September 11 Attacks and Surviving Same-Sex Partners: Defining Family Through Tragedy

Nancy J. Knauer
THE SEPTEMBER 11 ATTACKS AND SURVIVING SAME-SEX PARTNERS: DEFINING FAMILY THROUGH TRAGEDY

NANCY J. KNAUER
ARTICLES

THE SEPTEMBER 11 ATTACKS AND SURVIVING SAME-SEX PARTNERS: DEFINING FAMILY THROUGH TRAGEDY

Nancy J. Knauer*

TABLE OF CONTENTS

I. INTRODUCTION .................................................................32
II. SURVIVING SAME-SEX PARTNERS .......................................39
   A. Probate Law: In the Absence of Marriage, Biology, or Adoption
      ..........................................................41
   1. Distribution of Property ...........................................42
      a. Intestacy ...............................................43
      b. Wills ....................................................45
   2. Fiduciary appointments and decision-making authority ..........46
   B. Survivor Benefits ..................................................49
   C. Wrongful Death and Survival Actions ............................51
III. SEPTEMBER 11 VICTIM COMPENSATION FUND OF 2001 ...........54
   A. The Air Transportation Safety and System Stabilization Act.....56
   B. Title IV—The Compensation Fund ...................................59
      1. Eligible claimants .......................................61
      2. Calculation of the award ....................................65
         a. Economic loss .......................................66
         b. Non-economic loss ....................................68
         c. Collateral source offset .............................70
      3. Determination of the recipients of the award ....................72
IV. STATE CRIME VICTIMS COMPENSATION BOARDS ....................76
   A. Virginia: “We Don’t Look Too Kindly on Those Types of
      Relationships” ..................................................79
   B. New York: Mutual Interdependence and a Nexus of Factors ....82
   C. Pennsylvania: “We’ll Go to Bat for You” .........................84

* Professor of Law, James E. Beasley School of Law of Temple University. I would like to thank Caroline J. Lindberg, Melanie Jacobs, and Deborah Zalesne for their insightful comments on earlier drafts.
I. INTRODUCTION

In one of his first official press conferences following the September 11 attacks, Mayor Rudolph Giuliani was pressed to give an estimate of the number of casualties at the World Trade Center. Mayor Giuliani would only say that when the final count was known, it would be “more, ultimately than any one of us can bear.” And, so it was. Even as the number of estimated dead at the World Trade Center site has crept ever downward from that momentary spike of over 6,300, the magnitude of the loss is staggering. Including those killed at the Pentagon and in Pennsylvania, the death toll for the September 11 attacks on the United States currently stands at 3,051.


3. See id. (discussing changing estimates of number of individuals killed at World Trade Center). The spike of 6,300 occurred on September 21, 2001, when the city of New York estimated over 6,300 dead after foreign consulates submitted their reports of missing citizens. Id.

4. Dead and Missing, N.Y. TIMES, April 11, 2002, at A22. In December, 2001, Talbot reported that the number of dead at the Pentagon and in Pennsylvania at the crash of United Flight 93 is 288 and, unlike the number of dead at the World Trade Center site, has been stable since shortly after the
In the days immediately following the September 11 attacks, commentators continually remarked on the diversity of those killed in the attacks, recognizing that the emerging profile of the dead and missing presented a heart-wrenching cross-section of the people who live and work in the United States. As The New York Times began its Portraits of Grief series, it became clear that the dead included, *inter alia*, undocumented workers, financial titans, active military personnel, secretaries, lawyers, carpenters, and rescue workers. This diversity, however, was presented against the backdrop of the overriding commonality of the victims' stories and their shared humanity. Even though the dead and missing represented citizens of 62 countries, adherents of all major religions and members of many ethnic and racial groups, their activities that Tuesday morning were extremely familiar. Most were just doing their jobs, sitting at their desks, attending a breakfast meeting, or waiting for their shift to change. Some were on their way to visit relatives. In their last moments, they reached for their cell phones or typed a final email to say good bye to friends and loved

---


6. Three days after the attacks, The New York Times began its Portraits of Grief series comprised of a brief “impressionistic” description accompanied by a picture of the dead and missing. Jenny Scott, *Closing a Scrapbook Full of Grief and Sorrow*, N.Y. TIMES, Dec. 31, 2001, at B6. The Portraits were discontinued as a daily feature on December 31, 2001. *Id.* By that time, over 1800 Portraits had been published. *Id.* A complete catalogue of the Portraits is available on The New York Times website. N.Y. TIMES, Portraits of Grief, available at [http://www.nytimes.com/pages/national/portraits/index.html](http://www.nytimes.com/pages/national/portraits/index.html). Referring to the dead and missing, Scott notes that “[t]here were the traders, firefighters, window washers, chefs and managing directors; the new parents, pairs of siblings, fathers of 10; the avid shoppers, rugby team captains, lovers, fanatical golfers, part-time bouncers and the rare few whose mothers lovingly conceded that they were definitely not saints.” Scott, supra.

7. In the wake of the September 11 attacks Anna Quindlen wrote of the inherent good that “enables us, from time to time, to love our neighbors as ourselves.” Anna Quindlen, *Imagining the Hanson Family*, NEWSWEEK, Sept. 24, 2001, at 96. Quindlen explained that this was what was at work when “we could see ourselves in all of them: the executives, the waiters, the lawyers, the police officers, the father, the mother, the 2-year-old girl off on an adventure, sitting safe between them. taking wing.” *Id.*


9. See Quindlen, supra note 7 (describing how she could imagine two-year-old Christine Hanson traveling with her parents wearing “her backpack to make her feel important going on the airplane[“].”).


11. *Id.*
ones. The fact that they were male and female, young and old, rich and poor, and black and white was overshadowed by the knowledge that they were also parents, children, spouses, fiancées, aunts and uncles. What no one mentioned, as either a point of diversity or as evidence of shared humanity, was that the victims were also gay and straight.

The invisibility of the gay and lesbian victims of the September 11 attacks did not bode well for their surviving partners, especially given the lack of legal recognition for same-sex relationships. There were likely a number of reasons commentators did not point out the divergent sexual orientations of the victims. First, those who neither are gay nor have openly gay friends or relatives, may be guilty of a self-referential, but benign, form of ignorance. The fact that not everyone identifies as heterosexual might simply not occur to them. Those


13. See Scott, supra note 6 (describing "the new parents, pairs of siblings, fathers of 10").


With regard to finding a sense of shared humanity in the September 11 attacks over the question of sexual orientation, one commentator suggested that the September 11 attacks were analogous to the early days of the AIDS epidemic and that now the general population could better understand the fear and uncertainty that accompanied the early reports about GRID—Gay Related Immune Deficiency. John Corigliano, We Are All AIDS Sufferers, N.Y. TIMES, Sept. 23, 2001, § 2, at 26. See generally Nancy Levit, A Different Kind of Sameness: Beyond Formal Equality and Antisubordination Strategies in Gay Legal Theory, 61 OHIO ST. L.J. 867 (2000) (discussing application of "shared humanity theory" to struggle for lesbian and gay civil rights).

15. The September 11 attacks also left surviving opposite-sex unmarried partners struggling in their grief with no legal recognition. See Shaila K. Dewan, No Dress, No Vows, and Less Status in Grief, N.Y. TIMES, Jan. 22, 2002, at A1 (discussing difficulties of grieving without any form of official status). Although many of the rules applicable to surviving same-sex partners, apply equally to surviving opposite-sex partners, this Article is limited to a discussion of same-sex partners, and it does not discuss directly the question of de facto children. Unlike opposite-sex partners, same-sex partners do not have the option to marry. Moreover, the legal position of same-sex couples is inexorably framed by considerations of homophobia and the force of heteronormativity.

16. When sexual orientation is left unmarked, the default setting is heterosexuality. The unreflective assumption of universal heterosexuality speaks principally to the force of heteronormativity, rather than homophobia, which is one reason to refer to it as "benign." This is not to say, however, that the ability of heteronormativity to foreclose consideration of non-normative sexual orientations does not have a real impact on the legal and political status of gay men and
who are otherwise uncomfortable with homosexuality might recast the question of sexual orientation as primarily a privacy issue and conclude that since a victim’s sexual orientation shouldn’t matter, there is no reason to mention it.\textsuperscript{17} Finally, many commentators may have instinctively felt that questions of sexual orientation remain destined to divide us as a nation rather than to unite us and, in the aftermath of the September 11 attacks, such differences were best left unspoken.\textsuperscript{18}

The first hint of this potential for division appeared on September 13, 2001, when the Reverend Jerry Falwell blamed the September 11 attacks, in part, on “the gays and lesbians who are actively trying to make that an alternative lifestyle[.]”\textsuperscript{19} While conservatives went to great pains to distance themselves from Falwell’s remarks, declining to blame the September 11 attacks on gay men and lesbians is a far cry from embracing the same-sex survivors and openly celebrating (or at least acknowledging) the lives of the gay and lesbians victims.\textsuperscript{20}

lesbians or those in same-sex relationships. Michael Warner provided the seminal definition of heteronormativity as the view that heterosexuality is “the elemental form of association, as the very model of intergender relations, as the indivisible basis of community, and as the means of reproduction without which society wouldn’t exist.” MICHAEL WARNER, INTRODUCTION TO FEAR OF A QUEER PLANET: QUEER POLITICS AND SOCIAL THEORY xxi (Michael Warner ed., 1993).

17. This approach claims to be acting with the best interests of the victim at heart, but the resulting silence imposes on the victim’s memory a closet that perhaps did not exist in life. The insistence on silence even in death, or perhaps particularly in death, reinforces a view of homosexuality as shameful—as something that should not be disclosed. Thus, the protestations made on behalf of the victim’s privacy effectively illustrate the singular reality of homophobia, while at the same time purporting to deny its importance.


What we saw on Tuesday, as terrible as it is, could be minuscule if, in fact, God continues to lift the curtain and allow the enemies of America to give us probably what we deserve.... The abortionists have got to bear some burden for this because God will not be mocked. And when we destroy 40 million little innocent babies, we make God mad. I really believe that the pagans, and the abortionists, and the feminists, and the \textit{gays and the lesbians who are actively trying to make that an alternative lifestyle}, the ACLU, People for the American Way, all of them who have tried to secularize America, I point the finger in their face and say, “You helped this happen.”


20. Even as the mainstream media began to acknowledge that Mark Bingham, a passenger on Flight 93, was gay, other voices began a chorus of “why do you have to bring \textit{that} up now.” Evelyn
After gay and lesbian advocacy groups received requests for assistance from surviving same-sex partners who had been turned away by relief organizations, the groups began to lobby federal, state, and local authorities, as well as private charities, in an attempt to insure that surviving same-sex partners had access to victim assistance on an equal basis with legal spouses. These efforts were denounced by so-called pro-family advocates, such as the Reverend Lou Sheldon, who urged the various parties to deny assistance to surviving same-sex partners on the grounds that to do otherwise would debase traditional marriage.

The ensuing controversy over the recognition of surviving same-sex partners presents the September 11 attacks as a unique prism through which to view the status of same-sex relationships and to consider which families count when the United States is at its most generous, most united, and most injured. On a basic human level, would the nation grieve for Peggy Neff, who lost her partner of 18 years when Flight 77 crashed into the Pentagon, as it had for the widow of a fire fighter? Would Neff be eligible to file a claim with the multi-billion dollar federal September 11 Victim Compensation Fund, which Congress established to compensate victims and their “relatives”? Or, consistent with state probate law, would Neff be considered a “mere stranger?” Would the crime victims compensation boards in the three states directly effected by the attacks—New York, Virginia, and Pennsylvania—accommodate claims by surviving partners who did not otherwise qualify as a “spouse” or a dependent?


23. Rescue workers comprise over fifteen percent of the dead and missing. Talbot, supra note 2. Three hundred forty-three firefighters are among the dead and missing. Dean E. Murphy, Honoring the Rescuers, N.Y. TIMES, Sept. 23, 2001, at B8. For a description of Peggy Neff and her partner, Sheila Hein, see infra text accompanying notes 275-302.

24. For a description of the federal September 11 Victim Compensation Fund see infra text accompanying notes 120-260.

25. Probate law confirms rights on the basis of marriage, biology, and adoption. See infra text accompanying notes 47-91 for a discussion regarding the above statement. Accordingly, to refer to an individual as a “mere stranger” to the decedent is to conclude that he has no rights with regard to the decedent’s property.

26. For a discussion of the state crime victims compensation boards, see infra text accompanying
And, finally, would the private charitable contributions, which within five weeks of the attacks exceeded $1 billion, be available to surviving same-sex partners or would they, as Reverend Sheldon urged, be dispensed based on the “priority of one man and one woman in a marital relationship.”

The full impact of the September 11 attacks on the recognition of same-sex relationships remains to be seen. However, it is possible to make some preliminary observations based on the eligibility requirements as announced and clarified by the relevant federal, state, and private relief efforts. First, the treatment of surviving same-sex partners has proven to be much more tentative and contradictory than either the pro-gay forces or their pro-family opponents advocated. Surviving same-sex partners have not been shut out from all victim assistance, but nor have they been considered the same as surviving spouses. The disparate rules adopted by the various relief efforts result in a lack of uniformity that is emblematic of the larger treatment of same-sex relationships in the United States, where domestic partnership registries coexist with anti-marriage laws and legal status varies wildly from jurisdiction to jurisdiction.

