threatened."[33]

LGBT individuals who reside in congregate living facilities also face the prejudice and bias of the other residents that can be expressed by bullying and shunning behavior. There have been reports that facilities will transfer residents who appear to be

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[32] Jane Gross, *Aging and Gay, and Facing Prejudice in Twilight*, N.Y. TIMES, Oct. 9, 2007, at A1, *available at* 2007 WLNR 19751537.

[33] *Id.*

LGBT to secure dementia wards in order to appease the complaints of the other residents. For example, in 2007 the *New York Times* reported that an elderly gay man hanged himself when he was moved to a secure "memory" ward after other residents complained about his perceived sexual orientation.[34]

For older LGBT individuals, the prospect of being confined to a dementia ward without cause harkens back to the threat of institutionalized that defined much of their early years. The story of the elderly gay man who took his own life also underscores the increased risk of suicide among older LGBT individuals. Although the increased risk of suicide among LGBT youth is widely known, recent research from Australia shows an alarming increase in the risk of suicide among older LGBT individuals.[35] In fact, the Australia government has specially identified the LGBT community as an "at-risk sub-population" and tailors suicide prevention efforts directly to the community, including seniors.[36]

C. Older LGBT persons and social isolation

Demographic factors, the prevalence of the closet, and the fear of encountering anti-LGBT bias can combine to form a perfect storm and place older LGBT individuals at an increased risk of social isolation. As noted above, LGBT individuals express

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[34] *Id*.

[35] Jo Harrison and Corey Irlam, *The Removal Of Same-Sex Discrimination: Implications For Lesbian, Gay, Bisexual, Transgender & Intersex (LGBTI) Aged Care*, 2010, *available at* http://www.pc.gov.au/__data/assets/pdf_file/0010/101152/sub190-attachment1.pdf (last visited Mar. 20, 2012).

[36] Parliament of Australia, *Senate Community Affairs References Committee Report: The Hidden Toll: Suicide in Australia,* July 21, 2010, *available at* *http://202.14.81.34/Senate/committee/clac_ctte/suicide/report/b02.htm*.

considerable fear when faced with the prospect of entering any type of congregate care facility and overwhelmingly report that they would prefer to "age in place." Unfortunately, older LGBT individuals often lack the necessary support network to facilitate community-based aging, and they are unwilling to use home health care assistance and other supportive services for fear of encountering anti-LGBT bias. The shortage of informal support and their reluctance to utilize supportive services can place older LGBT individuals in a precarious situation, especially if they are experiencing cognitive difficulties or other disabilities.

The case of Harold Scull and Clay Greene illustrates what can happen when isolated LGBT seniors try to age in place without assistance.[37] In 2008, eighty-eight year-old Harold fell at his Sonoma County in California home where he had lived for twenty years with his long-time partner, Clay. Clay called the paramedics over Harold's objections, and their lives were quickly turned upside down. Harold died four months later; alone in a nursing home. Clay, who was seventy-seven at the time, was unaware of Harold's death because he had been placed in a secure dementia ward at a different long-term care facility. The Office of Public Conservator/Public Guardian was appointed as guardian of the estate and person for both Harold and Clay, disregarding clear directions in the couple's estate planning documents. By the time Harold died, county officials had sold all of the couple's possessions and destroyed their cats, Sassy and Tiger. Clay later sued the county for a variety of civil rights violations. Without admitting wrongdoing,

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[37] Nancy J. Knauer, *Gay and Lesbian Elders: Estate Planning and End-of-Life Decisionmaking*, 11 FLA. COASTAL L. REV. 164, 164-66 (2010) (Symposium issue: *Family, Life, and Legacy: Planning for the LGBT Community*).

the county settled the case for an amount in excess of $600,000, and agreed to modify its public guardianship procedures to prevent similar events in the future.

