September 11 Relief Efforts and Surviving Same-Sex Partners: Reflections on Relationships in the Absence of Legal Recognition

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ARTICLE

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I. INTRODUCTION

The criteria established by federal, state, and private relief efforts to assist the families of the victims of the September 11 attacks present a unique opportunity to examine the status of same-sex relationships in the United States. The singular nature of the attacks and the horrific death toll triggered a prolonged period of collective grief and mourning, accompanied by an unprecedented outpouring of financial support from federal, state, and private sources for the families of the victims. The federal government distributed $6.9 billion dollars through the September 11 Victim Compensation Fund (“Compensation Fund”). The New York state crime victim compensation program and state insurance fund distributed over $44 million in emergency assistance awards. *

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2. Discussing the collective sense of mourning, Judith Butler notes: “Despite our differences in location and history, my guess is that it is possible to appeal to a ‘we,’ for all of us have some notion of what it is to have lost somebody. Loss has made a tenuous ‘we’ of all of us.” Butler, supra note 1, at 20.


and a mere five weeks after the attacks, contributions to private charitable initiatives exceeded $1 billion.\textsuperscript{5} The question facing the surviving same-sex partners was whether their relationships would be deemed worthy of recognition and deserving of compensation at a time when the United States was purportedly at its most generous, most united, and most injured.\textsuperscript{6}

Despite the objections of religious conservatives, surviving same-sex partners, as a class, were not foreclosed from participation in the relief efforts, but they were not recognized as spousal equivalents.\textsuperscript{7} Surviving same-sex partners received payments from some sources, but not others, resulting in a partial and shifting pattern of recognition that varied depending upon the payor and the individual circumstances of the surviving partner’s relationship with the victim.\textsuperscript{8} When recognition was available, aid was rarely awarded to the surviving partner qua partner.\textsuperscript{9} The bulk of federal and state aid that was distributable to a surviving same-sex partner was made available on the basis of criteria independent of, or at least indifferent to, the partner’s committed relationship with the victim.\textsuperscript{10} For example, a partner could qualify for certain aid if she were the beneficiary of the victim’s estate or could establish the requisite financial ties to the victim.\textsuperscript{11} In some instances,


\textit{Shalia K. Dewan, No Dress, No Vows, and Less Status in Grief, N.Y. TIMES, Jan. 22, 2002, at A1 (noting obstacles to mourning in absence of spousal status). The situation of the surviving same-sex partners, however, differs in two important respects. First, different-sex couples can marry, whereas no state recognized same-sex marriage at the time of the September 11 attacks. Accordingly, different-sex couples either chose not to formalize their relationships or had simply not yet had the opportunity to formalize their relationships. A same-sex relationship, by definition, was not eligible for legal recognition. Second, the social and legal disabilities imposed on same-sex relationships are the result of an ongoing morality discourse defined by persistent homophobia and the compelling force of heteronormativity. See generally, Nancy J. Knauer, Science, Identity and the Construction of the Gay Political Narrative, 12 LAW & SEXUALITY 1 (2003).}
beneficiaries of the victim’s will or the heirs of the victim’s estate. See infra text accompanying notes 103-118 (describing Compensation Fund). To the contrary, a surviving same-sex partner in Virginia would only qualify for compensation payable to the victims of crimes if the partner could show that she was economically dependent on the victim. See infra text accompanying notes 110 -111 (describing Virginia Criminal Injuries Compensation Fund).

12. To some extent, surviving same-sex partners are always subject to the whim of the deceased partner’s next of kin due to the ease with which next of kin can challenge testamentary dispositions, using doctrines such as undue influence or lack of mental capacity. Moreover, surviving partner can often benefit immensely from the assistance of the deceased partner’s next of kin in situations where the law leaves certain discretion or decision-making authority in the hands of relatives. The Special Master administering the Federal Compensation Fund made this type of reliance explicit when he stated that awards would be paid to surviving same-sex partners without question where the next of kin agreed. See infra note 99 (discussing Compensation Fund). Although this stance was received by some as pro-gay, at base, it represents the simple willingness to respect a gift from the next of kin to the surviving partner.

13. As explained more fully below, the American Red Cross Guidelines for the Definition of Family set forth an inclusive definition of family that incorporated factors concerning economic interdependence, reciprocal beneficiary designations, and recognition or registration as domestic partners or some other form of parallel status. See infra text accompanying notes 119-135.

14. Some states, a large number of municipalities, and an increasing number of private employers offer domestic partnership benefits to the same-sex partners of their employees. According to the Human Rights Campaign Foundation, 11 state governments and 129 municipal or county governments extend domestic partnership benefits. Human Rights Campaign Foundation, Employers that Offer Domestic Partnership Health Benefits, at http://www.hrc.org/Template.cfm?Section=Search_the_Database&Templates=CustomSource/WorkNet/srch.cfm&searchtypeid=3&searchSubType ID=1 (last visited Jan. 29, 2005). In addition, 228 of the Fortune 500 companies offer domestic partnership benefits. Id. In order to qualify for these employee benefits, a same-sex couple must establish that either they are registered as domestic partners with the relevant jurisdiction or they must satisfy a prescribed number of factors establishing a relationship. See Nancy J. Knauer, Domestic Partnership and Same-Sex Relationships: A Marketplace Innovation and a Less Than Perfect Institutional Choice, 7 TEMP., POL. & CIV. RTS. L. REV. 337, 346-48 (1998) (describing general requirements to qualify for domestic partnership benefits).

On the municipal or county level, domestic partner ordinances can extend relatively few benefits to non-employees. Id. at 340-42. Domestic partner registries are largely symbolic, although registration does provide strong evidence of a committed relationship. Id. at 340-41. According to the Human Rights Campaign Foundation, Work Life: Search for an Organization or Agency, at http://www.hrc.org/Template.cfm?Section=Get_Informed2&Template=CustomSource/Agency/AgencySearch.cfm (last visited Jan. 28, 2005) [hereinafter Domestic Partnership]. However, the increasing availability of registries may lead to a negative inference in the case of a couple who failed to register.


17. HAW. REV. STAT. § 572C-1 (2004). Hawaii enacted legislation granting certain inheritance rights to “reciprocal beneficiaries.” Id.

18. In 2004, Maine enacted legislation, Public Law 672, establishing a state-wide domestic partner registry and extending to same-sex couples certain health-care decision-making authority and inheritance rights equivalent to spouses. 2003 ME. LAWS 672.