Second, very few of the relief efforts have been willing to recognize same-sex partners qua same-sex partners. Unlike a spouse, or a child, or a parent, a same-sex partner will rarely qualify for benefits automatically, if at all. As someone whom the law considers a “mere stranger,” a same-sex partner generally will only qualify for assistance where she is a beneficiary of the victim’s estate or where she can prove that she had been economically dependent on the victim. In other words, the law will respect a partner as either a beneficiary or a dependent, but not as a partner. The fact that some of the guidelines for victim compensation take into account the testamentary wishes or lifetime economic ties of the victim will offer some surviving same-sex partners an opportunity for

---

27. Edsall, supra note 22.
29. As explained more fully below, the Pennsylvania rules governing crime victim compensation for the September 11 attacks authorize surviving “significant others” to file claims for compensation. See infra text accompanying notes 329-344 (describing addition of “significant other” category for purposes of compensation for September 11 attacks). In addition, the Red Cross’ family guidelines provide sixteen nonexclusive factors that can establish a family relationship. See infra text accompanying notes 368-89 (describing family guidelines). Two of the factors relate to whether the victim and the surviving partner had registered as domestic partners or were recognized as such by an employer. See infra text accompanying notes 384-85 (discussing fact that guidelines include proof of domestic partnership status).
30. As explained more fully below, a same-sex partner is not a “mere stranger” for all purposes in California, Hawaii, or Vermont. See infra text accompanying notes 42-44 (describing varying levels of protections afforded under laws of California, Hawaii, or Vermont).
recovery, but it will also work to exclude many others.\textsuperscript{31} Moreover, considerations of the testamentary autonomy of the victim or the economic need of the surviving partner may be trumped, in many instances, by what is considered to be the superior interests of the victim's next of kin.\textsuperscript{32}

This Article examines the status of surviving same-sex partners under the federal September 11 Victim Compensation Fund, the Virginia, New York, and Pennsylvania state crime victims compensation boards, and the Red Cross disaster guidelines. Because many of the positions taken by the different assistance programs reference or replicate existing state laws and the way those laws impact and regard same-sex relationships, the Article begins with a discussion of the general rights which otherwise accrue to a surviving same-sex partner. Part II outlines the treatment of surviving same-sex partners in the three areas of law most directly relevant to the survivors of the victims of the September 11 attacks: probate law, employment-related survivor death benefits, and wrongful death actions.\textsuperscript{33} Part III discusses the federal September 11 Victim Compensation Fund and concludes that its emphasis on the victim's estate works, perhaps unwittingly, to the advantage of same-sex couples who had valid estate plans.\textsuperscript{34} However, in the absence of a valid will, the distribution scheme privileges relatives to the exclusion of surviving same-sex partners.\textsuperscript{35} Part IV compares the three state victim compensation boards, noting the disparities among the boards with regard to their recognition of same-sex surviving partners and the varying weight each gives to economic need.\textsuperscript{36} Part V provides a description of the guidelines adopted by the Red Cross which are designed to facilitate the recognition of a broad range of families, including same-sex partners.\textsuperscript{37} The inclusive approach adopted by this private charitable organization is reflective of the arguably greater acceptance of same-sex

\textsuperscript{31} In the case of the September 11 Compensation Fund, the focus on the victim's estate means that a partner who is a beneficiary under her partner's will is qualified to file for assistance. See infra text accompanying notes 173-75 (discussing "eligible claimants"). However, if the partner died intestate or the will is successfully challenged, the surviving partner is not eligible for assistance. See infra text accompanying notes 173-75. With regard to state crime victims compensation boards, a surviving partner is typically required to show that she relied on the deceased partner for her "principal support." See infra text accompanying notes 270-74 (describing "principal support" requirement). This perspective only helps the dependent partner. If the dependent partner is killed, the surviving partner would have no recourse because she would not be able to prove an economic dependence that was never there. See infra text accompanying notes 270-74.

\textsuperscript{32} As explained in Part III, infra, the Special Master of the September 11 Victim Compensation Fund has the discretion to reallocate any award in favor of relatives regardless of the terms of the victim's will or the applicable rules of intestate succession. See infra text accompanying notes 243-45 (outlining discretion of Special Master).

\textsuperscript{33} See infra text accompanying notes 40-119 for a discussion of these three areas of law.

\textsuperscript{34} See infra text accompanying notes 242-45 for an explanation of the distribution of awards.

\textsuperscript{35} This is because in all states, with the exception of Hawaii and Vermont, surviving same-sex couples are not entitled to take under the laws of intestate succession. See infra text accompanying notes 60-67 for a description of the treatment of surviving same-sex partners under intestacy law.

\textsuperscript{36} See infra text accompanying notes 261-344 for a description of the three separate state boards.

\textsuperscript{37} See infra text accompanying notes 368-389 for an outline of family guidelines.
relationships currently existing in the private sector.\textsuperscript{38} The Conclusion summarizes the disparate treatment of surviving same-sex partners under the various September 11 relief efforts, including the lack of uniformity within the September 11 Victim Compensation Fund due to its deference to state law, and notes how the federal government's hands-off approach with regard to surviving same-sex partners differs dramatically from its treatment of the surviving spouses and family members of victims who were in the United States illegally.\textsuperscript{39} In this regard, the Attorney General's assurances that claims filed on or on behalf of undocumented aliens will be honored without any adverse consequences illustrates that the force of heteronormativity is powerful enough to transcend even U.S. immigration laws.

\section*{II. Surviving Same-sex Partners}

This section provides a necessary preface to the larger discussion of surviving same-sex partners and the September 11 relief efforts by summarizing the current status of same-sex partners with respect to probate law, employment-related survivor benefits, and wrongful death actions. A brief review of these three areas most directly implicated by the sudden and wrongful death of a partner establishes a useful baseline against which to evaluate the treatment of surviving same-sex partners under the various September 11 victim compensation and assistance schemes. It also provides an important substantive component because, in many instances, the September 11 relief efforts defer to state law to determine who is eligible to present a claim and receive compensation.

Generally, the extent to which the law protects the interests of a surviving same-sex partner depends on where the couple lived, whether the deceased partner left a valid will (and necessary beneficiary designations), and whether the relatives of the deceased partner decide to challenge any distributions to the surviving partner. Where the couple lived is important because a handful of jurisdictions have extended surviving partners significant rights with regard to a deceased partner's estate as part of broader legislation affording some level of legal recognition to same-sex relationships.\textsuperscript{40} Although no state recognizes


\textsuperscript{39} See infra Conclusion for a discussion of the disparate treatment of same-sex partners.

\textsuperscript{40} These states include California, Hawaii, and Vermont. See infra text accompanying notes 42-45 (discussing varying rules governing same-sex relationships). The Defense of Marriage Act (DOMA) states that a same-sex partner can not qualify as a "spouse" for any federal purpose. 1 U.S.C.A. §7 (West 1997). DOMA adds the following definition of "marriage" and "spouse" to the United States Code:

In determining the meaning of any Act of Congress, or of any ruling, regulation, or interpretation of the various administrative bureaus or 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 the person of the opposite sex who is a husband or wife.
same-sex marriage and thirty-six states expressly prohibit it. Vermont now recognizes same-sex civil unions. Hawaii has enacted legislation granting certain rights to "reciprocal beneficiaries," and California has recently granted registered domestic partners the right to exercise certain decision-making authority typically reserved for spouses, including standing to sue for wrongful death. In addition, numerous states and municipalities have adopted domestic partnership policies which generally benefit public employees, but in some cases direct all employers in a given jurisdiction to provide domestic partnership benefits.

The vast majority of jurisdictions, however, still deny a surviving same-sex partner any of the property rights or decision-making authority which inure automatically to the benefit of a surviving spouse or next of kin, such as the right to take under the rules of intestate succession or standing to file a wrongful death action. In these jurisdictions, a same-sex couple must rely on a combination of testamentary documents, lifetime transfers, beneficiary designations, and other declarations to safeguard the interests of the surviving partner. Although courts will uphold an otherwise valid will which primarily benefits a same-sex partner, such a will remains subject to challenge by the relatives of the deceased partner and will most likely fail to address or remedy every eventuality. As explained more fully below, testamentary planning is, at best, an incomplete substitute for the broader legal recognition of same-sex relationships.

Id. However, state law controls the disposition of a deceased partner's estate and determines who is authorized to exercise certain decision-making authority and who can file a wrongful death action.


43. HAW. REV. STAT. § 572C-1 et seq. (1999).


The Ninth Circuit has twice upheld the San Francisco domestic partnership ordinance, which requires all city contractors to offer benefits to domestic partners on an equal basis with spouses. See Air Transp. Assoc. of Am. v. City and County of San Francisco, 266 F.3d 1064, 1068-69, 1079 (9th Cir. 2001) (affirming ordinance, which mandates airlines must provide benefits on equal basis to married employees and registered domestic partners, is not preempted); Myers v. City and County of San Francisco, 253 F.3d 461, 465 (9th Cir. 2001) (upholding San Francisco ordinance requiring city contractors to provide nondiscriminatory benefits to employees with registered domestic partners).

46. The recognition that the protection offered by even the most comprehensive and carefully drawn estate plan is hopelessly incomplete has been a major impetus in the push for equal marriage rights. From the perspective of a surviving same-sex partner, the legal recognition of same-sex relationships means much more than the alluring promise of joint tax returns and reduced rates on car insurance.
A. Probate Law: In the Absence of Marriage, Biology, or Adoption

It is common practice to measure the rights of same-sex partners by reference to the rights afforded spouses under similar circumstances. With respect to matters of probate law and related issues, however, it is important to understand that a surviving same-sex partner is not simply afforded unequal rights when compared with those granted to a surviving spouse. In most instances, a surviving same-sex partner qua same-sex partner is afforded no rights. In the absence of a will or legislation recognizing same-sex relationships, parents, children, siblings, aunts, uncles, grandparents, cousins, and even the state all have rights superior to those of a surviving partner. A surviving same-sex partner is considered a “mere stranger.”

Probate law is principally concerned with the distribution of a decedent’s assets at death. It also controls the appointment of certain fiduciaries, such as a personal representative to act on behalf of a decedent’s estate. With the exceptions of Vermont, Hawaii, and California, state probate law invariably privileges relationships created by marriage, biology, and adoption to the exclusion of same-sex partners in both the distribution of assets and in the appointment of fiduciaries.

47. This is partly due to the analogous relationship existing between the parties and partly due to the recent prominence of the push for equal marriage rights. See Leit, supra note 14, for a critique of arguments based on assertions of formal equality. Leit advocates the use of “shared humanity theory” and asserts that as currently constructed “[t]he formal equality model will fail to transform the status of sexual others.” Leit, supra note 14, at 868.

48. For a discussion of the non-rights of a surviving same-sex partner under traditional probate law, see In re Estate of Cooper, 592 N.Y.S. 2d 797, 798-801 (N.Y. App. Div. 1993). Cooper holds that a surviving same-sex partner is not a “spouse” for purposes of New York probate law and that such an interpretation of state law is not unconstitutional. Id.

49. See, e.g., UNIF. PROBATE CODE § 2-103 (1991) (providing order of distribution for those other than spouse).

50. Probate codes also govern, inter alia, the lifetime administration of an incapacitated person’s estate, the administration of trusts, minors, general powers of attorney, and organ donation. The Uniform Probate Code (“UPC”) has expanded the reach of probate law to include certain lifetime transfers that would otherwise be considered to concern “nonprobate property.” See Uniform Law Commissioners National Conference of Commissioners on Uniform State Law, Uniform Probate Code; A Brief Overview, available at http://www.nccusl.org/nccusl/uniformact_summaries/uniformacts-s-utexaso.asp (last visited Jan. 18, 2002) (noting “aspects of nonprobate transfers on death are also covered in the UPC, as are guardianships and other protective arrangements for minors and incapacitated adults”).


52. The UPC restricts the class of those eligible to qualify as a personal representative, in the absence of a will, to the spouse and relatives. UNIF. PROBATE CODE § 3-302 (1991). Under such circumstances, the only way a surviving same-sex partner could qualify is if she were a “creditor” of the estate. Id. Even then, she would have last priority. Id. Individuals who are qualified to take by intestate succession are also restricted by marriage, biology, or adoption. See UNIF. PROBATE CODE § 2-102A (1991) (establishing share of spouse in separate property states); UNIF. PROBATE CODE § 2-103 (1991) (establishing share of heirs other than spouse); UNIF. PROBATE CODE § 2-114 (1991) (establishing status of children by adoption and clarifying effect of marital status of parents with
The execution of a will and other estate planning documents can go a long way to circumvent the default setting imposed in favor of a decedent's next of kin. However, a will benefiting a surviving same-sex partner is subject to contest by the testator’s intestate heirs.\textsuperscript{53} This leaves a same-sex couple in the position where they can neither rely on the rules of intestacy to effectuate their wishes with regard to the distribution of their property nor necessarily trust a court to uphold their clear testamentary directions.\textsuperscript{54} Thus, probate law clearly places the burden on the same-sex partner, as it does on any nontraditional testator, to arrange his affairs in such a way as to avoid the law's strong preference for relationships defined by marriage, biology, or adoption.\textsuperscript{55}

The following discusses the rights of a surviving same-sex partner in the distribution of the estate of a deceased partner and the appointment of fiduciaries where the partner died intestate and where the partner died leaving a will in favor of the surviving partner.\textsuperscript{56}

1. Distribution of Property

Probate law only governs the distribution of property titled in the decedent’s name at the time of death.\textsuperscript{57} It does not generally concern itself with property which passes upon death by operation of law under a right of survivorship or property payable under a third-party beneficiary contract such as life insurance proceeds.\textsuperscript{58} However, the preference for next of kin which is enunciated so strongly throughout the state probate codes often holds considerable normative sway over various distribution questions involving respect to child).

\textsuperscript{53} See infra text accompanying notes 74-80 (discussing will contests).

\textsuperscript{54} With regard to property rights, one possible alternative is to minimize the amount of assets subject to probate, and hence distribution by will, through some combination of inter vivos transfers and beneficiary designations.

\textsuperscript{55} The need to take these precautions imposes a number of costs on same-sex couples. Before a couple embarks on any sort of estate planning, the couple must first be aware that planning is necessary, they must have some level of access to the legal profession, and they must have the means to pay for that access.

\textsuperscript{56} In the case of a will that does not benefit a same-sex partner, a surviving same-sex partner would have few rights outside of Hawaii or Vermont. The surviving partner would not have standing to challenge the will unless she stood to benefit under an earlier will because she would not otherwise be a legal heir. See infra note 75 (defining “pecuniary interest” required to have standing to contest a will). In addition, she would not be entitled to claim an elective share of the decedent’s estate. See In re Cooper, 592 N.Y.S.2d 797, 798 (N.Y. App. Div. 1993) (determining homosexual relationship is not spousal relationship that entitles survivor right of elective share). Finally, if the will had been written before the partners established their relationship, it would not be terminated automatically as is the case in a subsequent marriage. See UNIF. PROBATE CODE § 2-301 (1991) (establishing rights of spouse under premarital will).

\textsuperscript{57} The purpose of probate is to transfer title in property from the decedent’s name to the names of the beneficiaries. JESSE DUKE MINER & STANLEY M. JOHANSEN, WILLS, TRUSTS AND ESTATES 59-42 (6th ed. 2000) (providing summary of probate procedure).