V. Guardianship systems

Over the last several decades, guardianship laws have also undergone a remarkable period of reform and commentary. Reform efforts have sought to enhance respect for the core concepts of dignity and self-determination by revising the capacity standards, rejecting plenary guardianships, increasing procedural safeguards, and imposing certification and monitoring requirements on guardians. Jurisdictions have also developed innovative alternatives to guardianship, as well as new decision making models designed to support, rather than supplant, the decisions of the ward.

These reforms all share a common silence on issues related to sexual orientation and gender identity. Although this silence could be interpreted as simply adopting a "neutral" stance, the result is a false neutrality that disadvantages LGBT individuals and LGBT families. The failure to expressly mandate that respect for a ward's sexual orientation and gender identity is integral to the concepts of dignity and self-determination leaves guardianship law open to the influences of anti-LGBT bias that can range from cultural insensitivity to outright hostility. When this occurs, facially neutral guardianship provisions can operate to erase LGBT identity, deny autonomy, and ignore partners and chosen family. The following addresses a number of these types of provisions that are commonly found in guardianship systems, specifically capacity standards, preferences for next of kin, decision-making standards, and alternatives to guardianship.

A. Determination of capacity and undue influence

Although homosexuality is no longer classified as a mental illness and gender identity disorder is a treatable medical condition, tests evaluating capacity or undue may continue to disadvantage LGBT individuals, especially where the individuals in question are closeted and estranged from their legally recognized next of kin. Capacity doctrines typically take into account an individual's ability to engage in deliberative decision-making and, in some instances, the perceived reasonableness of the individual's actions. In this way, the value assigned to a particular decision or action may ultimately determine whether an individual has the requisite capacity to engage in the activity.

Closeted LGBT individuals can clash with estranged family members who may be alarmed by what they perceive to be aberrational behavior. Take for example, an estranged nephew who is contacted when his uncle Chester starts having cognitive difficulties. If the nephew believed that uncle Chester was a "confirmed bachelor," he may be shocked to find Chester living with another man and immediately assume that Chester is being taken advantage of by the "roommate." In these situations, the confused relative may also be able to use criminal undue influence laws to stop the "roommate" from having further contact with Chester. In the state of Wisconsin, the relative could attempt to get a restraining order against the "roommate" regardless of whether uncle Chester has capacity and consents to the contact.[38]

In addition to a universal presumption of capacity, capacity doctrine should include the universal right of an individual to self-identify his or her sexual orientation

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[38] Nina Kohn, *Elder (In)Justice: A Critique of the Criminalization of Elder Abuse,* 49 AM. CRIM. L. REV. (forthcoming 2012).

and gender identity. Capacity doctrine should also take steps to insure that the determination of capacity is done in a culturally sensitive way that takes into account the unique socio-legal status of LGBT individuals. For example, the fear of encountering anti-LGBT bias may cause older LGBT individuals to make choices that could appear irrational if they are viewed out of context. The *Psychologist's Handbook* prepared by the ABA Commission on Law and Aging notes that "a person's race, ethnicity, culture, gender, sexual orientation, and religion may impact his or her values and preferences," but provides no further guidance.[39] The only other time it mentions sexual orientation is in connection with the capacity to engage in sexual activity, ignoring more expansive issues related to identity.

B. Choice of Guardian

Guardianship systems generally establish an order of priority to determine who serves as guardian, and these provisions invariably privilege legally recognized next of kin. The U.K.'s *Mental Capacity Act of 2005* grants a ward's "nearest relative" certain rights that cannot be exercised by a court-appointed deputy, including the right to admit the ward to hospital. Preferences for traditional family can greatly disadvantage same-sex partners in jurisdictions without relationship recognition, as was the case with Patrick and Brett. *In re Guardianship of Atkins* involved an Indiana statute that prescribed the following order of priority: an individual named in a power of attorney, a spouse, an adult child, parents, and any person related by blood or marriage with whom the ward had