20. VT. STAT. ANN. tit. 15, §§ 1201-1207 (2004). Vermont established same-sex civil unions. Id. The parallel status extends to same-sex couples who enter into civil unions the benefits and responsibilities equivalent to spouses. Id.


No State, territory, or possession of the United States, or Indian tribe, shall be required to give effect to any public act, record, or judicial
relationships guarantees that, notwithstanding a comprehensive estate plan, thorough beneficiary designations, and even state-wide relationship recognition, a surviving same-sex partner will be legally invisible in certain contexts – a mere stranger under the law.\textsuperscript{22} This invisibility places the burden on the surviving partner to claim standing or recognition as something other than a partner. It requires her to disaggregate her relationship with the decedent and present a partial picture of their relationship and their life together. Moreover, in some instances there are simply no alternative avenues for recovery, and the surviving partner is categorically excluded because she is not considered next of kin.\textsuperscript{23} This potential for erasure will always exist, absent uniform relationship recognition on the state and federal level.

The potential for erasure became immediately clear to Nancy Walsh on the morning of September 11, 2001 when she called American Airlines to confirm whether her partner of 12 years, Carol Flyzik, had indeed boarded Flight 11, the first plane to hit the World Trade Center.\textsuperscript{24} American Airlines refused to give Walsh any information about her partner because, under the airline’s guidelines, Walsh was not considered Flyzik’s next of kin.\textsuperscript{25} Walsh had to wait for Flyzik’s sister to place the call before American Airlines would confirm that Flyzik was a passenger aboard Flight 11.\textsuperscript{26} For Walsh, the erasure was complete. Not only was she denied status as a surviving spouse, she was considered unrelated to her partner. She was a legal stranger.\textsuperscript{27}

\begin{footnotes}
\item[23] This potential for erasure will always exist, absent uniform relationship recognition on the state and federal level.
\item[25] Id.
\item[26] Id. In addition, Walsh did not receive the $25,000 American Airlines paid to the families of the passengers or the urn of debris from the World Trade Center site that was given to the victims’ families. Id.
\item[27] Writing of the gay and lesbian victims of the September 11 attacks, Butler notes: “The queer lives that vanished on September 11 were not publicly welcomed into the idea of national identity built into the obituary pages, and their closest relations were only belatedly and selectively (the marital norm holding sway once again) made eligible for benefits. But this should come as no surprise, when we think about how few deaths from AIDS were publicly grievable losses, and how, for instance, the extensive deaths now taking place in Africa are also, in the media, for the most part unremarkable and ungrievable.” BUTLER, supra note 1, at 35.
\end{footnotes}
II. THE RELIEF EFFORTS

Many of the September 11 relief efforts were designed to provide emergency assistance to surviving family members and augment amounts that would otherwise be payable to the survivors by reason of a victim’s death. Although these payments were auxiliary to rights in the victim’s estate, it is important to preface any further discussion of the relief payments with a brief review of the general legal rights of surviving same-sex partners. Such a review provides an important backdrop against which to evaluate the treatment of the surviving same-sex partners of the victims of the September 11 attacks. Moreover, it supplies a necessary substantive component because, in certain instances, the relief efforts deferred to state law to determine eligibility and the priority of distribution.

A. Legal Rights of Surviving Same-Sex Partners

The rights of surviving same-sex partners in the United States is an exceedingly complex topic because survivor rights may involve the application of federal law (e.g., social security survivor benefits), state law (e.g., property distribution and fiduciary appointments), local law (e.g., rent control guidelines), as well as private contract. As a result, any attempt to provide a summary will be necessarily incomplete and overly broad.

Under the 1996 Defense of Marriage Act (DOMA), marriage is defined as a union between one man and one woman for all federal purposes. As of January 2004, the United States General Accounting Office identified 1,138 federal statutory provisions under “which marital status is a factor in determining or receiving benefits, rights, and privileges.” This is relevant to surviving partners because certain federal death benefits are payable only to a surviving spouse or to a relatively narrow group of relatives. For example, a surviving same-sex partner will not qualify for social security survivor benefits, nor will she be able to compute her federal income taxes under the favorable “surviving spouse” rate table.

28. As explained more fully below, the Compensation Fund was, by far, the largest single payor. It was designed initially to insulate the airline industry from potentially disabling tort liability arising from the September 11 attacks. Accordingly, awards from the Compensation Fund were made expressly in lieu of any tort recovery. In addition, the Compensation Fund adopted a very controversial collateral offset rule, whereby presumptive awards were reduced by amounts payable from collateral sources such as life insurance and employer death benefits. See infra text accompanying notes 80-102 (describing Compensation Fund).

29. As explained more fully below, the Compensation Fund deferred to the law of the state in which the victim was domiciled and distributed a portion of the award in accordance with state probate law and a portion in accordance with the state rules governing wrongful death actions. See infra text accompanying notes 86-88 (describing deference to state law).


31. State probate law controls the disposition of property to which the decedent held title at the time of her death through the regulation of the testamentary transfer of title and, in the absence of a valid will, the application of the rules of intestate succession. In addition, state law governs the appointment of a personal representative to administer the decedent’s estate. See, e.g., HAW. REV. STAT. ANN. §§560:2-101, 560:3-1001; VT. STAT. ANN. tit. 14, § 104 (1985).

32. For example, New York City rent control guidelines allowed a member of the decedent’s immediate family who shared the household to stay in a rent controlled apartment even where the family member was not a named party to the lease. The ground-breaking 1989 case of Brashi v. Stahl Associates Co., 543 N.E.2d 49 (N.Y. 1989), extended this protection to a surviving same-sex partner through the adoption of a functional definition of family, with an emphasis on mutual interdependence.

33. This could include death benefits payable by third parties, such as employers and life insurance companies. In recent years, employment-related death benefits have increased in importance. They represent non-probate property and, as such, they are not distributable either under a decedent’s will or in accordance with the rules of intestate succession. Knauer, supra note 1 at 49-51 (discussing employment-related survivor benefits). In some instances, the concept of “next of kin” influences or even directs the payment of these benefits. Id. For example, an employee may have no authority to designate a beneficiary in the case of certain benefits which are only payable to certain close relatives. Id. In addition, if an employee is permitted to and fails to designate a recipient, the benefit will likely be payable to prescribed relatives in an order of priority which closely follows the rules of intestate succession. Id.