\textsuperscript{58} But see UNIF. PROBATE CODE §§ 6-201 through 6-227 (1991) (describing rules governing multi-party bank accounts); UNIF. PROBATE CODE §§ 6-301 through 6-311 (1991) (describing rules governing “transfer on death” designations).
nonprobate assets. As discussed in Part II.B, it is not unusual for the terms of an employment-related survivor’s benefit to rely on the laws of intestacy in the absence of a valid beneficiary designation.59

a. Intestacy

When a decedent dies without a will, the distribution of his estate is governed by the rules of intestate succession which are designed to approximate the result which most decedents would have directed had they written a will.60 With the exceptions of Hawaii and Vermont, a surviving same-sex partner is not included in any of the categories of individuals who are entitled to take in the case of intestacy.61 Generally, a surviving spouse will receive the lion’s share of a decedent’s estate.62 In the absence of a surviving spouse, a decedent’s estate is distributed to his closest relatives in the following order of priority: children, parents, siblings, nieces and nephews, grandparents, aunts and uncles, first cousins, and so on.63 If a decedent is not survived by any relatives within the prescribed degree of relationship, then his property escheats to the state.64 Accordingly, when a same-sex partner dies without a will, the surviving partner will likely have no legal rights with regard to the deceased partner’s probate assets.65

59. See infra text accompanying notes 92-105 for a description of employment-related survivor benefits.

60. The General Comment to the provisions governing intestate succession in the Uniform Probate Code (“UPC”) describes the distribution scheme as “designed to provide suitable rules for the person of modest means who relies on the estate plan provided by law.” UNIF. PROBATE CODE, pt. 1, General Comment (1991).

61. Under Hawaii Law, parties who sign a “declaration of reciprocal beneficiary relationship” as prescribed by statute are afforded certain rights and benefits. HAW. REV. STAT. ANN. § 572C-5 (Michie 1999). The stated purpose of recognizing a “reciprocal beneficiary relationship” is “to extend certain rights and benefits which are 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). The rules governing intestate succession afford a surviving reciprocal beneficiary the same rights extended to a spouse. HAW. REV. STAT. ANN. § 5602-102 (Michie 1999). Under Vermont law, parties who enter into a “civil union” are afforded “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) (2001). This includes equal rights under the rules of intestate succession. VT. STAT. ANN., tit. 15, § 1204(e)(3) (2001).

62. See UNIF. PROBATE CODE § 2-102 (1991) (establishing share of surviving spouse). The share is reduced in certain circumstances if the decedent is survived by parents, children who are not children of the surviving spouse, or stepchildren. Id.

63. See UNIF. PROBATE CODE § 2-103 (1991) (establishing share of those other than surviving spouse). The UPC does not include intestate heirs beyond descendants of grandparents. UNIF. PROBATE CODE § 2-103(4) (1991). California has extended the right to take as an intestate heir to stepchildren, but only in the case where there is no other taker except the state. CAL. PROB. CODE § 6454 (West 2001).

64. See UNIF. PROBATE CODE § 2-105 (1991) (establishing priority of state if no surviving relative exists within prescribed degree of relationship).

65. Some couples have considered adult adoption as a means to qualify as an intestate heir and secure other rights. At least one state, New York, considers this use of its adoption laws to be against
Without the ability to assert a legal right to a partner's probate assets, the surviving partner often finds himself literally at the mercy of the deceased partner's relatives who are considered the legal heirs.\textsuperscript{66} The closet, homophobia, and the pressures of grief can greatly complicate the relationship between a surviving partner and the next of kin, who may seek to justify dispossessing the surviving partner on the grounds that the couple were not really a couple or that the absence of a will is a clear statement of the decedent's intent to prefer family over a "roommate."\textsuperscript{67}

public policy. See In re Robert Paul P., 471 N.E.2d 424, 427 (N.Y. 1984) (holding sexual relationship was inconsistent with parent-child relationship). Adopting a partner can also avoid a will contest because the partner, as a child, is an intestate heir with priority over other relatives to challenge any will. See infra text accompanying notes 74-76 (discussing standing to challenge will). A major consideration with adoption is that, unlike domestic partnership or marriage, a parent-child relationship is forever.

\textsuperscript{66} During the first round of public commentary with respect to the proposed regulatory guidance for the Compensation Fund, a group of gay and lesbian advocacy groups submitted a letter to the Department of Justice which expressly recognized the difficulties surviving same-sex partners could encounter with the relatives of their deceased partner. See Lambda Legal Defense and Education Fund, Comments on the Department of Justice's Rulemaking Regarding the September 11th Victim Compensation Fund of 2001, Nov. 21, 2001. available at http://www.lambdalegal.org/cgi-bin/ iowa/documents/record?record=919 (last visited Feb. 14, 2002) (telling story of surviving same-sex partner who was "now at the mercy of [her partner's] biological family").

The letter briefly outlined the case of "Denise" whose partner "Laura" suffered horrible burns while on her way to work in the North Tower of the World Trade Center. \textit{Id.} Laura eventually died as a result of the burns and "now Denise is at the mercy of Laura's biological family to decide how long she may stay in the home they shared." \textit{Id.} An added problem is that Denise cannot claim Laura's life insurance proceeds because the copies of the beneficiary designation forms were destroyed when the North Tower collapsed. \textit{Id.} (The letter did not use the parties' real names in order to respect their privacy).

\textsuperscript{67} This is what happened when Frank Vasquez's partner of twenty-seven years, Robert Schwerzler died without a will. Marsha King, \textit{Should Companion Get Deceased's Estate? SEATTLE TIMES}, Jan. 23, 2001, at A1. Vasquez and Schwerzler ran a burlap bag recycling business in Puyallup, Washington where they shared a modest three-bedroom house. \textit{Id.} When Schwerzler died intestate at the age of seventy-eight, Vasquez quickly learned that the house, their two cars, and their furniture—the entire $230,000 estate—was titled in Schwerzler's name. \textit{Id.} Schwerzler's siblings asserted their rights to Schwerzler's property as next of kin and, according to Vasquez's lawyer, "literally wanted to put Mr. Vasquez out on the street with nothing." Sam Skolnik, \textit{Same-Sex Estate Rights Backed, State High Court Says Gays May Be Entitled to Partners' Property in Absence of a Will, SEATTLE POST-INTELLIGENCER}, Nov. 2, 2001, at B1. Although not required to legally, the siblings justified their claim to Schwerzler's estate, including the home he had shared with Vasquez, with the assertion that the two men were not homosexual. \textit{Id.} \textit{See also} King, \textit{ supra} (quoting Schwerzler's brother, "[certainly, there was nothing being done in public"). In the eyes of Schwerzler's family Vasquez was really more like a housekeeper or a boarder who just happened to stick around for twenty-seven years. \textit{See King, supra} (stating Vasquez "was a boarder or friend, nothing more than that....")

This was also the case with Frank Gagliano who had lived with his partner Rob Pierce for four years, but they never got around to drawing up wills. Michael Meleod, \textit{Law Closes Eyes to Gay Partners; A Slain Police Officer's Companion has been Denied a Spousal Pension, ORLANDO SENTINEL}, Jan. 1, 2002, at A1. When Pierce, who was a television cameraman, was killed in a helicopter crash, his next of kin claimed their house, which was in Pierce's name, and all of Pierce's possessions. \textit{Id.} According to Gagliano, Pierce's family treated him like he was "a fag houseguest." \textit{Id.}

Ultimately, Vasquez was able to assert an equitable claim against his partner's estate. Associated
b. Wills

Every competent adult is qualified to execute a will. A will is said to "speak" upon death and directs to whom the testator wants his estate distributed and in what proportions. In all separate property states with the exception of Georgia, a surviving spouse has a right to elect against a spouse's will if the will fails to provide the survivor with a guaranteed statutory share—traditionally one-third. The spouse's elective share is designed to protect a surviving spouse from being disinherited by an improvident spouse and assumes that the efforts of the surviving spouse contributed to the acquisition of the decedent's property. Only Vermont and Hawaii extend this protection to same-sex partners.

Assuming that a will complies with the requisite formalities, a testator can generally rest assured that upon death his testamentary wishes will be respected and followed by the court. However, a will which names a surviving same-sex partner as a beneficiary is subject to challenge by the decedent's intestate heirs. This is because individuals who have a "pecuniary interest" in the decedent's estate (i.e., individuals who would benefit if a will were set aside) have standing to contest a will on a number of grounds, including lack of testamentary capacity, undue influence, fraud and duress. The charge of undue influence is the

Press, Gay's Claim on Estate to be Retried, RECORD (Bergen County, N.J.), Nov. 2, 2001, at A24. Under Washington state law, an unmarried partner can assert a claim against the deceased partner's estate on a theory similar to equitable adoption, provided that the surviving partner can show he relied on the decedent to execute the necessary documents to secure the survivor's property interests. Id. The Supreme Court of Washington ruled that this equitable claim was not limited to couples who could have legalized their relationships and remedied the case for retrial. Vasquez v. Hawkinson, 33 P.3d 735, 737-38 (Wash. 2001).

68. See UNIF. PROBATE CODE § 2-501 (1991) (requiring testator be "18 or more years of age" and "of sound mind").
69. See UNIF. PROBATE CODE § 2-507 (1991) (describing requirements to revoke a will).
70. DUKEMINIER & JOHANSON, supra note 57, at 480 n.1.
72. The UPC substantially revamped the spousal elective share provisions in order to comport "with the contemporary view of marriage as an economic partnership." Id.
74. See UNIF. PROBATE CODE § 2-502 (imposing formalities of execution). The "plain meaning rule" of will construction generally mitigates against the introduction of extrinsic evidence. DUKEMINIER & JOHANSON, supra note 57, at 409-10.
75. See In re Estate of Getty, 149 Cal. Rptr. 656, 660-61 (Cal. Ct. App. 1978) (holding contingent trustee did not have standing to challenge will of J.P. Getty because she lacked "pecuniary interest" in the outcome). In the case where a surviving same-sex partner is the primary beneficiary under the will, the decedent's intestate heirs would have standing to challenge the will because if the will were disregarded, then the decedent would be deemed to have died intestate and the heirs would take the estate in accordance with the rules of intestate succession. Whether a beneficiary under a prior will has standing to sue is a more difficult question and depends upon the jurisdiction's view regarding the "revival" of prior wills. See UNIF. PROBATE CODE § 2-501 (1991) (proving for revival of revoked will
objection most easily deployed against a will which favors a same-sex partner.\textsuperscript{76}

Undue influence arises where a beneficiary induces the testator to favor that beneficiary over the individuals whom the law considers to be the natural objects of the testator's bounty, or, in other words, the intestate heirs.\textsuperscript{77} In this way, the beneficiary is said to have substituted his will for that of the testator's and the court must then set aside the resulting document because it does not represent the true intent of the testator.\textsuperscript{78} A charge of undue influence is easier to prove where the beneficiary and the testator are deemed to have been in a "confidential relationship" which includes, in addition to attorney-client and other fiduciary relationships, any sexual/romantic relationship short of marriage.\textsuperscript{79} Accordingly, until same-sex relationships are granted some form of legal recognition, same-sex partners will remain locked in a confidential relationship which under traditional probate law warrants suspicion and triggers special protections in order to secure the financial interests of next of kin who may be harmed by the relationship.\textsuperscript{80}

2. Fiduciary Appointments and Decision-making Authority

The personal representative of a decedent's estate, acting in a fiduciary capacity, is charged with safeguarding the assets of the decedent, satisfying all debts, and distributing the assets to the appropriate beneficiaries.\textsuperscript{81} The personal

\begin{flushright}
\textsuperscript{76} Claims of lack of mental capacity have been used to challenge the testamentary plans of gay men who died from HIV/AIDS. See Thomas J. Maier, AIDS Victims' Bitter Legacy: Lovers and Relatives Battle for Estates in Disputes Over Wills, NEWSDAY, Oct. 2, 1988, at 4 (noting number of such challenges was increasing).
\textsuperscript{77} See generally Ray D. Madoff, Unmasking Undue Influence, 81 MINN. L. REV. 571, 578 (1997) (providing critique of traditional undue influence doctrine). Madoff explains that impermissible undue influence "involves the substitution of the mind of the person exercising the influence for the mind of the person executing the instrument, causing him to make an instrument that he otherwise would not have made." \textit{Id.}
\textsuperscript{78} With regard to this element of undue influence, Madoff correctly points out that "[a]ll wills are the result of influence." \textit{Id.} at 575.
\textsuperscript{79} In fact, in some jurisdictions, once a "confidential relationship" is established between the testator and the proponent of the will, the burden of proof shifts to the proponent, in this case the surviving partner, to prove the absence of undue influence. \textit{See, e.g.}, Estate of Reichel, 400 A.2d 1268, 1270 (Pa. 1979) (holding that after clear and convincing showing of confidential relationship, burden shifts to proponent to disprove undue influence, provided certain other requirements are satisfied).
\textsuperscript{80} The frequency with which next of kin actually contest wills which primarily benefit surviving same-sex partners is not clear nor is it easily susceptible to study. Gary Spitzko notes that "[t]here is some evidence that gay men and lesbians who exercise their donative freedom to execute a will or non-probate means to transfer their estate to their same-sex partner at their death are more likely than those in a non-gay relationship to have their donative intent disregarded by the trier of fact in a challenge to their estate plan." E. Gary Spitzko, The Expressive Function of Succession Law and the Merits of Non-Marital Inclusion, 41 ARIZ. L. REV. 1063, 1075 (1999). A recent empirical study measured the opinion of individuals regarding rewriting the intestacy laws to include committed same-sex partners. \textit{See} Mary Louise Fellows et al., Committed Partners and Inheritance: An Empirical Study, 16 LAW & INEQ. 1, 3 (1998) (undertaking study to assess public opinion about including same-sex partners as heirs).
\textsuperscript{81} \textit{See DUKEMINIER & JOHANSON, supra} note 57, at 35-36 (describing basic duties of personal
representative is also responsible for a variety of tasks undertaken on behalf of the decedent, such as filing the decedent’s final lifetime tax returns and pursuing any survival actions which might have accrued by reason of the decedent’s death. In addition, the personal representative is often regarded as having authority over the disposition of the decedent’s remains and other decisions related to the decedent’s person. For purposes of the September 11 relief efforts, the identity of the personal representative is extremely important because only a personal representative is eligible to file a claim on behalf of a victim with the federal September 11 Victim Compensation Fund.