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[39] AMERICAN BAR ASSOCIATION AND AMERICAN PSYCHOLOGICAL ASSOCIATION, ASSESSMENT OF OLDER ADULTS WITH DIMINISHED CAPACITY: A PSYCHOLOGIST'S HANDBOOK 27 (2008) *available at* http://www.apa.org/pi/aging/programs/assessment/capacity-psychologist-handbook.pdf. (last visited Mar. 20, 2012).

resided for six months prior to the application.[40] As a result, the Patrick's partner of twenty-five years was reduced to a legal stranger who was required to petition the court for visitation rights. Moreover, Patrick was left in the care of disapproving guardians whom the court doubted could fulfill his emotional needs.[41]

The increasing recognition of marriage equality will resolve the disadvantages imposed on same-sex partners and, presumably, the ambiguity that exists in certain jurisdictions regarding the ability of transgender individuals to marry (or stay married). If Patrick and Brett had been legally married under Indiana state law, then Brett would have had clear priority to serve as Patrick's parents. The one complicating factor could have been that Patrick fell ill in a different state. Given that relationship recognition in the U.S. is rarely portable, it is possible that Georgia could have refused to recognize the relationship even though Patrick and Brett were legally married in their state of domicile, leading to a jurisdictional dispute.

Even full marriage equality, however, will not address the larger issue posed by the reliance of LGBT individuals on chosen family because marriage allows an individual to make his partner part of his family, but there is no comparable mechanism to make his best friend part of his family. Accordingly, choice of guardian provisions should include non-martial partners regardless of gender and provide a mechanism for the recognition of chosen family.

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[40] In re Guardianship of Atkins, 868 N.E.2d 878, 880 (Ind. App. 2007).

[41] *Id*. at 884.

The vulnerability that exists for individuals who rely on chosen family is illustrated by a recent case from the U.K.[42] Sue W. was single when she developed MS, but she enjoyed the support of a wide network of friends. Sue had not yet executed a lasting power of attorney under U.K. Law when she was hospitalized with a serious infection. When she was found unable to manage her affairs, her estranged father was authorized under the *Mental Health Capacity Act of 2005*, as her "nearest relative," to admit her to a long-term care facility.[43] Sue was admitted to a Christian facility for seniors, even though she was only fifty years of age and identified as a Buddhist. Confined to her bed, Sue's friends tried unsuccessfully to "free" her for two years before she died in 2010.

The cases of Patrick and Sue both involved estranged relatives working at odds with the ward's interests, but it should be noted that older LGBT individuals struggling with social isolation might not have any relatives waiting in the wings. When this occurs, as it did with Harold and Clay, public guardians will be appointed, and these parties may be even less inclined to familiarize themselves with a ward's values and preferences. Accordingly, it is imperative to provide public guardians with cultural competency training designed to equip them to represent LGBT wards.

C. Decision-Making Standards

All guardianship models ultimately involve questions of decision making – how and under what conditions should or will decisions be made either for a ward, on behalf

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[42] REGARD, *Sue's Law: Love is Stronger than Blood*, June 9, 2010, *at* http://www.regard.org.uk/the-news (last visited Mar. 20, 2012).

[43] The Mental Capacity Act of 2005 (UK) *available at* http://www.legislation.gov.uk/ukpga/2005/9/contents (last visited Mar. 20, 2012)

of a ward, or in consultation with a ward. In the U.S., some guardianship systems incorporate aspects of three different decision making models: the best interests standard, substituted decision making, and supported decision making. LGBT individuals fare better depending upon which decision making regime is in use, but they ultimately remain at risk regardless of the standard because of the continuing influence of anti-LGBT bias and the related socio-legal considerations discussed in the preceding section.