34. DOMA provides:

In determining the meaning of any Act of Congress, or of any ruling, regulation, or interpretation of the various administrative bureaus and agencies of the United States, the word “marriage” means only a legal union between one man and one woman as husband and wife, and the word “spouse” refers only to a person of the opposite sex who is a husband or wife.


The disproportionate number of rescue personnel who died in the September 11 attacks highlighted a little-known federal death benefit for “public safety officers” killed in the line of duty. Under this provision, a death benefit of $250,000 was payable to the officer’s children, spouse, or parents. Post-September 11 lobbying efforts led Congress to amend the federal benefits to allow payment to the designated beneficiary of the officer’s insurance policy where the officer left no surviving children or spouse. In a seemingly ironic twist, the legislation was named after Father Mychal Judge, a beloved chaplain with the New York Fire Department, who was routinely reported to have been openly gay. Although this amendment was heralded as a pro-gay victory, perhaps in large part because it bears Father Judge’s name, a surviving same-sex partner qualifies for this benefit due to her status as a designated beneficiary, not as a result of her relationship with the decedent. The amendment recognizes the ability of an officer to designate a beneficiary to receive the death benefit in the absence of surviving children or spouse, whereas under prior law the benefit would have gone to surviving parents or, if they were deceased, it would not have been paid.

Below the federal level, state law varies widely from jurisdiction to jurisdiction. For this reason, the extent to which the law protects the interests of a surviving same-sex partner depends on where the couple lived and whether the deceased partner left a valid will and the requisite beneficiary designations. State law governs the distribution of property owned by the decedent at the time of death, referred to as the probate estate. In addition to administering the estate, the personal representative is responsible for pursuing a number of matters on behalf of the decedent, including instituting a survival claim, and is generally considered to have some power over the disposition of the decedent’s remains and other related issues. Most importantly for this

39. See Knauer supra note 1 at 49 (discussing prior version of law where death benefit payable to certain close family members in prescribed order of priority).
43. Under current law, the death benefit is payable to the beneficiaries designated under the officer’s most recently executed life insurance policy where there is no surviving spouse and no surviving children. 42 U.S.C.A. § 3796(a)(4) (2004). Parents only receive the benefit where there is no surviving spouse, children or designated beneficiary. Id. Under prior law, the benefit was payable to certain designated next of kin. Knauer, supra note 1, at n.96. An officer had no ability to designate a beneficiary. Id.
44. Not only does the law regarding relationship recognition vary from state to state, but it also varies within states from municipality to municipality. See Domestic Partnership, supra note 14 (describing domestic partner ordinances and registries). In addition, many of the city and county domestic partnership registries exist in states with anti-marriage legislation. Id.
45. Where the couple lived is obviously important because of the small but growing number of states which extend certain rights to surviving same-sex partners. These states are: California, Hawaii, Maine, Massachusetts, New Jersey, and Vermont. See infra text accompanying notes 61-70 (discussing state law).
46. Probate refers to the process by which title in property is transferred from the decedent to the beneficiaries. JESSE DUKEMINIER & STANLEY M. JOHANSON, WILLS, TRUST AND ESTATES 39-42 (6th ed. 2000) (outlining probate process).
47. The personal representative is responsible for safeguarding the estate assets, paying all creditors, and effecting distribution to the beneficiaries. Id. at 35-36 (outlining responsibilities of personal representative).
48. A survival claim is distinct from the more commonly known wrongful death action. The former tort claim is brought by the victim’s personal representative for the damages experienced by the decedent from the moment of injury until death. See MARC A. FRANKLIN & ROBERT L. RABIN, TORT LAW AND ALTERNATIVES: CASES AND MATERIALS 17 (7th ed. 2001) (describing torts claims which arise from death). A wrongful death action is brought by the victim’s survivors for their damages resulting from the loss. Id.
49. It is not entirely clear whether the personal representative has authority to direct the disposition of remains and to make funeral and cemetery arrangements. In many instances, these very personal decisions must be made before the will has been submitted for probate or before an administrator has been appointed. Knauer, supra note 1 at 45-47. On this point, Dukeminier and Johnson remarked “a person now has something more than a hope, but far less than an assurance, that his or her wishes will be carried out at death if the family objects.” DUKEMINIER & JOHANSON, supra note 46, at 405. On the specific topic of surviving same-sex partners see Jennifer E. Horan, Note, “When Sleep at Last has Come”: Controlling the Disposition of Dead Bodies for Same-Sex Couples, 2 J. GENDER RACE & JUST. 423 (1999) (discussing difficulty
discussion, only the personal representative of a victim of the September 11 attacks was eligible to file a claim with the Compensation Fund.  

State law allows full testamentary autonomy over property, subject only to an elective share in a surviving spouse or a legal challenge by next of kin who have automatic standing to dispute the validity of a will. This means that in all states a testator is free to designate her same-sex partner as a beneficiary under and the executor of her will. A will can only direct the disposition of the probate estate and, therefore, is ineffective to direct the payment of many third-party survivor death benefits, such as life insurance and pensions.

In the absence of a valid will, the rules of intestate succession prescribe who receives a decedent’s property. Intestate succession privileges relationships defined by marriage, biology, and adoption, and rarely inquires as to the quality or strength of the relationship. In the absence of a surviving spouse, a decedent’s probate estate is distributed to his closest next of kin in the following general order of priority: children, parents, siblings, nieces and nephews, grandparents, aunts and uncles, first cousins, and so on. If a decedent is not survived by a spouse or any relatives within the prescribed degree of consanguinity, his probate estate escheats to the state. This same order of priority is also used to determine who is appointed as the personal representative responsible for administering the decedent’s estate in the absence of a will. Thus, a surviving same-sex partner of a decedent who dies intestate will have no legal rights over or interest in the decedent’s probate estate nor any ancillary intangible decision-making authority unless the decedent dies a resident of one of the handful of states which has included a surviving same-sex partner in the scheme of intestate succession.