If a decedent dies intestate, the law prescribes the order of priority for the appointment of an administrator of the decedent’s estate. With the exception of Hawaii and Vermont, this list does not include surviving same-sex partners. A testator typically appoints a personal representative to serve as executor of his will. Where a will fails to appoint an executor or an executor refuses serve, the court will appoint an individual to act as executor in accordance with the order of priority prescribed by statute.

In addition to the personal representative’s wide authority to deal with estate assets, the personal representative may have apparent legal authority to make a variety of inherently personal decisions regarding the disposition of the decedent’s remains and funeral and cemetery arrangements. It is particularly difficult to ensure that a surviving same-sex partner has the authority to make these types of decisions, even when she is acting as the personal representative.

82. For a discussion of survival actions see infra text accompanying notes 111-115.

83. With regard to a person’s ability to direct the disposition of his remains, Dukeminier and Johanson note “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 57, at 405.

84. See UNIF. PROBATE CODE § 3-203(a)(1)-(2) (1991) (granting surviving spouse first priority, after person determined by probated will). These sections apply to the appointment of an executor as well. Id. Disregarding the instructions specific to a decedent who did die testate, the order of priority is spouse, other intestate heirs, and “45 days after the death of decedent, any creditor.” Id. § 3-203(a)(6).

85. See HAW. REV. STAT. § 560.3-203 (1999) (granting reciprocal beneficiary same priority as surviving spouse); VT. STAT. ANN., tit. 15, § 1204(e)(3) (2001) (granting same-sex partners same protections and responsibilities as marital spouses in realm of probate law and procedure). California’s new domestic partnership legislation has taken the unusual step of granting a registered domestic partner the same priority as a spouse, but failing to recognize a domestic partner as an intestate heir. CAL. PROB. CODE § 8462, ch. 893, sec. 54, 2001 Cal. Adv. Legis. Serv. 1, 54 (Deering). The UPC restricts the class of those eligible to be appointed as personal representative, in the absence of a will, to the spouse and relatives. UNIF. PROBATE CODE § 3-203(a)(1)-(5) (1991). Under such circumstances, the only way a surviving same-sex partner could qualify is if she were a “creditor” of the estate. Id. § 3-203(a)(6). Even then, she would have last priority. Id.

86. First priority is given to the individual appointed under the will, unless she is otherwise disqualified. See UNIF. PROBATE CODE § 3-203(a)(1) (1991) (listing as first priority “person nominated by a power conferred in a will”).

87. Id.
for two reasons. First, in some instances it is not completely clear that a personal representative actually has the authority to make the necessary decision. Second, even assuming that a personal representative has the required authority, there remains the possibility that a third party, such as a funeral director or a cemetery, will refuse to honor the directions of the surviving partner, particularly where they are contrary to the wishes of the next of kin. Experience shows that when faced with legally binding documents in the hand of a surviving same-sex partner, many third parties will still turn instinctively and, 

88. Same-sex couples can draft documents which try to anticipate such circumstances, but the extent to which the documents can legally bind third parties such as funeral directors or cemeteries is uncertain. Such documents may be considered to offer only some indicia of the decedent's wishes and fall short of being able to compel third parties to respect them, except where such documents are expressly authorized by law. For example, Virginia expressly authorizes the designation of an individual who "shall make arrangements for [the declarant's] burial or the disposition of [the declarant's] remains, including cremation, upon [the declarant's] death." VA. CODE ANN. § 54.1-2825 (Michie 2001).

89. Often, the most personal decisions regarding the disposition of the decedent's remains and funeral arrangements are required to be made before a court would have had an opportunity to confirm the appointment of a personal representative. Thus, a grant of authority under an unprobated will may in fact carry little force.

90. For example, when Sherry Barone's partner of thirteen years, Cynthia Friedman, died at age thirty-five, she left a will which appointed Barone as executor. Debbie Woodell, Gay Partner Battles for Rights Even at the Grave, AUSTIN AMERICAN-STATESMAN, May 31, 1997, at C8. The will expressly authorized Barone to "arrange for the disposition" of Friedman's remains. Murray Dubin, Late Woman's Parents, 'Life Partner' Wage Legal Battle Over Headstone Inscription, PHILADELPHIA INQUISITOR, June 30, 1997, at Lifestyle, available at LEXIS, News Library, current file. The cemetery where Friedman was buried refused to inscribe her headstone with the epitaph directed by Barone— "beloved life partner, daughter, granddaughter, sister and aunt"—because Friedman's parents objected to the use of the term "beloved life partner." Claudia N. Ginanni, Cemetery To Inscribe Headstone, Pay $15,000, THE LEGAL INTELLIGENCER, Sept. 8, 1997, at 5. Perhaps predictably, the parents were partial to a slightly different ordering of Friedman's filial ties: "our beloved daughter, sister, granddaughter, and loving friend." Dubin, supra. Shortly before the third anniversary of Friedman's death, the cemetery acceded to Barone's wishes as part of a settlement agreement reached in the federal lawsuit Barone brought against the cemetery. Ginanni, supra.

Barone's dispute with the cemetery illustrates how difficult it is to draft for every eventuality. It also illustrates the priority that third parties often give to the views and opinions expressed by the decedent's next of kin. As executor, Barone was expressly authorized to "arrange for the disposition" of Friedman's remains and yet the cemetery refused to honor her directions because Friedman's parents, who had no legal right to represent the estate, objected. Apparently, and quite reasonably, it did not occur to Friedman that she and Barone should type up the following, sign it, and have it notarized:

Cynthia L. Friedman
Beloved life partner,
daughter, granddaughter,
sister and aunt
A spirited and compassionate
woman who will be
forever in our hearts

Dubin, supra. Even if Friedman had left a signed directive, is it not clear whether any documentation would have been sufficient to the sway the cemetery.
perhaps stubbornly, toward the traditional decision-makers who, in these types of situations, are the next of kin.91

B. Survivor Benefits

Employment-related survivor benefits often provide a significant source of financial support for surviving family members.92 As nonprobate property, the distribution of these survivor benefits is not determined by the decedent’s will or the rules of intestate succession.93 However, the conventions of intestate succession clearly influence some of the restrictions with respect to permissible classes of beneficiaries and the provisions regarding distribution of benefits in default of a beneficiary designation.

Employment-related survivor benefits come in a variety of forms, including social security benefits, pension funds, lump sum death benefits, continuing health insurance for surviving family members, and employer-provided life insurance.94 Some types of benefits allow the covered employee to designate a beneficiary, whereas others by their terms are only payable to certain classes of individuals which always include a “surviving spouse.” For example, a surviving same-sex partner will not qualify for federal social security survivor benefits95 or the federal $250,000 death benefit for “public safety officers” killed in the line of duty96 because both benefits are restricted to “spouses” and, for all federal purposes, DOMA defines marriage as the union between one man and one woman.97

Where an employee is authorized to designate a beneficiary, a completed designation form should be sufficient to protect the interests of a same-sex partner regardless of whether the employer has a policy extending benefits to domestic partners.98 However, where a beneficiary designation is not an option (or one is not completed), the eligibility of a surviving same-sex partner to receive the benefit will depend on the payor’s policy regarding domestic partners

91. 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, 424-25 (1999) (discussing presumption in law that either spouse or family members of deceased will best know deceased’s intent with respect to disposition of her body).

92. See DUKEMINIER & JOHANSON, supra note 57, at 475 (noting “[p]rivate pension plans funded by employers or jointly funded by employer and employee contributions mushroomed in the twentieth century”).

93. For a discussion on how probate law affects such property, see supra notes 57-59 and accompanying text.

94. DUKEMINIER & JOHANSON, supra note 57, at 475.

95. Under the current social security system, the spouse of a retired worker receives fifty percent of the retiree’s benefits and one hundred percent of a deceased retiree’s benefit. Obviously, this works to the exclusion of surviving same-sex couples due to DOMA.

96. See 42 U.S.C.S. § 3796 (Law Co.-op. 2001) (outlining recipients of $250,000 benefit payable when public safety officer dies in line of duty).

97. See supra note 40 (quoting DOMA).

98. A will naming a same-sex partner as primary beneficiary will have no effect on the transfer of non-probate assets.
and the wording of the plan document. In the absence of a domestic partnership policy or other legal obligation, a class of beneficiaries restricted to spouse, children, and parents effectively excludes same-sex partners, as would a default scheme of distribution which was patterned after the general rules of intestate succession.99

Given the sharp increase in the number of private employers and public employers on both the state and local level which extend benefits to domestic partners, surviving same-sex partners may have considerably more success in the area of employment-related survivor benefits than under existing probate law.100 In the case where an employer (or other payor) has a domestic partnership policy, any benefit payable to a specified class of beneficiaries, or any default distribution, would presumably include a domestic partner in the same class as a spouse by either express reference or by construction. Thus, where an employer (or other payor) has a domestic partnership policy in place, the surviving same-sex partner should be eligible to receive the benefits, regardless of whether the beneficiaries were restricted to a particular class and, if not, regardless of whether the covered employee completed a designation form.

The difficulty arises when the employer (or other payor) does not have a domestic partnership policy and beneficiary designation is either not an option or a required beneficiary designation was not completed.101 This leaves the surviving same-sex partner arguing that she should be considered a spouse, which will be an uphill battle, particularly if she lives in one of the thirty-six states with anti-marriage legislation or the payor is the federal government.102

99. In some instances payment might be directed to the employee's estate. In such case, the ultimate distribution of the benefit would depend upon whether the employee died testate and named the surviving same-sex partner as a beneficiary under the will.


101. There is also the possibility that the designation form may be lost or mislaid. Apparently, many beneficiary designations may have been lost in the collapse of the World Trade Towers, including both employer records and employee records. See Lambda Legal Defense and Education Fund, Comments on the Department of Justice’s Rulemaking Regarding the September 11th Victim Compensation Fund of 2001, Nov. 21, 2001, available at http://www.lambdalegal.org/cgi-bin/iowa/documents/record?record=919 (last visited Feb. 14, 2002) (stating surviving same-sex partner of victim of September 11 attacks, "Denise," was not able to claim her partner’s life insurance proceeds because beneficiary designation form was destroyed in collapse of North Tower).

102. It was under these circumstances that Detective Micki Mashburn tried to convince the city of Tampa that she should be considered a "spouse" when her partner of eleven years, Officer Lois Marrero, was killed at age forty by a suspect in a bank robbery. See Michael Meloeod, Law Closes Eyes to Gay Partners; A Slain Police Officer’s Companion has been Denied a Spousal Pension, ORLANDO SENTINEL, Jan. 1, 2002, at A1 (discussing Mashburn’s attempt to receive death benefits of her murdered same-sex partner). Marrero had failed to designate Mashburn as her pension beneficiary. Id. If Mashburn had been Marrero’s legal spouse, she would have automatically received one-half of
Because the availability of domestic partnership benefits is often determined on the municipal level or on an employer by employer basis, the disparate results in this area can be striking. For example, the surviving same-sex partner of a New York City police officer is eligible to receive her partner’s pension benefits by reason of New York City’s domestic partnership ordinance. However, a surviving same-sex partner of a police officer in Tampa, Florida, is not a qualified pension beneficiary. In neither case would the surviving partner qualify for the federal $250,000 death benefit paid to the surviving spouses of officers killed in the line of duty.

C. Wrongful Death and Survival Actions

A negligent or intentional killing can give rise to two distinct tort claims: a wrongful death action brought on behalf of the victim’s survivors to compensate for their loss and a survival action brought on behalf of the victim’s estate to compensate for the victim’s suffering prior to death. Every state has a wrongful death statute which sets forth the class of survivors who are eligible to pursue the claim and the general nature of the compensable damages. Not

Marrero’s salary for life. See Amy Herdy, Partner Denied Marrero Pension, St. Petersburg Times, Aug. 29, 2001, at 1A (explaining fire-fighter and police pension board followed law providing death benefits to surviving spouses only). In addition, she would have received $250,000 from the federal government, as well as educational assistance. See infra note 260 for a discussion of the federal death benefits payable to “public safety officers” killed in the line of duty. The Tampa pension board turned down Mashburn’s request and the board awarded a lump sum payment of $50,000 to Marrero’s relatives. Herdy, supra.

Unlike Schwerzler’s family discussed supra, note 67, Marrero’s relatives did not justify their position on the grounds that Marrero was not gay and that Mashburn was just an eleven-year boarder. See King, supra note 67 (characterizing Vasquez, who had lived with decedent for twenty-seven years, as a “boarder”). Instead, Marrero’s mother and sister asserted that the relationship between Mashburn and Marrero had cooled and that Marrero had a “long distance love interest” at the time of her death. Mcleod, supra. See also Herdy, supra (claiming it “was not the happy union [Mashburn] portrayed it to be”). A local paper found the mysterious other women and reported the lurid details of how the two had met over the Internet. See Amy Herdy, Woman Details Relationship with Marrero, St. Petersburg Times, Sept. 4, 2001, at 1A (reporting details of relationship between Marrero and Texas woman). To the family, Marrero’s affair was clear evidence that her relationship with Mashburn, which had been solemnized in a ceremony at the local Metropolitan Community Church, was over, notwithstanding the fact the two continued to live together. Mcleod, supra. Of course, had Mashburn been a surviving spouse, any inquiry into the nature or strength of their relationship would have been irrelevant. Moreover, it is incomprehensible to think that anyone would ever consider penalizing the surviving spouse for a lapse of fidelity on the part of her dearly departed husband.

103. See Mike Allen, Defiance Reigns as Council Keeps Swinging at Mayor, N.Y. Times, June 25, 1996, at B3 (noting ordinance grants city workers domestic partner benefits equal to those extended to spouses).

104. See supra note 102 (discussing case of Officer Lois Marrero and her surviving partner, Detective Micki Mashburn).

105. Id.


107. See John G. Culhane, A “Clanging Silence”: Same-Sex Couples and Tort Law, 89 Ky. L.J.
surprisingly, the order of priority for those entitled to bring a wrongful death action invariably starts with the surviving spouse and then lists the now familiar next of kin. With the exception of three states—California, Hawaii, and Vermont—this statutory scheme works to exclude same-sex partners. As explained more fully below in Part III.B, it appears that a surviving same-sex partner who is a beneficiary under her partner's will fares much better under the federal September 11 Victim Crime Compensation Fund than she would have fared under the wrongful death statutes of the vast majority of states.

Survival statutes permit the victim's estate to bring an action for the losses experienced by the victim between the moment of injury and death. This includes economic loss, such as lost wages and medical expenses, and, in some jurisdictions, damages for pain and suffering. Considered an asset of the estate, a survival action is brought by the decedent's personal representative and any recovery is distributable to the beneficiaries of the estate in accordance with the terms of the decedent's will or the rules of intestate succession, whichever is applicable.