1. Best interests

Under a best interests standard, the guardian is charged with making decisions and otherwise exercising his authority in a way that will further the "best interests" of the ward.[44] There is no attempt to establish the actual wishes of the ward or what the ward would have wanted in a given situation. Instead, decisions are reached by reference to a value set that determines what constitutes a ward's "best interests." These values typically include considerations such as autonomy, self-determination, and respect for life. For some guardians, these values would also include disapproval of LGBT identities, such as Patrick's mother and guardian who held an unshakable belief that "homosexuality is a grievous sin."[45] Patrick's mother "testified that no amount of evidence could convince her that Patrick and Brett were happy together or that they had a positive and beneficial relationship."[46] Under Indiana guardianship law, a combination of the preference for next of kin and the best interest standard empowered Patrick's

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[44] Lawrence A. Frolik, *Is a Guardian the Alter Ego of the Ward*, 37 STETSON L. REV. 53, 57 (2007).

[45] In re Guardianship of Atkins, at 881.

[46] *Id.*

mother to make decisions that negated Patrick's identity and the family that he had built for twenty-five years. Best interests standards should affirm that respect for a ward's sexual orientation and gender identity is essential to the concepts of dignity and self-determination.

2. Substituted judgment

The substituted judgment standard provides that the guardian should act consistent with what the ward would have wanted if the ward had capacity.[47] LGBT individuals should fare better under this standard, assuming it is possible to know what they would have wanted. Obviously, this increases the importance of executing advance directives and other documents that memorialize an individual's wishes. However, the standard assumes that it is possible to know the ward's preferences, which may not be easily known if the ward was closeted and the guardian is an estranged family member or a public guardian.

3. Supported-decision making

A supported-decision making model assumes capacity and provides an individual with support to maximize autonomy.[48] A number of jurisdictions have implemented supported decision making models that utilize a trusted person or network of friends to help the individual make decisions. One model is the appointment of a legal mentor, such as the Swedish "god-man" or good or fair man, who acts as a decision-maker, but cannot bind the ward on major transactions without the ward's consent. [49] Another model

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[47] Salzman, *supra* note 30.

[48] *Id.*

[49] *Id*. at 235.

is the private representation agreement that has been adopted in British Columbia and the Yukon Territory.[50] The British Columbia Representation Agreement Act allows an individual to authorize an individual or support network to help her make certain decisions. This sort of model should provide LGBT individuals with the greatest level of security, but this again assumes that the individual is not closeted and is willing to discuss decisions openly. The model will also not help individuals who are socially isolated and do not have a trusted friend or a support network capable of helping, such as older LGBT people whose support systems may already be overtaxed.

D. Alternatives to guardianship

Alternatives to guardianship are very important given the vulnerabilities that LGBT individuals and LGBT families face under guardianship laws. The ability to execute advance directives and powers of attorney provides LGBT individuals the opportunity to opt out of the guardianship regime. In the case of both Patrick and Sue, the outcome could have been very different if they had executed a durable power of attorney and nominated an individual to serve as guardian. At least in the short term, however, there will remain instances where even the most carefully drafted documents will be ineffective because third parties and other gatekeepers will refuse to respect them. Harold and Clay had a full complement of estate planning documents that were disregarded by county employees who were supposedly working in their best interests.

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[50] *Id*.

Since Clay settled the lawsuit, his lawyer reports that he is a "scared little rabbit" and lives in fear that the county workers will come and take him away.[51]

VI. Conclusion

The silence of guardianship law with respect to sexual orientation and gender identity disadvantages LGBT individuals and LGBT families. Reforms should affirm that respect for a ward's sexual orientation and gender identity is a core value essential to the concepts of dignity and self-determination. Capacity and decision making standards should reflect this value. Choice of guardianship provisions should include partners regardless of gender and provide a mechanism for the recognition of chosen family. Finally, cultural competency training should be made widely available to guardians, judicial personnel, and social service providers.

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[51] Scott James, *An Unlikely Plaintiff. At Issue? He Dares Not Speak Its Name*, N.Y. TIMES, May 7, 2010, at A19, *available at* 2010 WLNR 9469110.

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