At the time of the September 11 attacks, no state recognized same-sex marriage. Only Vermont and Hawaii included same-sex partners as intestate heirs. The California Registered Domestic Partnership Act granted domestic partners some decision-making authority and standing to sue for wrongful death, but stopped short of including same-sex partners in the scheme of intestate succession. Currently, five states include same-
sex partners as intestate heirs: California, Hawaii, Maine, Massachusetts, and Vermont. (This list could be expanded if the marriages performed by officials in a number of jurisdictions during 2004 are declared valid). In addition, New Jersey has granted same-sex partners certain authority regarding health-care decisions, but stopped short of amending its rules of intestate succession.

Although the rules of intestate succession are often described as a default setting, their influence is much more pervasive, given that an estimated three-quarters of all decedents die without a will. In addition, the rules of intestate succession are frequently used to identify the class of individuals eligible to receive a host of benefits made available under federal and state programs, as well as under private employment contracts and tort claims.

In instances where the decedent does not have the power to override the designation of next of kin, the rules of intestate succession constitute compulsory distribution in accordance with the state’s order of presumed priority. For example, this would be the case with state statutes authorizing wrongful death actions which typically prescribe the categories of individuals who have standing to bring such actions in accordance with the state rules of intestate succession. This is also the case with some pension benefits and other employment-related death benefits. This type of compulsory distribution illustrates the inability of private contract or testamentary documents to imbue a surviving same-sex partner with rights comparable to those enjoyed by surviving spouses or even those enjoyed by surviving next of kin.

64. See CAL. FAM. CODE § 297 et seq. (Deering 2004) (establishing procedure for “registered domestic partners”). Effective January 1, 2005, registered domestic partners will have substantially all the rights and responsibilities enjoyed by spouses under California law. Assemb. B. 205, 1st Sess. (Cal. 2003-04). Currently, registered domestic partners enjoy a number of rights traditionally reserved for spouses, including inheritance rights, certain health care decision-making authority, and standing to sue for wrongful death. See CAL. CTIV. PRO. CODE § 377.60 (West 2004).

65. Hawaii established the category of “reciprocal beneficiary relationship” in order “to extend certain rights and benefits which [were] presently available only to married couples to couples composed of two individuals who are legally prohibited from marrying under state law.” HAW. REV. STAT. ANN. § 572C-1 (Michie 1999). Individuals must sign a “declaration of reciprocal beneficiary relationship” in order to be eligible for certain benefits. HAW. REV. STAT. ANN. § 572C-5 (Michie 1999). A reciprocal beneficiary is afforded the same status as a spouse under the rules of intestate succession. HAW. REV. STAT. ANN. § 560-2-102 (Michie 1999).

66. In 2004, Maine enacted legislation establishing a state-wide domestic partner registry and extending to same-sex couples certain health-care decision-making authority and inheritance rights equivalent to spouses. 2003 Me. LAWS 672.


68. Vermont established civil unions under which parties to the union are granted “all the same benefits, protections and responsibilities . . . whether they derive from statute, administrative or court rule, policy, common law or any other source of civil law, as are granted to spouses in marriage.” VT. STAT. ANN. tit. 15, § 1204(a) (2002). This broad grant of rights includes equal status under the rules of intestate succession. VT. STAT. ANN. tit. 15, § 1204(e)(3) (2002).


70. New Jersey’s newly enacted status of “domestic partners” extends certain medical decision-making authority to same-sex partners, as well as certain insurance and state tax benefits. N.J. STAT. ANN. § 26:8A-1 et seq. (2004).


72. Knauer, supra note 1, at 49-51.

73. At the time of the September 11 attacks, only three states, California, Hawaii, and Vermont, granted surviving same-sex partners standing to bring a wrongful death claim. CAL. CTIV. PRO. CODE § 377.60 (West 2004); HAW. REV. STAT. ANN. § 663-3(b)(5) (Michie 2004); VT. STAT. ANN. tit. 15, § 1204(e)(2) (2002).

74. For example, the New York state comptroller recently announced that New York State pension fund would recognize same-sex marriages performed in Canada and thereby grant same-sex partners those rights otherwise reserved for spouses. Michael Cooper, Hevesi Extends Pension Rights to Gay Spouses, N.Y. TIMES, Oct. 14, 2004, at B1.

75. The ability of private contract to compensate for equal marriage rights is a favorite canard of the pro-family organizations. For example, a book review on the website of the Family Research Council praises the author of a book on gay marriage because he “demonstrates that
Numerous municipalities have domestic partnership ordinances and registries. Generally, local domestic partnership ordinances operate to grant employee benefits to public employees and provide limited benefits to city residents who register as domestic partners. In addition, many private employers have domestic partnership policies which guarantee spousal employee benefits for domestic partners. The rights afforded by these policies are by their nature limited and are rarely portable.

B. Federal Victim Assistance: September 11 Victim Compensation Fund

The single largest payor of relief for the survivors of the September 11 attacks was the Compensation Fund. Congress created the Compensation Fund within days of the attacks, in an attempt to insulate the airline industry from potentially staggering tort liability. Under a no-fault scheme, the Compensation Fund promised prompt payment to survivors who waived all legal claims arising from the attacks. In less than three years from the date of its creation, the Compensation Fund closed, after distributing $6.9 billion in awards and processing claims representing 97% of all eligible families.

Hastily enacted, the statute creating the Compensation Fund was very bare bones, directing that awards be paid to the victim’s “relatives.” Pro-gay organizations immediately seized on this arguably ambiguous term to make the case for the inclusion of surviving same-sex partners. After a period of public comment, the

80. The Compensation Fund distributed $6.9 billion in awards. 9/11 Fund Closes Its Doors, supra note 3.

81. The Compensation Fund was part of the Air Transportation Safety and System Stabilization Act (the “Stabilization Act”) enacted by Congress by overwhelming majorities on September 21, 2001. Lizette Alvarez & Stephen Labaton, An Airline Bailout: Congress Votes Billions for Industry and Sets Up Victims’ Fund, N.Y. TIMES, Sept. 22, 2001, at A1. At the time, the Stabilization Act was considered a matter of the highest national security. See Knauer, supra note 1, at 56-59 (describing the level of concern regarding economy).


83. 9/11 Fund, supra note 3.

84. The statute states that the purpose of the Compensation Fund is “to provide compensation to any individual (or relatives of a deceased individual) who was physically injured or killed as a result of the terrorist-related aircraft crashes of September 11, 2001.” Air Transportation Safety and Stabilization Act, Pub. L. No. 107-42, § 403, 115 Stat. 230, 237 (2001).