A surviving same-sex partner is entitled to share in a survival recovery to the extent that she is a beneficiary of her partner's estate and would share in the distribution of any other asset. However, a survival action is not a fair substitute for a wrongful death claim because it does not offer the surviving partner the opportunity to recover for her own loss. In addition, where death quickly follows injury or the two are indistinguishable, the amount recoverable in a survival action may be negligible, particularly in jurisdictions such as New York and California where a decedent's pain and suffering is not compensable.

In essence, a wrongful death statute identifies whose loss matters, whose loss is compensable, and whose loss is foreseeable by the tortfeasor, none of

911. 953-54 (2000-2001) (outlining history and statutory origin of wrongful death actions which typically include survivor's economic loss and in some cases include loss of companionship).

108. Culhane notes that some statutes simply refer to the rules of intestate succession. Id. at 956. He notes that statutes which name the specific classes of those eligible always start with spouse. Id. at 955. Culhane points out that a few states allow beneficiaries under the victim's will to bring an action, but only with substantial limitations. Id. at 956.


110. This is because a surviving same-sex partner who is a beneficiary of the victim's will is eligible to file a claim, whereas comparable standing with respect to wrongful death actions is available in only a handful of states.

111. See Franklin & Rabin, supra note 106, at 639-43 (discussing potential damages for moments victims experienced between injury and death).

112. Id.

113. Id.

114. Id. at 639-40.

115. Id. at 640-41.
which generally includes a surviving same-sex partner.\textsuperscript{116} Moreover, a
deceased's will is powerless to effect a change in the rules governing who has
standing to bring a wrongful death action which can be changed only by appeal
to the legislature or through judicial interpretation.\textsuperscript{117} Currently, only three
states allow same-sex partners to sue for wrongful death. In Hawaii and
Vermont, the inclusion of surviving same-sex partners was the result of the
sweping legislation which granted same-sex partners certain rights comparable
to spouses.\textsuperscript{118} In California, it was part of a much more tailored legislative
package which granted registered domestic partners certain decision-making
authority comparable to spouses, such as the right to consent to medical
treatment on behalf of an incapacitated partner.\textsuperscript{119}

\textsuperscript{116} See generally Culhane, supra note 107 (discussing reluctance of courts to recognize same-sex
relationships in tort law).

\textsuperscript{117} But see Culhane, supra note 107, at 956 (noting “a small group of statutes” allow beneficiary
to pursue claim, “but only with substantial qualifications and limitations”).

\textsuperscript{118} In both states the legislation extending recognition to same-sex partners was the result of
successful court challenges with respect to same-sex marriage.

legislation was pending when Diane Whipple, a 33-year-old lacrosse coach was mauled to death by her
neighbors' two large dogs in the hallway outside the door to the apartment that she shared with her
partner of seven years, Sharon Smith, on January 26, 2001. Christopher Heredia, Dog Mauling
Victim's Partner to Test Wrongful Death Law, S.F. CHRON., Feb. 19, 2001, at A13. The details of
Whipple's attack were widely reported in the press and generated considerable sympathy for her
 surviving partner and hostility toward the owners of the dogs. Bill Hewitt et al., Unleashed Fury: A
Dog Attack in San Francisco Kills a Beloved Lacrosse Coach and Stirs Outrage Coast to Coast,
PEOPLE, Feb. 19, 2001, at 177. In the course of the ten minute attack, which took place in the presence
of one of the owners, the dogs tore off all of Whipple's clothes with the exception of one white sock
and ripped out her throat. Maul to Death, BUSINESS WIRE, May 11, 2001, available at LEXIS, News
Library, currwps file. The dogs were two Presa Canarios, a 123 pound male, Bane, and a 112 pound
female, Hera. Hewitt et al., supra. Whipple was dragged twenty to fifty feet from her apartment.
Evelyn Nieves, Interest Rises in Killer-Dogs Case as Owners' Trial Nears, N.Y. TIMES, Jan. 23, 2002, at
A10. At the time of the attack Bane, who was the primary actor, was leased by Whipple's neighbor
and Bane's co-owner, Marjorie Knoller. Id. The crime scene was so disturbing that veteran police
officers who responded to the 911 call had to seek psychological counseling. Id. Until she lost
consciousness, Whipple continued to try to crawl toward her open apartment door. Id. See also Kim
Vo & Marilee Enge, Transcript of Dog-Owners Testimony Released, SAN JOSE MERCURY NEWS, Sept.
raise[d] her torso to try to pull herself along the floor toward her apartment door”).

The circumstances of the attack and the outrageous behavior of the owners, who were keeping
the dogs for their incarcerated white supremacist adopted son, quickly focused attention on the fact
that as a same-sex partner, Smith had no standing to sue the owners for wrongful death. Heredia,
supra. In the face of clear statutory language to the contrary, Smith pursued her wrongful death action
against the owners arguing that the exclusion of same-sex partners was invalid under the California
state constitution and met with unexpected success at the trial court level. Peter Hartlaub, Same-Sex
Partner Can Sue for Damages, S.F. CHRON., July 28, 2001, at A1. See also, Heredia, supra (noting “no
case like Smith's has ever been successful”). Whipple's mother also filed a wrongful death suit in case
Smith's was dismissed, with the intent that the two suits would be merged. Alexis Chin, Mother of
Dog-Attack Victim Files Wrongful Death Suit, SAN JOSE MERCURY NEWS, Apr. 11, 2001, available at
LEXIS, News Library, currwps file. To mark the one-year anniversary of the fatal attack, the city of
San Francisco declared January 25, 2002 a day of commemoration for Diane Whipple. City Honors
Dog-Maul Victim, S.F. CHRON., Jan. 25, 2002, at A25. At the same time, jury selection for the
III. SEPTEMBER 11 VICTIM COMPENSATION FUND OF 2001

The September 11 Victim Compensation Fund of 2001 (the "Compensation Fund") was overwhelmingly approved by Congress on September 22, 2001, as part of the Air Transportation Safety and Stabilization Act (the "Stabilization Act").\(^{120}\) The Stabilization Act represented a $15 billion comprehensive federal bailout of the airline industry which was left reeling after the September 11 attacks.\(^{121}\) As Title IV of the Stabilization Act, the Compensation Fund was designed to insulate the airline industry from the potentially disabling tort liability associated with the September 11 attacks by offering victims and their survivors a quick and equitable monetary award in lieu of pursuing a civil tort action.\(^{122}\) Congress originally estimated that it would require appropriations of $15 billion to satisfy all of the anticipated claims.\(^{123}\) That initial estimate has been revised downward to $4.8 billion, but the Compensation Fund remains the largest single source of compensation for the victims of the September 11 attacks.\(^{124}\)

Despite the obvious pro-industry origins of the Compensation Fund, the popular sense is that Congress created the fund primarily to compensate victims and their survivors for their loss.\(^{125}\) This misconception has led many survivors

\(^{120}\) See generally Alvarez & Labaton, supra note 120.\(^{121}\) See Diana B. Henriques & David Barstow, Fund for Victims' Families Already Proves Sore Point, N.Y. TIMES, Oct. 1, 2001, at A1 (noting legislation was "intended to protect the airlines from liability for damages and deaths on the ground, something airline executives and their lobbyists said was crucial to their financial well-being").\(^{122}\) See Diana B. Henriques & David Barstow, Victims' Fund Likely to Pay Average of $1.6 Million Each, N.Y. TIMES, Dec. 21, 2001, at A1 (noting with collateral offset rule, and presumably reduced death toll, cost would be "roughly $4.8 billion").\(^{123}\) Two separate New York Times editorials have tried to stress the fact that the Compensation Fund was designed to limit liability. The Victims' New Referee, N.Y. TIMES, Dec. 1, 2001, at A26; Putting a Value on Lives, N.Y. TIMES, Jan. 24, 2002. The first editorial stated very plainly: it is essential that the public understand the fund's basic purpose. It is not charity. It is a Congressionally mandated alternative to litigation that could have driven the airlines into bankruptcy—a pot of money of undetermined size that is designed to substitute for awards that victims' families would have received had they taken the airlines to court.
to complain bitterly concerning the adequacy of proposed awards from the Compensation Fund. It has also invited uncomfortable comparisons between the treatment of the victims of the September 11 attacks and those of other terrorist acts where the victims and their survivors were not offered any direct federal compensation, such as the 1995 bombing of the Murrah federal building in Oklahoma City.

Although the statute creating the Compensation Fund expressly refers to providing compensation to the "relatives" of victims of the September 11 attacks, the overriding focus of the Compensation Fund is on the victim. The victim's personal representative is authorized to file a claim on behalf of the victim, not on behalf of the victim's "relatives." The award is distributable to the victim's estate in accordance with the terms of the victim's will or the rules of intestate succession, whichever is applicable, subject to the discretion of the Special Master. However, "relatives" are not completely absent from the equation: they factor into the calculation of the amount of the award and their interests are protected by the Special Master's discretion to reallocate the award in their favor. But, unlike many of the employment-related survivor death benefits described in Part II,B, the Compensation Fund does not exist for the exclusive benefit of "relatives."

By placing the primary emphasis on the victim and the victim's estate, the Compensation Fund has created considerable room for surviving same-sex partners who are beneficiaries under a partner's will or intestate heirs to file claims and seek compensation—something that would have been much more difficult or impossible if the regulatory guidelines had restricted "eligible claimants" to the victim's surviving "relatives." Because awards from the

The Victims' New Referee, supra, at A26. The second editorial noted that "[t]he victims' survivors would be spared a long and uncertain trial." Putting a Value on Lives, supra.

126. See, e.g., Robert F. Worth, Families of Victims Rally for Higher Federal Awards, N.Y. TIMES, Jan. 18, 2002, at B4 (quoting widow of firefighter stating proposed awards "are a betrayal and double-victimization of our families").

127. Associated Press, Oklahomans Questioning Sept. 11 Aid, N.Y. TIMES, Dec. 23, 2001, at B8. In the case of the Oklahoma bombing, where many of the victims were federal workers, the only direct federal aid was in the form of the regular death and disability benefits payable to federal employees. Id. One clear distinction between the September 11 attacks and the Oklahoma bombing was that the latter did not implicate the continued viability of a major industry. See also, Diana B. Henriquez & David Barstow, Officials Move to Aid Families of Embassy Bombing Victims, N.Y. TIMES, Nov. 30, 2001, at B9 (discussing introduction of legislation to compensate victims, and their survivors, of 1998 U.S. embassy bombings).

128. Air Transportation Safety and Stabilization Act, Pub. L. No. 107-42, § 403, 115 Stat. 230, 237 (2001). The purpose clause of the statute creating the Compensation Fund states that it is intended "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." Id. (emphasis added).

129. Air Transportation Safety and Stabilization Act § 405(c)(2)(C). The provision provides that it is the "personal representative who files a claim on behalf of the decedent." Id. (emphasis added).


131. The statute creating the Compensation Fund is clear that a victim's personal representative
Compensation Fund are distributable to and through the victim's estate, the payment of an award from the Compensation Fund will be governed by the probate law of the state where the victim died a resident. 132 This deference to state law will require the Compensation Fund, on one hand, to ratify the existing inequities in the treatment of surviving same-sex partners and, on the other hand, to affirm the instances where state law would respect the interests of a surviving partner. The result will be inconsistent outcomes for similarly situated surviving partners depending upon the decedent's domicile. 133

A. The Air Transportation Safety and System Stabilization Act

A review of the Congressional debate over the Stabilization Act immediately reminds one of just how high the levels of tension, anxiety, and grief were in the early days following the September 11 attacks. 134 At the time, there was deep uncertainty regarding the future of the U.S. economy, and the airline industry seemed truly to be in dire straits. 135 As soon as it became clear that the September 11 hijackers had turned commercial airliners into weapons of mass destruction, all commercial air traffic in the United States was grounded. 136 The


132. See infra text accompanying notes 242-260 (discussing distribution rules).

133. The regulatory guidance provides one major caveat to the general proposition that the Compensation Fund will authorize awards to surviving same-sex partners. The Special Master retains the discretion to disregard an otherwise valid will or plan of distribution and direct the personal representative to distribute an award to the victim's "relatives." September 11 Victim Compensation Fund—Interim Final Rule, § 104.52, 66 Fed. Reg. 66274, 66287 (proposed Dec. 21, 2001) (to be codified at 28 C.F.R. pt. 104). Thus, even if the natural objects of the victim's bounty do not challenge a will benefiting a same-sex partner, or they do so unsuccessfully, the Special Master is empowered to protect their interests in compensation for the death of a relative who chose not to include them in his will.

134. See, e.g., 147 CONG. REC. H5894 (daily ed. Sept. 21, 2001) (providing debate on Stabilization Act). Representative Young summed up the situation as follows: "They have murdered thousands of innocent people, destroyed billions of dollars in property and have dealt a terrible blow to an air transportation system that is vital to the economic health of our country." Id. (statement of Rep. Young).