85. See, e.g., Lambda Legal Defense & Education Fund, et al., Letter to Department of Justice, (November 21, 2001), available at

Department of Justice declined to engage in rulemaking on the issue of surviving same-sex partners. Instead, it issued regulatory guidance under which awards would be distributed in accordance with state law. Specifically, the portion of the award representing “non-economic loss” would be distributed through a victim’s estate in accordance with the victim’s will or the rules of intestate succession, whichever was applicable, and the portion of the award representing “economic loss” would be distributed under the law governing wrongful death tort claims.

The average size of a beneficiary’s total award was approximately $2 million. In the majority of instances, the economic portion of the award greatly eclipsed the size of the presumptive non-economic award, which started at $250,000 and was increased by $100,000 for each surviving spouse or dependent. The bifurcated payment approach could have dire consequences for a surviving same-sex partner. A partner who was the beneficiary of her partner’s will would be entitled to the non-economic portion of the award. However, the economic portion would follow state law governing wrongful death actions, which, with the exception of three states at the time (California, Hawaii, and Vermont), followed traditional prescriptions regarding next of kin. If the deceased partner died intestate, only two states, Hawaii and Vermont, recognized surviving same-sex partners in the scheme of intestate succession. In such case, both portions of the award would be payable to next of kin.

The Special Master charged with administering the Compensation Fund repeatedly deflected questions about the status of surviving same-sex partners by stating that he was bound to follow state law. This deference to state law meant that the federal government was not required to take a position as to whether or not same-sex partners should be eligible for compensation, the outcome of which seemed preordained given DOMA. However, it also signaled respect for the testamentary autonomy of the victim and for the handful of states which had adopted some form of same-sex relationship recognition. As mentioned above, at the time of the September 11 attacks, only Hawaii and Vermont recognized same-sex partners as intestate heirs, and only California, Hawaii, and Vermont enabled surviving same-sex partners to receive wrongful death awards.
Responding to the Special Master’s clearly articulated deference to state law, New York state adopted several measures designed to make surviving same-sex partners eligible for certain state benefits and thereby increase the likelihood that they would be entitled to recover from the Compensation Fund.98

Eventually, the Special Master announced that the Compensation Fund would make awards to surviving same-sex partners on the direction of the victim’s next of kin.99 In the end, some surviving partners received awards from the Compensation Fund, and at least one surviving partner is still litigating her claim against her deceased partner’s brother.100 It is important to note, however, that even in the case where a surviving same-sex partner received an award, the amount of the award would always be considerably less than that for a similarly situated victim who left a surviving opposite-sex spouse.101 This is because a victim who leaves a surviving same-sex partner was considered “single” for purposes of the calculation used to determine the amounts of both the economic and the non-economic loss portions of the presumptive awards.102

C. State Victim Assistance: the Crime Victim Compensation Boards

All states have crime victim compensation boards which provide modest monetary awards to the victims of crime and their survivors.103 The awards are designed to meet emergency expenses, but not to compensate for amounts that would otherwise be recoverable in tort.104 Legislative findings often refer to crime victim compensation in terms of a “moral responsibility” owed by the sovereign.105 A survivor is generally eligible to receive compensation if she is either related to the victim or economically dependent on the victim for her “principal support.”106 Surviving same-sex partners who are not considered related to the victim generally must establish the requisite level of economic dependency to qualify for compensation.

In other words, a surviving spouse is automatically eligible to file a claim for compensation, whereas a surviving same-sex partner must prove that she relied on the victim for a specified percentage of her financial support, which, in many instances, is as high as 75%.107 For same-sex couples, this type of requirement only

99. On the subject of family cooperation, the New York Times quoted Mr. Feinberg as saying: “If the next of kin is supportive and there’s no dispute, it’s a nonissue . . . If the personal representative, say a parent, comes to me and says, ‘Cut a check for the same-sex partner,’ there will be no problem. Then it’s a ministerial function. What do I care?” Jane Gross, U.S. Fund for Tower Victims Will Aid Some Gay Partners, N.Y. TIMES, May 30, 2002, at A1.
101. See Vogel, supra note 100 (quoting attorney that surviving same-sex partner “was compensated at a level nearly commensurate with that received by surviving spouses”).
102. The presumptive method for calculating the economic loss portion of the award includes a consumption factor that takes into account the victim’s marital status and number of dependents. See Statement of Special Master, September 11th Victim Compensation Fund, 67 Fed. Reg. 11233, 11234 (proposed Dec. 21, 2001) (codified at 28 C.F.R. Part 104) (explaining rationale of presumptive methodology). The presumptive award for non-economic loss is a flat $250,000 that is increased by $100,000 where the victim was survived by a spouse and an additional $100,000 for each dependant. 28 C.F.R. § 104.44 (2004). By way of example, a forty-year old victim with an average annual income of $100,000 who leaves a surviving same-sex partner would be entitled to a presumptive award of $1,168,322, whereas the similarly situated victim who left a surviving opposite-sex spouse would be entitled to $1,896,663. Knauer, supra note 1, at 65-72 (describing calculation of the awards).
104. The amount of the typical award is relatively modest. For example, the maximum amount payable to an eligible victim or survivor under the laws of the three states where the airliners crashed on September 11 were as follows: Virginia: $15,000; New York: $30,000, and Pennsylvania $35,000. VA. CODE ANN. § 19.2-368.11:1G (Michie 2001); N.Y. EXEC. LAW § 631 (McKinney 1996); 18 PA. CONS. STAT. § 11.707(B)(1) (2001).
106. At the time of the attacks, all three states required non-relative survivors to prove that the victim provided 75% of the survivor’s financial support. Knauer, supra note 1, at 76-87 (outlining compensation boards of Virginia, New York and Pennsylvania).
provides relief if the partners have markedly disparate income levels and the higher income partner is the one who is killed. It provides no relief if the lower income partner is killed, and no relief if the partners are merely financially interdependent. To the contrary, when a spouse is murdered, the surviving spouse is automatically eligible to file a claim for compensation regardless of the relative income levels or the patterns of income pooling within the relationship. Indeed, no inquiry is made as to any of the financial details of their marital relationship.

On September 11, hijacked aircraft crashed in three states: Virginia (the Pentagon), New York (the World Trade Towers), and Pennsylvania (Shanksville). Each state’s crime victims compensation board dealt differently with the question of whether same-sex partners qualified for compensation. Virginia adhered to its strict requirement that a non-relative survivor had to prove that she relied on the victim for her “principal support,” defined as 75% of her financial support. The Virginia Crime Injuries Board refused to make any exceptions for surviving same-sex partners, despite negative press coverage.

At the time of the September 11 attacks, New York law regarding non-relative survivors was identical to Virginia law. Shortly after the attacks, Governor Pataki issued an Executive Order which suspended the “principal support” requirement for the survivors of the victims of September 11 and required instead a showing of “mutual interdependence.” For the survivors of the victims of other homicides, the percentage of support required to be shown was lowered to 50%. A 2003 decision of the New York Crime Victims Board eliminated the principal support requirement for the surviving partners of all homicide victims. As with the Mychal Judge Act, press reports characterized the Executive Order as an official recognition of same-sex partners, despite the fact that the Order did not include same-sex partners within the class of those automatically eligible to file claims. Instead, it reached surviving same-sex couples by reworking the definition of individuals who were financially dependent on the victim.

Pennsylvania took a decidedly different approach. Virginia ignored surviving same-sex partners who failed to satisfy its strict support test. New York relaxed its support test to the point where two individuals living together could likely prove “mutual interdependence,” but it did not openly embrace same-sex partners. Pennsylvania, however, declared affirmatively, and immediately after the attacks, that “significant others” represented as a class of survivors eligible to file a compensation claim without a showing of financial dependence. The PA Sept. 11 Assistance Program announced on its website that its services were available to the “significant others” of those killed in the September 11 attacks and promised “There may not be legal ties, but

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108. As recently as 1997, New York appellate courts denied eligibility to a surviving same-sex partner of a homicide victim. Secord v. Fishetti, 653 N.Y.S.2d 551, 552 (N.Y. App. Div. 1997). The surviving partner’s claim was denied on the grounds that he was not a “spouse” and could not prove that he had been dependent upon the victim for 75% of his support. See id.

109. Again, this is instructive given that the laws of all three states were exceedingly similar with respect to the support requirement. See supra note 106 (describing state laws). The differences that existed dealt with the maximum amount of available awards and the class of relatives automatically eligible to file for compensation. Id.

110. Virginia law provides an individual who was “legally dependant for his principal support upon a victim of crime who dies as a direct result . . . [of such] crime” is eligible to file a claim. VA. CODE ANN. § 19.2-368.4.A.5 (2004).

111. As with the Mychal Judge Act, press reports characterized the Executive Order as an official recognition of same-sex partners, despite the fact that the Order did not include same-sex partners within the class of those automatically eligible to file claims. Instead, it reached surviving same-sex couples by reworking the definition of individuals who were financially dependent on the victim.

112. See supra note 106 (describing state laws).


114. Id.


116. The New York Times reported “Gov. George E. Pataki recently signed an executive order to cover gay partners under the state’s Crime Victims Board . . . .” Denny Lee, Partners of Gay Victims Find the Law Calls Them Strangers, N.Y. TIMES, Oct. 14, 2001, § 14, at 4. This characterization is incorrect. The Governor’s Executive Order made it easier for surviving same-sex partners to qualify for assistance. It did not embrace them as a category that has automatic standing to apply for compensation.

117. The Web site for the PA Sept. 11 Victim Assistance Program answers the question of “Who is eligible?” for assistance with the following: “a spouse, child, parent, grandparent, or significant other of a person who was injured physically, emotionally, or financially, or was killed in the terrorist attacks on the World Trade Center or the Pentagon on September 11.” PA Sept. 11 Assistance Program, Who Is Eligible?, at http://www.pasept11.org/services.html#eligible (last visited Jan. 14, 2005).

This did not translate into an amendment of the law governing victim compensation. However, the instructions for the Pennsylvania Victims Compensation Form clearly state that an individual who “shared a household” with a homicide victim qualifies as an eligible claimant. Pennsylvania Commission on Crime and Delinquency, Victims Compensation Form Instruction Book, available at http://www.pccd.state.pa.us/ (last visited Oct. 16, 2004). It is unclear whether such claims are limited to counseling expenses. Id.
we would certainly go to bat for you."\(^{118}\)

D. Private Charitable Assistance: American Red Cross Guidelines for the Definition of Family

Private charitable organizations distributed over $2.2 billion in September 11-related aid.\(^{119}\) The largest private relief effort was conducted by the American Red Cross which awarded $908 million to assist victims of the September 11 attacks.\(^{120}\) In the course of its relief efforts, it became the first national disaster agency to issue guidelines specifically recognizing surviving same-sex partners qua partners.\(^{121}\) In response to lobbying by pro-gay organizations that claimed surviving same-sex partners were being treated unevenly by the Red Cross and other private relief efforts, the Red Cross issued a set of guidelines upon which to base a finding of eligibility.\(^{122}\)

The Guidelines for the Definition of Family was designed to provide a “broad and inclusive definition of family.”\(^{123}\) The enumerated factors attempt to disaggregate the various indicia of family ties and set forth a sixteen-factor non-exhaustive list.\(^{124}\) From among these factors, a surviving same-sex partner could qualify for relief assistance upon a showing of economic interdependence, beneficiary designations, or some form of partnership recognition by a governmental entity or employer. Not surprisingly, the Guidelines generated harsh criticism from religious conservatives.\(^{125}\) Although the Guidelines were created specifically for the September 11 attacks, the Red Cross has announced that, going forward, the Guidelines will apply to all of its disaster relief programs.\(^{126}\)

The majority of the factors are concerned with the parties’ “financial interdependence.”\(^{127}\) In this way, the Guidelines follow the typical domestic partnership ordinance or employee policy which requires partners to provide proof of their economic interdependence.\(^{128}\) However, the emphasis on interdependence separates this approach from that adopted by state crime victims boards where eligibility for non-relatives is based on economic dependence and often requires a showing of “principal support.”\(^{129}\) As discussed above, under these tests, only a dependent partner would be eligible for compensation and, as a result, recognized family ties can only run in one direction and do not exist at all in a relationship with equal income pooling.\(^{130}\)

Five of the sixteen factors involve beneficiary designations.\(^{131}\) The emphasis on beneficiary designations is consistent with the statutorily created category of “reciprocal beneficiary” under Hawaii law,\(^{132}\) as well as domestic partnership laws and policies which often include reciprocal beneficiary designations as a qualifying