135. The New York Stock Exchange suspended trading for six days and, when trading finally resumed on September 17, the value of airline stock declined significantly, as the market lost seven percent of its value on the first day. Gretchen Morgenson, Wall St. Reopens Six Days after Shutdown: Stocks Slide 7%, but Investors Resist Panic, N.Y. TIMES, Sept. 18, 2001, at A1. By the end of the week, the market had declined by fourteen percent representing the single largest one-week loss since the Great Depression. Alex Berenson, Share Prices Plunge 14% for the Week, Second Worst Ever, N.Y. TIMES, Sept. 22, 2001, at A1.

order remained in effect for two days and when flights finally resumed, ridership was down dramatically.\textsuperscript{137} The airlines canceled thousands of flights, cut back service, and began to announce the first rounds of layoffs, which totaled over 100,000 by the time Congress voted on the Stabilization Act.\textsuperscript{138}

It was in this context that Congressional leaders declared the stability of the airline industry to be a matter of national security.\textsuperscript{139} At the urging of the President and the industry, Congress authorized a $15 billion broad-based industry-wide federal bailout.\textsuperscript{140} The Stabilization Act authorized up to $5 billion in federal compensation to airlines for losses relating to the order to ground all commercial air traffic after the September 11 attacks.\textsuperscript{141} It also authorized the issuance of up to $10 billion in federal loans to air carriers,\textsuperscript{142} provided for the federal reimbursement of certain increases in insurance costs realized by air carriers,\textsuperscript{143} granted an extension of the due date for certain excise tax payments,\textsuperscript{144} and appropriated $3 billion for “airline safety and security . . . in order to restore public confidence in the airline industry.”\textsuperscript{145} The only objections to the Stabilization Act voiced on Capitol Hill were from members of Congress who thought the bill did not go far enough in terms of either providing for displaced workers or improving airport security.\textsuperscript{146}

Title IV of the Stabilization Act created the Compensation Fund in order to shield the airline industry from tort liability in the wake of the September 11 attacks.\textsuperscript{147} The potential scope of the liability appeared staggering given that the family of a single passenger killed aboard Pan Am Flight 103 had recently

\begin{footnotes}
\item[138] See 147 \textit{Cong. Rec.} H5884 (daily ed. Sept. 21, 2001) (statement of Rep. Hastings) (stating “in the past week nearly 100,000 airline employees have been laid off as a result of the terrorist attacks”).
\item[139] President Bush shared this assessment of the situation, and in his much awaited address to the joint houses of Congress on September 20, 2001, he specifically identified the need “to promote stability and keep our airlines flying with direct assistance during this emergency.” 147 \textit{Cong. Rec.} H5884 (daily ed. Sept. 21, 2001) (statement of Rep. Reynolds quoting President Bush). On the subject of national security, Representative Young stated: “The capital markets are not coming to the aid of most of the airlines. We are seeing a ripple effect in our economy as layoffs occur in other related industries. Our economy is at risk. \textit{Our national security is also at risk.}” 147 \textit{Cong. Rec.} H5894 (daily ed. Sept. 21, 2001) (statement of Rep. Young) (emphasis added).
\item[140] Alvarez & Labaton, supra note 120.
\item[142] Id. § 101(a)(1).
\item[143] Id. § 201(b).
\item[144] Id. § 301.
\item[145] Id. § 501.
\item[146] See, e.g., 147 \textit{Cong. Rec.} S9604 (daily ed. Sept. 21, 2001) (statement of Sen. Cantwell) (asserting legislation “does not go far enough” to protect employees).
\end{footnotes}
received a judgement of $17.5 million. In the case of the September 11 attacks, the potential claimants included not only the individuals who were killed on the planes, but also those killed and injured on the ground at the World Trade Center and at the Pentagon. There was also the matter of the economic loss suffered by the displaced businesses and the emotional trauma suffered by the thousands who fled lower Manhattan as the Twin Towers collapsed. Moreover, the liability did not necessarily run only to the two airlines whose planes were hijacked, American Airlines and United Airlines. Passenger security is the collective responsibility of the all the airlines which fly out of a given airport. Accordingly, if the security at Logan International Airport in Boston, Newark International Airport in New Jersey, and Dulles International Airport in Virginia was potentially negligent in failing to stop the hijackers, the threat of liability could have implicated every airline flying out of those airports. Difficult questions of causation and foreseeability would make many of these claims speculative at best, but the prospect of $17.5 million claims multiplied thousands of times produced a level of untenable economic uncertainty that could have extended years into the future. Congress hoped that the creation of the Compensation Fund would forestall this eventuality.

In addition to establishing the Compensation Fund, Title IV limited the liability of any air carrier for all claims arising from the September 11 attacks to the amount of liability coverage maintained by the airlines. It also created an exclusive federal cause of action for any damages arising out of the September 11 attacks with exclusive jurisdiction over all such actions reserved to the District Court for the Southern District of New York. In other words, if the size and

148. See id. (stating potential liability could exceed insurance coverage). See also Diana B. Henriques & David Barstow, Head of Fund Says Families Should State Their Cases, N.Y. TIMES, Dec. 22, 2001, at B8 (noting $17.5 million Pan Am award).

149. Treaster, supra note 147.

150. It is now estimated that up to 20,000 people were successfully evacuated from the World Trade Center before the Towers collapsed. See Eric Pooley, Mayor of the World, TIME, Dec. 31, 2001, at 40 (reporting efforts to evacuate World Trade Center and surrounding buildings resulted in "perhaps 20,000 civilian lives saved").


153. See id. (noting workers employed by several different agencies hired by different airlines could be manning passenger checkpoints at any given time).

154. Treaster, supra note 147, at A19. Notwithstanding the creation of the Compensation Fund, the first lawsuit on behalf of a victim of the September 11 attacks was filed against American Airlines and a company responsible for airport security on April 9, 2002. Robert F. Worth, Airline Sued in Tower Death, N.Y. TIMES, Apr. 9, 2002, at A16. The suit asks for $50 million in damages. Id.


156. Id. § 408(b).
the speed of the proposed payments from the Compensation Fund were not sufficient to entice survivors not to sue, Congress intended to set meaningful limits on both the size and venue of any future tort claims.

B. Title IV—The Compensation Fund

The size and scope of the Compensation Fund is unprecedented. As explained below in Part IV, government-provided compensation for crime victims is a relatively new concept and is generally administered on the state level.\textsuperscript{157} Since 1984, Congress has provided funding for state crime victim compensation boards,\textsuperscript{158} but, with the exception of a handful of instances all related to overseas terrorism, the U.S. government has never provided the type of direct compensation for crime victims as proposed under the Compensation Fund.\textsuperscript{159} The Compensation Fund combines the perspective of the state crime victims boards, which emphasize need and are considered payors of last resort, with some of the more traditional aspects of wrongful death claims and survival actions.\textsuperscript{160} For example, the Compensation Fund operates as a payor of last resort insofar as it insists on reducing awards by amounts received from a “collateral source,”\textsuperscript{161} but it contemplates compensating victims for the types of damages asserted in both survival actions and wrongful death actions in amounts which far exceed the level of compensation available under the various state

\textsuperscript{157} Some concern was expressed in Congress as to whether the creation of the Compensation Fund would serve as an unwelcome precedent for future acts of terrorism or even natural disasters. See 147 CONG. REC. E1764 (daily ed. Oct. 2, 2001) (statement of Rep. Waxman) (noting victims of past terrorist acts have not received compensation and asking whether “the compensation system in this bill be the model for future victims of terrorist acts or natural disasters?”).


In addition to the Compensation Fund, Congress enacted tax relief for the individuals killed in the September 11 attacks, the Oklahoma bombing, and the anthrax attacks which occurred subsequent to the September 11 attacks. See White House Fact Sheet in Victims’ Relief Bill, 2002 TAX NOTES TODAY 16-30, Jan. 24, 2002, available at LEXIS, Fedtax Library, tnt file. The Victims of Terrorism Relief Act waives federal income tax for the year of death and the year prior to death. Id. In addition, it reduces the estate tax rate applicable to the victims’ estates. Id. It also guarantees a minimum payment of $10,000 on behalf of each victim. Id. The IRS has issued guidelines designed to expedite refund claims arising from the Victims of Terrorism Relief Act. IRS Implements New Tax Relief for Victims of Terrorist Attacks, 2002 TAX NOTES TODAY 16-14, available at LEXIS, Fedtax, Library, tnt file.

\textsuperscript{160} For a discussion of the basic elements of survival actions and wrongful death claims see supra text accompanying notes 106-109. For a description of the state crime victims boards see infra text accompanying notes 261-278.

crime victims programs.\textsuperscript{162}

The statutory language creating the Compensation Fund is relatively terse, presumably the result of the haste with which the Stabilization Act was enacted. This has necessarily left many of the details regarding the administration of the Compensation Fund to be established by regulation, and the statute specifically authorizes the Special Master charged with administering the fund to issue "all procedural and substantive rules."\textsuperscript{163} On November 26, 2001, Attorney General John Ashcroft appointed Kenneth R. Feinberg to serve as the Special Master.\textsuperscript{164} An initial round of public comment regarding the regulations governing the operation of the Compensation Fund yielded over 800 comments.\textsuperscript{165} The Department of Justice issued regulations designated as the "Interim Final Rule" effective as of December 21, 2001 and inaugurated a second round of public commentary which ended on January 18, 2002.\textsuperscript{166} The Final Rule was issued on March 13, 2002.\textsuperscript{167}

The Interim Final Rule resolved the three most controversial elements of the compensation scheme, namely who was eligible to bring a claim, what monetary limits would be imposed on the recovery amounts, and whether charitable assistance would be deducted as a "collateral source."\textsuperscript{168} The first issue was thought to be the one most directly affecting the claims of surviving same-sex partners. As clarified by the Interim Final Rule, however, the identity of the eligible claimant is distinct from the identity of the ultimate beneficiaries.

\textsuperscript{162} The government estimates that the average award will be $1.6 million before the collateral offset. Henriques & Barstow, supra note 124.

\textsuperscript{163} Air Transportation Safety and Stabilization Act § 404(a)(2).


This Article was submitted for publication before the issuance of the Final Rule and, therefore, relies heavily on the Interim Final Rule. At the time, this reliance was reasonable because the Special Master was accepting claims which were being filed based on representations made in the Interim Final Rule. Given that filing a claim has the effect of waiving any right to tort recovery, one could assume that the Final Rule would not differ in any significant respects from the Interim Final Rule. In fact, the Final Rule made very few substantive changes in the overall regulatory scheme and the modifications it did make will likely have the effect of only increasing the potential awards. See Statement by the Special Master, 67 Fed. Reg. At 11233-34 (summarizing the clarifications made by the Final Rule).

For purposes of this Article, the most significant changes were the increase in the amount of additional compensation for non-economic loss for a surviving spouse from $50,000 to $100,000 and a modification in the methodology used in calculating economic loss. Id. These two changes only further the disparity between presumptive awards payable where the victim left a surviving same-sex partner and where the victim left a surviving spouse.

of the award. A victim's personal representative is authorized to file the claim, but the award is ultimately distributed through the victim's estate to his beneficiaries or heirs, as determined under the relevant state law. This is very good news for the surviving same-sex partners who are beneficiaries under their partners' wills. However, it does not provide much hope for survivors if their partners died intestate, unless they were residents of Hawaii or Vermont, where surviving same-sex partners are entitled to take under the rules of intestate succession. Finally, it leaves a surviving partner of a victim who died intestate and a resident of California in the incongruous position of not being entitled to share in an award from the Compensation Fund, but having standing under state law to sue for wrongful death.

1. Eligible Claimants

A surviving same-sex partner who is appointed executor of her deceased partner's will qualifies as an "eligible claimant" and is authorized to file a claim for compensation on behalf of her partner. However, if the deceased partner died intestate, it is highly unlikely the surviving partner would be permitted to proceed with a claim on behalf of her partner because under state law a surviving same-sex partner is not generally among the class of individuals eligible to be appointed administrator, unless the partner died a resident of either Hawaii or Vermont. The identification of an "eligible claimant" is important to determine who has control over bringing the claim, but it does not determine the identity of the recipients of the award. Accordingly, if the surviving partner were named as a beneficiary under the will, but not, for whatever reason, appointed executor of the will, then the surviving partner could still qualify as a "beneficiary" of the award, but would not have the authority to decide whether to assert a claim in the first place.

The Interim Final Rule explains that the Compensation Fund was "designed to provide a no-fault alternative to tort litigation for individuals who were physically injured or killed as a result of the aircraft hijackings and crashes..."

---

170. See infra text accompanying notes 242-60 (discussing distribution rules).
171. See supra text accompanying notes 60-67 (discussing surviving same-sex partners and rules of intestate succession).
172. See supra text accompanying notes 106-19 (discussing surviving same-sex partners and rules governing wrongful death actions).
174. See supra text accompanying notes 81-91 (describing rules governing appointment of executors and administrators and surviving same-sex couples). Under a new California law, a surviving "registered domestic partner" may qualify as an administrator. See supra note 85 for a discussion of the amended version of CAL. PROB. CODE § 8462. However, a "registered domestic partner" is not an intestate heir, making the ability to serve as administrator of limited utility. Id.
175. See September 11 Victim Compensation Fund—Interim Final Rule § 104.3, 66 Fed. Reg. at 66,282 (defining "beneficiary" as "a person entitled under the laws of the decedent's domicile to receive payments or benefits from the estate of or on behalf of the decedent").
on September 11, 2001.”176 It excludes those who suffered property losses or lost employment or who experienced non-physical injuries.177 In order to be eligible, an individual must have been present “at the time, or in the immediate aftermath, of the terrorist-related aircraft crashes” at the World Trade Center, the Pentagon, or Shanksville, Pennsylvania,178 or have been a passenger or a crew member on one of the four aircraft which crashed that day.179 Where the victim is deceased, the statute provides that the eligible claimant is “the personal representative...who files a claim on behalf of the decedent.”180

As explained in Part II above, “personal representative” is a state probate term which identifies the individual appointed to act either as executor of the decedent’s will or, if the decedent died intestate, as administrator of the decedent’s estate.181 The Interim Final Rule clarifies that the statutory reference to a “personal representative” was intended to be read as a term of art and to be defined by reference to state law, presumably the state in which the decedent was domiciled.182 In the case of surviving same-sex partners, this reliance on

177. September 11 Victim Compensation Fund—Interim Final Rule, § 104.1, 66 Fed. Reg. at 66,282 (stating “[a]ll compensation provided through the Fund will be on account of personal physical injuries or death”).
178. Air Transportation Safety and Stabilization Act, Pub. L. No. 107-42, § 405(c)(2)(A)(i), 115 Stat. 230, 239 (2001). The Interim Final Rule defines “immediate aftermath” and provides a special rule for “rescue workers.” September 11 Victim Compensation Fund—Interim Final Rule, § 104.2(b), 66 Fed. Reg. at 66,282. “Immediate aftermath” is defined as “the period of time from the crashes until 12 hours after the crashes.” Id. For “rescue workers,” the time limit is increased to 96 hours. Id.

The Interim Final Rule also further defines “present at the site.” September 11 Victim Compensation Fund—Interim Final Rule, § 104.2(e), 66 Fed. Reg. at 66,282. In addition to the actual buildings that were destroyed or partially destroyed, the Special Master is authorized to designate an area contiguous to the crash site where “there was a demonstrable risk of physical harm resulting from the impact of the aircraft or any subsequent fire, explosions, or building collapses (generally, the immediate area in which the impact occurred, fire occurred, portions of buildings fell, or debris fell upon and injured persons).” September 11 Victim Compensation Fund—Interim Final Rule, § 104.2(e)(2), 66 Fed. Reg. at 66,283.

179. Air Transportation Safety and Stabilization Act § 405(c)(2)(B). With regard to the individuals who were aboard the four aircraft, the statute specifically excludes “an individual identified by the Attorney General to have been a participant or conspirator” in the September 11 attacks. Id.