118. Knauer, supra note 1, at 86 (quoting the website).
122. Lambda Legal Defense and Education Fund, the Empire State Pride Agenda, and the New York City Gay and Lesbian Anti-Violence Project met with the CEO of the Red Cross of Greater New York “to discuss the inequitable and inconsistent treatment being given to gays and lesbians applying for relief assistance,” Lambda Legal Defense and Education Fund, Red Cross Issues Guidelines on Relief Assistance to Lesbian and Gay Survivors of September 11, at http://www.lambdalegal.org/cgi-bin/iowa/documents/record?record=926 (last visited Jan. 26, 2005).
123. Guidelines on the Definition of Family for Red Cross Assistance and the Family Gift Program, supra note 121.
124. Id.
125. Edsall, supra note 7 (quoting Reverend Lou Sheldon, Chair of the Traditional Values Coalition).
128. See Knauer, supra note 14, at 346-48 (discussing typical requirements imposed under domestic partnership ordinances and registration laws).
129. See supra text accompanying notes 107 - 111 (discussing requirement of “principal support and its effect on eligibility of surviving same-sex partners).
130. See supra text accompanying notes 107 - 108 (discussing a partial construction of family through emphasis on economic dependency).
factor.  However, this expressive use of beneficiary designations is very different from recognizing a surviving partner solely as a beneficiary out of respect for the testamentary autonomy of the individual decedent. Under the Guidelines, a beneficiary designation is relevant because of what it reveals about the nature of the relationship, not out of deference to the victim’s ability to direct the disposition of her property upon death.

Finally, the Guidelines ask whether the parties have been recognized as domestic partners by either a foreign, state, or local government or a private employer. This represents a bright line status approach that parallels the one used to determine the existence of a marital relationship. A surviving spouse is not asked for proof of financial independence or a reciprocal estate plan. A surviving spouse is simply asked whether she was married to the decedent. It also represents a willingness to accept a determination from a governmental or private entity which is highly unusual. As discussed above, one of the hallmarks of same-sex relationship recognition is that it is rarely portable.

III. APPLICATION OF THE ELIGIBILITY REQUIREMENTS

The different eligibility criteria adopted by the various relief efforts required the surviving same-sex partners of the victims of the September 11 attacks to re-characterize and then prove their relationships. The surviving partners faced a confusing array of criteria and barriers, some of which they could overcome by establishing an independent tie to the victim. Others would prove insurmountable without the generosity and assistance of the victims’ next of kin—relief that may not necessarily be forthcoming given the stubborn persistence of homophobia and religious disapproval. Only the Red Cross Guidelines accepted a prior recognition of the relationship by a governmental or private entity as proof of a “family” relationship.

When Peggy Neff’s partner of 18 years, Sheila Hein, was killed at the Pentagon, Neff said that she lost her “entire world and [her] soulmate, [her] closest confidante and [her] best friend.” Neff was relatively lucky, in that Hein had named her as the executor and beneficiary of her will. Perhaps, even more importantly, Neff enjoyed a good relationship with Hein’s mother, who pledged shortly after the attacks to assist Neff in any way she could. Still, in the aftermath of the attacks, Neff’s recognition as a surviving same-sex partner was partial and confusing.

Hein was a civilian employee of the Army. Despite the military’s infamous “Don’t Ask, Don’t Tell Policy” applicable to service members, Secretary of Defense Donald Rumsfeld acknowledged Neff as Hein’s “partner” in his letter of condolence, and the military assigned Neff a “casualty officer.” The Red Cross helped Neff out with immediate living expenses, as did the National Association of Realtors. These affirming reactions held little sway with the Virginia Criminal Injuries Compensation Fund, which refused Neff’s application for assistance on eligibility grounds. Apparently, the Commonwealth of Virginia’s self-professed “moral responsibility” to provide “aid, care and support” for the innocent victims of crime and “their dependents” did not extend to surviving same-sex partners. Neff was not eligible to file for compensation because she was not Hein’s spouse, parent, child, or grandparent, nor was she “legally dependent” upon Hein for her "principal

133. Knauer, supra note 14, at 346-48 (discussing typical requirements imposed under domestic partnership ordinances and registration laws).
134. Guidelines on the Definition of Family for Red Cross Assistance and the Family Gift Program, supra note 121.
135. Vogel, supra note 100 (quoting Neff).
137. Vogel, supra note 100 (quoting Neff).
138. Id. (reporting that Hein’s mother “says she doesn’t want to inherit money from her only daughter and plans to help Neff[...]”).
139. Id. Neff was studying for her realtor’s license.
140. Id.
The fact that Neff would no longer be able to cover the mortgage payment on the home they had shared was not sufficient to make Neff “legally dependent.” In contrast, Neff received a sizable award from the Compensation Fund, which was consistent with the Special Master’s public commitment to make distributions to surviving same-sex partners when the next of kin were in agreement.

Margaret Cruz lost her partner of 19 years, Patricia McAneny, in the September 11 attacks. McAneny worked as a claims adjuster for Marsh & McLennan in Tower One.

Cruz received emergency assistance from the Red Cross under its Guidelines and from the New York Crime Victim’s Board under its expanded definition of “principal support.” However, McAneny died intestate, leaving her brother as her principal heir. After McAneny’s brother was appointed administrator of her estate, he filed for and received a $50,000 Workers’ Compensation death benefit. He also filed a claim with the Compensation Fund and was awarded $278,087. Cruz filed a competing claim and the Special Master nearly doubled the award payable to McAneny’s brother to $531,541. Despite the near doubling of the award, McAneny’s brother has refused to pay any of the award to Cruz, and the matter is currently in litigation.

As a result, Cruz has suddenly become McAneny’s “purported domestic partner.” Before the lawsuit, the New York Times reported on Cruz’s struggle as a surviving partner. However, the New York Times’ most recent article described the “bitter battle” between Cruz, “who says she was the domestic partner of Patricia McAneny,” and McAneny’s brother. For Cruz, it is no longer simply a question of whether her relationship would be respected and valued. The nineteen-year relationship itself has become a question suitable for fact finding.