180. Air Transportation Safety and Stabilization Act § 405(c)(2)(C).

181. The personal representative is a fiduciary who is entitled to compensation for her services. See supra text accompanying notes 81-91 for a discussion of the role of personal representatives. The personal representative, in her individual capacity, may also have a pecuniary interest in the estate. Generally, the will specifically appoints the executor, whose appointment is then confirmed by the local probate court or register of wills. In the case of an intestacy, most states provide an order of preference that tracks the intestate statute. For a discussion of intestacy, see supra text accompanying note 84.

182. The Interim Final Rule provides that, for purposes of the Compensation Fund, a “personal representative” is “[a]n individual appointed by a court of competent jurisdiction as the Personal Representative of the decedent or as the executor or administrator of the decedent’s will or estate.” September 11 Victim Compensation Fund—Interim Final Rule, § 104.4(a)(1), 66 Fed. Reg. at 66,283. The regulations could have defined “personal representative” to refer to close relatives rather than to the executor of the victim’s will or the administrator of the victim’s estate. The claim form requires a
state law may produce dramatically different results for otherwise similarly situated surviving partners depending on their state of residence. For example, if a deceased partner was a resident of Vermont, the surviving partner can qualify as the decedent's personal representative even if the deceased partner died intestate. If the deceased partner was a resident of New York, the surviving partner can only qualify as a personal representative if the deceased partner left a valid will appointing the surviving partner as executor.

The Special Master has an interest in ensuring that all affected parties are in agreement with regard to the identity of the personal representative because the Compensation Fund will permit only one claim per victim. Moreover, the filing of the claim purports to waive the right to file any civil action for damages resulting from the September 11 attacks. To further unanimity among the interested parties, the Interim Final Rule requires the personal representative to give notice to certain enumerated "beneficiaries" before filing a claim. It also provides procedures whereby interested parties can challenge the identity of the personal representative. The list of individuals required to receive notice is quite expansive. Before the personal representative files a claim, written notice must be provided to:

- the immediate family of the decedent (including, but not limited to, the decedent's spouse, former spouses, children, other dependents, and parents), to the executor, administrator, and beneficiaries of the decedent's will, and to any other persons who may reasonably be expected to assert an interest in an award or to have a cause of action to recover damages relating to the wrongful death of the decedent.

---

personal representative to indicate her relationship to the victim. Eligibility Form and Application for Advanced Benefits form The September 11 Victim Compensation Fund of 2001, available at http://usdoj.gov/victimcompensation/eligformappadvben.pdf (last visited Feb. 17, 2002). The choices include spouse, child, parent, guardian, attorney and other. Id. After the category of "other," the form contains space for the personal representative to "indicate nature of the relationship." Id.

If the decedent's will has not yet been submitted to probate, the Special Master is authorized to recognize the individual appointed executor under an existing, but unprobated will. September 11 Victim Compensation Fund—Interim Final Rule, § 104.4(a)(2), 66 Fed. Reg. at 66283. In the case of an intestacy where no formal administration has been opened, the Special Master is authorized to appoint the individual who stands first in line under the state laws of intestate succession. Id.

183. The statute creating the Compensation Fund provides that "[n]ot more than one claim may be submitted under this title by an individual or on behalf of a deceased individual." Air Transportation Safety and Stabilization Act § 405(c)(3)(A).

184. Air Transportation Safety and Stabilization Act § 405(c)(3)(B)(i). There is a limited exception where an individual has already commenced a civil action, in which case he must have withdrawn the action within 90 days of the promulgation of the final regulations in order to submit a claim to the Compensation Fund. Id. § 405(c)(3)(B)(ii).

185. September 11 Victim Compensation Fund—Interim Final Rule, § 104.4(b), 66 Fed. Reg. at 66283. The Interim Final Rule provides that "[p]ersonal delivery or transmission by certified mail, return receipt requested, shall be deemed sufficient notice under this provision." Id.


187. September 11 Victim Compensation Fund—Interim Final Rule § 104.4(b), 66 Fed. Reg. at 66283. The Eligibility Form prescribes a form of notice and expands the list of recipients to include beneficiaries of life insurance policies. Eligibility Form and Application for Advanced Benefits from...
The notice requirement presents an obvious problem for a surviving same-sex partner if the deceased partner’s family did not support the relationship. On the other hand, the notice provision arguably could protect a surviving same-sex partner from an overly anxious family member where the surviving partner is either a dependent or could “reasonably be expected to assert an interest in an award or to have a cause of action to recover damages relating to the wrongful death of the decedent,” as would be the case in California, Hawaii, or Vermont. For purposes of the Compensation Fund, a “dependent” is determined by reference to federal income tax rules and, based on the above-quoted language, it is arguable that a tax dependent qualifies as a member of “the immediate family of the decedent.”


188. See generally supra text accompanying notes 66-67 (discussing difficulties encountered when deceased partner’s family, as legal heirs, are not supportive or are hostile to surviving partner).

189. September 11 Victim Compensation Fund—Interim Final Rule § 104.4(b), 66 Fed. Reg. at 66,283. This is arguably a very low standard. It is only required that the individual be “reasonably expected to assert an interest in an award.” Id. There is no requirement that the individual be an eligible claimant or even have a reasonable expectation of success.

190. See supra text accompanying notes 106-119 (discussing surviving same-sex partners and wrongful death actions).

191. The Interim Final Rule provides that the Special Master “shall identify as dependents those persons so identified by the victim on his or her federal income tax return for the year 2000” in addition to any after-born minor children or other individuals who became dependent for income tax purposes on the decedent during 2001. September 11 Victim Compensation Fund—Interim Final Rule, § 104.3(b)(1), (2), 66 Fed. Reg. at 66282. Special rules apply where the decedent was not required to file a tax return for 2000. September 11 Victim Compensation Fund—Interim Final Rule, § 104.3(b)(3), 66 Fed. Reg. at 66282.

The reference to the federal income tax definition of “dependent” creates an ambiguity with regard to the definition of “dependent” because the federal income tax has two separate standards. The first standard applies to the many instances under the federal income code where favorable tax treatment extends to a taxpayer and her “dependents.” See, e.g., I.R.C. § 106 (2001) (excluding from employee’s gross income employer-provided health insurance for employee and her “dependents”). In order to qualify as a “dependent,” an individual must satisfy a relationship test and a support test. Where an individual is not related to the taxpayer, she can only qualify as a dependent if she is a member of the taxpayer’s household and the taxpayer provides “over half” of her support. I.R.C. § 152(a)(9) (2001). There is then a third requirement that must be met if the taxpayer wishes to claim an additional personal exemption on account of her dependent. In such case, the dependant must satisfy an additional income test and cannot receive gross income in excess of the amount of the personal exemption. See I.R.C. § 151 (2001) (providing exception to income requirement for spouses and certain children). Given that the amount of the personal exemption for 2001 is $2,900, this third requirement is a significant restriction, particularly for adult dependents. Rev. Proc. 2001-13, 2001-3 I.R.B. 337. Because the Interim Final Rule refers to “persons so identified by the victim on his or her federal tax return,” it is arguable that the intent of the Interim Final Rule was to only include within the definition of dependents those individuals for whom the victim had claimed an additional personal exemption. September 11 Victim Compensation Fund—Interim Final Rule, § 104.4(b), 66 Fed. Reg. at 66,282.

2. Calculation of the Award

The awards from the Compensation Fund are measured in terms of "economic loss" and "non-economic losses."\(^{193}\) The existence of a surviving spouse and/or a dependent will increase the amount of the award for both types of loss.\(^{194}\) In light of DOMA, which defines marriage for all federal purposes as the union between one man and one woman, it seems highly unlikely that the Special Master would interpret "spouse" to include a same-sex partner.\(^{195}\) Accordingly, a victim with a surviving same-sex partner will always receive less than a similarly situated victim with a surviving opposite-sex spouse.\(^{196}\)

Based on the illustrative tables published with the Final Rule, a forty-year-old victim whose average income over the last three years has been $100,000 and who leaves a surviving same-sex partner would be entitled to a presumptive award of $1,168,522, whereas that amount is increased to $1,896,663 if the same victim is survived by an opposite-sex spouse.\(^{197}\) The Interim Final Rule establishes a minimum combined award for economic and non-economic loss before the deduction of collateral sources of $500,000 for a deceased victim with

---


195. The Final Rule revised the methodology for computing presumed economic loss. *Statement of Special Master, September 11 Victim Compensation Fund—Final Rule*, 67 Fed. Reg. at 11234. The revised tables were released on April 2, 2002, and are available on the Department of Justice website. *See Presumed Economic and Non-Economic Loss Tables, available at* http://www.usdoj.gov/victimcompensation/vc_matrices.pdf (last visited April 12, 2002) (hereinafter "Compensation Matrices") (establishing presumptive awards under a variety of circumstances). The revised tables increase the disparity between the presumptive awards payable on account of a victim who leaves a surviving same-sex partner and a victim who leaves a surviving spouse. Based on the initial tables, a forty-year-old victim whose income averaged $100,000 over the last three years and who leaves a surviving same-sex partner would have been entitled to a presumptive award of $1,050,547, whereas if the same victim had left a surviving spouse the amount would have been $1,648,303. *Presumed Economic and Non-Economic Loss Tables, available at* http://www.usdoj.gov/victimcompensation/loss_calc.html (last visited Feb. 17, 2002) (hereinafter "Loss Tables"). Under the revised tables, these amounts are increased to $1,168,522 and $1,896,663, respectively. Compensation Matrices, *supra*.

196. Of course, this would not be the case if the victim with the surviving same-sex partner had ten children and the victim with an opposite-sex spouse who had none. However, all things otherwise being equal, the victim with a surviving spouse would be entitled to a larger award than a victim with a surviving partner.

197. In conjunction with the issuance of the Final Interim Rule, the Special Master published tables illustrating the presumed combined economic and non-economic loss for a number of variables, including age, income levels, marital status, and number and age of dependents based on this methodology. *See Loss Tables, supra* note 194 (establishing presumptive awards under a variety of circumstances).
a surviving spouse or a dependent and $300,000 for an unmarried victim with no recognized spouse or dependents. Therefore, at a minimum, a victim with a surviving spouse is worth $200,000 more than a victim with a non-dependent surviving same-sex partner.

It is not possible to use the published tables to gauge the impact of an adult dependent on the award because the tables are designed to provide illustrations which take into account dependent children of specific ages who cease to be dependent upon reaching age 18. If the surviving partner qualifies as a dependent based on the relevant federal income tax standard, the resulting award will be larger than that of an “unmarried” victim with no dependents because of certain “consumption factors” and the $100,000 of additional non-economic loss awarded for each dependent. However, if the deceased partner were co-parenting a non-biological, non-adoptive child whom the deceased partner could not claim as a dependent for tax purposes, the child will be disregarded.

a. Economic Loss

It is in connection with the calculation of “economic loss” that the Compensation Fund comes closest to providing an alternative to the types of damages that would be awarded in a wrongful death action. The statute defines “economic loss” as “any pecuniary loss” resulting from the September 11 attacks, including “the loss of earnings or other benefits related to employment, medical expense loss, replacement services loss, loss due to death, burial costs, and loss of business or employment opportunities.” It specifically limits such

---


199. The minimum amount would most likely be payable in the case of older, low income victims. This is not a guaranteed minimum award because such amount is still subject to collateral offset. Presumably, the low income victims are less likely to have left collateral sources available to their beneficiaries in the form of life insurance or pension funds, which would mean that the minimum amount would not be canceled out by collateral sources. On the other hand, higher income victims who, according to the tables, would receive a much larger assumed award may have left considerable collateral sources for their beneficiaries which could completely offset the presumptive award. The minimum amount is not designed to provide a minimum payment on behalf of those individuals. See Statement of Special Master, September 11 Victim Compensation Fund—Interim Final Rule, 66 Fed. Reg. at 66,275 (noting establishment of minimum awards “ensures that every needy claimant’s total compensation from this fund will be at least equal to these threshold amounts”).

200. The explanation of the methodology which accompanied the initial tables notes that the calculations “assume that...the child would have continued to be a dependent until the age of 18.” See Loss Tables, supra note 194 (explaining calculation of loss).

201. See Loss Tables, supra note 194. (explaining “consumption factor”).

202. This might also be a problem in the case of parents who are divorced where the non-custodial parent may be the one who claims the child as a dependent for federal income tax purposes. As explained in supra note 15, the question of de facto children is beyond the scope of this Article. The Final Rule clarifies that the victim need not have actually claimed the individual as a dependent on his federal tax return, provided the individual would have qualified for such treatment. September 11 Victim Compensation Fund—Final Rule § 104.3(b), 67 Fed. Reg. at 11245.

damages to those "allowed under applicable state law." 204

The manner in which economic loss is calculated accounts for the major
difference in the size of the presumptive awards on behalf of married versus
"unmarried" victims. The Final Rule establishes a methodology for the
calculation of presumed economic loss that is intended to apply in most cases. 205
According to the statement by the Special Master preceding the Interim Final
Rule, the methodology is "based on readily identifiable individual
circumstances...such as age, prior income levels, marital status, and the number
and ages of a victim's dependents." 206 The calculation assumes a "consumption
factor" that is sensitive to both marital status and the number of dependents and
represents the percentage of income a decedent is assumed to devote to personal
expenditures or consumption. 207 For example, a forty year-old victim with an
average income of $100,000 over the last three years who leaves a surviving
same-sex partner would be considered "unmarried" and, therefore, is assumed to
have devoted forty-eight percent of her income to personal consumption. 208 This
percentage decreases to 12.5 percent for a similarly situated victim who leaves a
surviving opposite-sex spouse. 209

The methodology used for calculating economic loss is presumptive. 210
Claimants may present evidence of "extraordinary individual circumstances" and
urge the Special Master to consider other factors. 211 It remains to be seen
whether the Special Master would consider proof of the type of economic
interdependence usually required to establish a domestic partnership as an
"extraordinary individual circumstance" which might merit a departure from the
presumptive award methodology. 212 As mentioned above, it is also unclear from


204. Id.

205. See Statement of Special Master, September 11 Victim Compensation Fund—Final Rule, 67
behind presumptive methodology).