Many of the stories of the surviving partners are marred by this partiality. William Randolph had lived with his partner, Wesley Mercer, for 26 years when Mercer was killed in the September 11 attacks. As vice president of corporate security at Morgan Stanley, Mercer directed the successful evacuation of the company’s 3,300 employees. Mercer had never divorced his wife, which left Randolph in a particularly precarious position. Mercer’s wife will receive his military pension, social security benefits, and worker’s compensation death benefit. Speaking recently on the subject of gay marriage, Randolph said “I didn’t have a chance because I wasn’t somebody important as far as they were concerned.” That notwithstanding, Randolph received $100,000 from Morgan Stanley in recognition of his relationship with Mercer. He also received assistance from the New York Crime Victims’ Board, the Red Cross, and the Compensation Fund.

Admittedly, the situations faced by many of the surviving same-sex partners were aggravated by the deceased partner’s failure to leave a will or the necessary beneficiary designations on life insurance policies or pensions. As explained earlier, however, even the most elaborate estate planning and the most thorough

146. VA. CODE ANN. § 19.2-368.4A (prescribing categories of individuals eligible to file claims); VA. CODE ANN. § 19.2-368.4(A)(5) (requiring claimant to be “legally dependent” on victim for “principal support”).
147. See Lombardi, supra note 138.
148. Vogel, supra note 100 (reporting Neff received a $500,000 award). As discussed earlier, the amount of any presumptive award from the Compensation Fund would always be smaller for a surviving same-sex partner because the calculation of the award favors married victims. See supra text accompanying notes 89 - 92 (describing calculation of presumptive awards). Neff’s attorney conceded that “She was compensated at a level nearly commensurate with that received by surviving spouses[,]” Vogel, supra note 100 (quoting Neff’s attorney).
150. Gross, supra note 99 (quoting Neff’s attorney).
152. Gross, supra note 99. See Wise, supra note 151 (noting that brother was appointed administrator).
153. Wise, supra note 151.
154. Id.
158. Eaton, supra note 100 (emphasis added).
159. Gross, supra note 99.
160. Id.
161. Id.
162. Id.
165. Id.; Tamrai, supra note 163, at A1.
beneficiary designations are inadequate to empower a surviving same-sex partner with rights equivalent to those enjoyed by a spouse. One unforeseen consequence of the September 11 attacks was that entire workplaces, including corporate records of beneficiary designations were destroyed. Tom Miller’s partner of three years, Seamus O’Neal, who worked for eSpeed in Tower One, was killed on September 11.\textsuperscript{166} Although O’Neal died intestate, he had designated Miller as the beneficiary of his life insurance policy. The insurance company was also located in the World Trade Center, and its records were obliterated.\textsuperscript{167} The company refused to pay Miller the proceeds despite signed affidavits from O’Neal’s next of kin and instead paid the proceeds to O’Neal’s estate.\textsuperscript{168} Miller noted “I did not have the luxury of grieving without having to defend myself and prove who I am and who we were.”\textsuperscript{169}

IV. THE SEPTEMBER 11 POSTSCRIPT: THE LUXURY OF GRIEF.

In the absence of uniform relationship recognition, surviving same-sex partners will continue to struggle with a loss that legally is not cognizable. As the handful of stories from the September 11 survivors illustrate, a surviving partner is a legal stranger, who often must reconfigure her relationship with her partner to fit within the various legal categories where relief or compensation might be forthcoming. These legal categories generally do not provide recovery in recognition of the nature of her relationship with her partner, but rather in spite of the nature of the relationship.

More than three years after the September 11 attacks, it seems clear that the attacks did not prove to be the transformative event in terms of the recognition of same-sex relationships as some commentators had predicted.\textsuperscript{1} Pro-gay advocates successfully engineered several changes in federal and state law that allowed room for surviving same-sex partners, such as the Mychal Judge Act\textsuperscript{2} and the eligibility standards adopted by the New York State Crime Victims Board.\textsuperscript{3} However, in many instances, these reforms did not expressly address same-sex couples, but instead were aimed at a broader class of individuals, such as designated beneficiaries or financially interdependent couples. Although the New York Times concluded that “gay partners were treated fairly,” it might have been more accurate to say that, despite the urgings of the religious right, surviving same-sex partners were not categorically disqualified from participation in the September 11 relief efforts.\textsuperscript{4}

In addition to this basic lack of legal standing, it is important to note that the loss experienced by a surviving same-sex partner unfolds against the backdrop of a persistent morality discourse that demonizes same-sex relationships and enshrines such sentiments in legislation and citizens’ initiatives designed to “protect” traditional marriage and deny the incidents of marriage to same-sex couples.\textsuperscript{5} The legal efforts to ensure that a same-sex partner remains a legal stranger have intensified since Lawrence v. Texas and legalization of same-sex marriages in Massachusetts.\textsuperscript{6} A surviving same-sex partner is denied the basic “luxury of grieving” because she must navigate a complicated legal system offering pockets of partial recognition and, at times, resort to litigation. However, she is also denied because of the highly politicized and polarized nature of the debate regarding the recognition of same-sex relationships. Her very loss becomes contested and her mourning politicized.

In her meditation on the events and aftermath of September 11, Judith Butler asks, “what makes for a “grievable life.””\textsuperscript{7} The simple answer would be the fact that it is no longer lived. Of course, we do not live in simple times.

\begin{itemize}
\item \textsuperscript{167} Id.
\item \textsuperscript{168} Id.
\item \textsuperscript{169} Dan Kerman, Sept. 11 Fund for Gay Families is Ready, PLANETOUT (Dec. 13, 2001), at http://www.planetout.com/news/article.html?2001/12/13/1 (last visited Jan. 25, 2005). Miller remarked that “There are a lot of people who thought that I lost a roommate and not a spouse.” \textit{Id.}
\item 1. See, e.g., Enright, supra note 1 (discussing changes in New York law favorable to same-sex couples). As Judith Butler noted, “the queer lives that vanished on September 11 were not publicly welcomed into the idea of national identity built in the obituary pages.” BUTLER, supra note 1, at 35.
\item 2. See supra text accompanying notes 40-43 (discussing Mychal Judge Act).
\item 3. See supra accompanying notes 113-115 (discussing New York Crime Victims Board).
\item 4. 9/11 Fund Closes Its Doors, supra note 3.
\item 5. See supra note 7 (discussing objections of religious conservatives).
\item 6. See supra note 21 (discussing increase in activity after Massachusetts legalized same-sex marriage).
\item 7. BUTLER, supra note 1, at 20 (emphasis added).
\end{itemize}