206. Id.

207. See Compensation Matrices, supra note 194 (explaining "consumption factor").

208. Decedent's Personal Expenditures or Consumption as Percent of Income for Single Decedent,

209. Decedent's Personal Expenditures or Consumption as Percent of Income for Married
Decedent with no Dependent Children, available at http://www.usdoj.gov/victimcompensation/
loss_calc.html (last visited Feb. 17, 2002).

210. See Statement of Special Master, September 11 Victim Compensation Fund—Interim Final

211. September 11 Victim Compensation Fund—Interim Final Rule, § 104.33, 66 Fed. Reg. at
66,285 (describing hearing process). The Interim Final Rule notes that claimants:
may request that the Special Master...review any evidence relevant to the determination of
the award, including without limitation: Factors and variables used in calculating economic
loss; the identity of the victim's spouse and dependents; the financial needs of the claimant;
facts affecting non-economic loss; and any factual or legal arguments that the claimant
contends should affect the award.

Id.

212. See id. (listing different types of factors specifically mentioned in regulatory guidance).
Shortly after the proposed regulations were released, the Special Master told The New York Times
the published tables how to account for an adult dependent, as opposed to a minor dependent who is assumed to become independent upon attaining the age of 18.213 Presumably, this would constitute an "extraordinary individual circumstance" which would require factoring in a dependent for the term of the dependent's life expectancy or that of the victim.214

b. Non-economic Loss

By compensating for non-economic loss related to "physical and emotional pain, suffering, inconvenience, physical impairment, [and] mental anguish" experienced by the victim, the Compensation Fund provides an alternative to a survival action that would be brought on behalf of the victim for damages suffered between the time of injury and death.215 The Final Rule establishes a presumed non-economic award for victims of $250,000.216 This amount is increased by $100,000 where the victim is survived by a spouse and by an extra $100,000 for each dependent.217 Here, the fact that a victim was survived by a same-sex partner will only be taken into account if the partner qualified as a dependent for federal income tax purposes.218 Otherwise, the presumptive award on behalf of a victim survived by a same-sex partner will be $100,000 less than an award for a victim survived by a spouse.

The Special Master opted for an across-the-board figure of $250,000 in order to establish a "rational and just way to approach the imponderable task of placing a dollar amount upon the pain, emotional suffering, loss of enjoyment of life, and mental anguish suffered by the thousands of victims of the September 11 attacks[]."219 Stating that in most cases the exact circumstances of death would be "unknowable," 220 the Special Master declined to draw distinctions between those in the World Trade Center offices who were killed instantly upon the impact of the aircraft and those who were trapped in Windows On the World on the 107th floor of the North Tower from the time of impact at 8:46 a.m. until

---

213. This would also be the case with a disabled child or an incapacitated adult.
217. Id.
218. See supra note 191 for a discussion of rules governing dependent status for federal income tax purposes.
220. Id.
he North Tower finally collapsed 102 minutes later at 10:28 a.m.221 The Special Master further explained that the $250,000 figure was comparable to the payments awarded to members of the military and public safety officers killed in the line of duty.222 As noted in Part II.B, surviving same-sex partners do not qualify for these federal survivor death benefits because eligible beneficiaries are restricted to “spouses” and other close relatives.223 This presents the paradoxical situation where a surviving same-sex partner of a rescue worker could be denied payment under the federal death benefit program, but recover from the Compensation Fund an amount designed to be comparable to the one that was denied by operation of DOMA.224

Despite the Special Master’s stated desire to treat all of the victims equally, the $100,000 additions to noneconomic loss in the case of a surviving spouse and/or dependents introduce a distinction in payment that does not appear to be directly related to the actual pain and suffering experienced by the victim.225 The additional payment in the case of a spouse and/or dependents is arguably authorized by the statute creating the Compensation Fund which includes under the definition of “noneconomic loss” a host of damages that would be typically asserted by a survivor on her individual behalf, such as “loss of society and companionship, loss of consortium (other than loss of domestic service), hedonic damages...and all other nonpecuniary losses of any kind or nature.”226 The inclusion of these types of losses suggests that Congress intended that the Compensation Fund should take into account nonpecuniary loss suffered by a survivor.227 This would explain, for example, the statutory reference to loss of consortium and militate against the otherwise very disturbing conclusion that the

221. Id. The Statement of the Special Master explains:
Some victims experienced terror for many minutes, as they were held hostage by terrorists on an airplane or trapped in a burning building. Some victims had no warning of what was coming and died within seconds of a plane hitting the building in which they worked. While these circumstances may be knowable in a few extraordinary circumstances, for the vast majority of victims these circumstances are unknowable.

222. Statement of Special Master, September 11 Victim Compensation Fund—Interim Final Rule, 66 Fed. Reg. at 66279. The Statement of the Special Master describes the presumptive non-economic award as “roughly equivalent to the amounts received under existing federal programs by public safety officers who are killed while on duty, or members of our military who are killed in the line of duty while serving our nation.” Id.

223. See supra text accompanying notes 102-05 for a discussion of the eligibility requirements for certain survivor benefits.

225. See id. (discussing calculation of non-economic loss).
226. Id.
227. Id. Before the issuance of the Interim Final Rule, it was possible to read the addition of these types of damages as relevant to calculating an award for an individual who was injured in the September 11 attacks, but survived. The $100,000 addition to the award for non-economic loss where the victim is survived by a spouse clarifies that the award includes a component designed to compensate survivors for non-economic loss.
methodology adopted by the Special Master places a higher value on the lifetime pain and suffering of a married victim or on the lifetime pain and suffering of a victim with tax dependents.

As with the calculation of economic loss, the set $250,000 award for non-economic loss is presumptive.\textsuperscript{228} Claimants are again invited to present "extraordinary circumstances that justify departure from the presumed award."\textsuperscript{229} It remains to be seen whether claimants will be able to argue successfully that the Special Master should depart from the presumed award upon a showing of a same-sex domestic partnership.\textsuperscript{230} However, unlike a departure from the actuarial consumption factors discussed above, a departure from the presumed $250,000 requires a recognition of the non-economic, non-pecuniary aspects of a same-sex relationship.\textsuperscript{231} It requires the Special Master to award damages to a surviving partner for loss of society and loss of consortium—losses currently compensable under the laws of only three states.\textsuperscript{232}

c. Collateral Source Offset

In calculating the amount of an award, Congress directed that the award should be reduced by "all collateral sources,"\textsuperscript{233} such as "life insurance, pension funds, death benefit programs," and government payments specifically related to the September 11 attacks.\textsuperscript{234} In this regard, the Compensation Fund acts more like a state crime victims board, which is designed as a payor of last resort, than as a true alternative to tort damages.\textsuperscript{235} The collateral source rule has proven to be a lighting rod for controversy since the creation of the Compensation Fund was announced.\textsuperscript{236} The Interim Final Rule clarified that private charitable assistance would generally not be considered a "collateral source" and,

\textsuperscript{228} Id.
\textsuperscript{229} Id.
\textsuperscript{230} See Henriquez & Barstow, supra note 212 (noting Special Master has been encouraging claimants to "state their case").
\textsuperscript{231} See generally Culhane, supra note 107 (discussing status of surviving same-sex partners under tort law).
\textsuperscript{232} See supra note 109 for the proposition that California, Hawaii, and Vermont permit same-sex partners to bring wrongful-death and survival actions.
\textsuperscript{233} Air Transportation Safety and Stabilization Act, Pub. L. No. 107-42, § 402(4), 115 Stat. 237 (2001). The statute defines "collateral source" to include, apparently without limitation, "life insurance, pension funds, death benefit programs, and payments by Federal, State, or local governments related to the terrorist-related aircraft crashes of September 11, 2001.” Id.
\textsuperscript{234} Id.
\textsuperscript{235} Collateral sources are not deducted from damage awards for survival actions or wrongful death claims. RESTATEMENT 2D OF TORTS § 920A(1). The "collateral source rule" provides: "Payments made to or benefits conferred on the injured party from other sources are not credited against the tortfeasor's liability, although they cover all or part of the harm for which the tortfeasor is liable." Id. The Comment explains that "it is the position of the law that a benefit which is directed to the injured party should not be shifted so as to become a windfall for the tortfeasor.” Id. cmt. b.
\textsuperscript{236} See Diana B. Henriquez & David Barstow, A Nation Challenged: Victims' Compensation; Fund for Victims' Families Already Proves Sore Point, N.Y. TIMES, Oct. 1, 2001, at A1 (discussing dissatisfaction with, inter alia, collateral offset rule).
therefore, amounts paid to the victim's survivors by charitable organizations, such as the Red Cross, would generally not reduce the ultimate amount of a claimant's award.237

The deduction of collateral sources assumes that the identity of the recipient of the collateral payment is the same as the identity of the beneficiaries of the award from the Compensation Fund. This would not be the case where a victim failed to execute a will, but faithfully filled out a beneficiary designation form in favor of her same-sex partner. Because the victim died intestate, any award from the Compensation Fund would be payable in accordance with the rules of intestate succession to the exclusion of the surviving partner (except in Hawaii or Vermont), but it would be subject to an offset for the collateral sources payable to that partner.238 The converse could arise where the deceased partner leaves a will in favor of the surviving same-sex partner, but fails to execute the necessary beneficiary designation forms to effect the transfer of non-probate property.239 As discussed in Part II.B, unless the employer (or payor) has a domestic partnership policy or is otherwise obligated by law to provide domestic partnership benefits, the failure to execute the proper beneficiary designations will make the benefits payable to the next of kin.240 In such a case,

237. September 11 Victim Compensation Fund—Interim Final Rule, § 104.47(b), 66 Fed. Reg. 66274, 66287 (proposed Dec. 21, 2001) (to be codified at 28 C.F.R. pt. 104) (discussing "extraordinary individuals' circumstances"). "Services or in-kind charitable gifts" are expressly excluded from the definition of collateral sources. Id. In addition, "charitable donations distributed... by private charitable entities" are excluded from the definition of collateral sources. Id. With respect to this last category, however, the Special Master has the discretion to classify a donation from a private charitable organization as a collateral source if he determines that it is "in substance" the same type of payment meant to be excluded under the collateral source rule. Id.

238. See supra text accompanying notes 60-67 (discussing rules of intestate succession). The gay and lesbian advocacy groups lobbying for equal treatment for surviving same-sex partners were well aware that there could be a difference between those receiving collateral benefits and those considered as "beneficiaries" under the Compensation Fund. Lambda Legal Defense and Education Fund, Comments on the Department of Justice's Rulemaking Regarding the September 11th Victim Compensation Fund of 2001, Nov. 21, 2001, available at http://www.lambdalegal.org/cgi-bin/iowa/documents/record?record=919 (last visited Feb. 14, 2002). In comments on the initial proposed rulemaking, a consortium of advocacy groups urged the Special Master not to reduce awards made to relatives by collateral source payments made to surviving same-sex partners who may be "unfairly" deemed ineligible to participate in awards from the Compensation Fund. Id. The Final Rule addresses this situation and grants the Special Master "discretion to exclude...compensation from the collateral source offset where necessary to prevent beneficiaries from having their awards reduced by collateral source compensation that they will not receive." September 11 Victim Compensation Fund—Final Rule § 104.47(a), 67 Fed. Reg. at 11246.

239. This was the case with Sheila Hein, who was killed at the Pentagon. See infra text accompanying notes 275-302 (discussing Hein's surviving partner's efforts to file for victim compensation with Virginia Criminal Injuries Compensation Board). Hein left a will under which her partner, Peggy Neff, was appointed executor and named as primary beneficiary. See infra note 296 (describing Hein's estate plan). Hein, however, neglected to fill out a beneficiary designation for $150,000 of life insurance she had received through the Department of Defense. See infra text accompanying note 298 (explaining Hein's failure to designate Neff). As a result, the life insurance proceeds are payable to Hein's mother as Hein's next of kin. See infra note 299 (noting Hein's mother intends to help Neff).

240. See supra text accompanying notes 101-02 (describing potential consequences when
the award from the Compensation Fund would be payable to the surviving same-sex partner under the decedent’s will, but it would be reduced by collateral sources payable to next of kin. 241

3. Determination of the Recipients of the Award

Under the Interim Final Rule, an award with respect to a deceased victim is payable to the victim’s personal representative, who is then directed to distribute the award in accordance with the terms or the decedent’s will, the rules governing intestate succession, or the ruling of a court of competent jurisdiction, whichever is applicable. 242 However, if the Special Master concludes that the distribution would “not appropriately compensate the victim’s spouse, children or other relatives,” 243 he can direct the victim’s personal representative, which as discussed above may very well be the surviving partner, to reallocate the award in favor of such relatives. 244 Accordingly, under the Interim Final Rule, a surviving same-sex partner is eligible to receive an award from the Compensation Fund provided that she is a beneficiary under the victim’s will, the will was not disregarded as the result of a successful will contest, and the Special Master does not contravene the victim’s testamentary wishes and direct that the award should be payable to the victim’s relatives instead of the beneficiaries under the victim’s will. If the victim died intestate, the surviving partner would only be entitled to the award where the victim was a resident of Hawaii or Vermont and the couple had complied with the requisite formalities to establish a relationship of “reciprocal beneficiaries” or had entered into a civil union. 245

Despite the lingering concern that the exercise of the discretion reserved by

241. As Hein’s executor and beneficiary, Neff is eligible to file a claim with the Compensation Fund and is likely the beneficiary of any award approved by the Special Master. However, under the collateral offset rule, the amount of Neff’s award would be reduced by the amount of the life insurance proceeds payable to Hein’s mother.

242. See September 11 Victim Compensation Fund—Interim Final Rule, § 104.52, 66 Fed. Reg. at 66287 (discussing distribution of award to beneficiaries). The actual language of the Interim Final Rule is arguably ambiguous. Although the heading of section 104.52 refers to “decedent’s beneficiaries,” the text of the regulation simply provides that the award shall be distributed “in a manner consistent with the law of the decedent’s domicile.” Id. Standing alone, this could invoke a concern that the award is payable in accordance with the rules of intestate succession. This would be notwithstanding the reference in the heading to “beneficiaries” who take under a will, as opposed to the term “heirs” who would take by virtue of intestate succession. The Statement of the Special Master resolves any ambiguity when it notes that “the Personal Representative must agree in an acknowledgment and release form to distribute the award to the beneficiaries of the decedent in accordance with the decedent’s will or applicable state law or ruling by a court of competent jurisdiction.” See Statement of Special Master, September 11 Victim Compensation Fund—Interim Final Rule, 66 Fed. Reg. at 66280. The last provision is apparently designed to take into account any successful will challenges or elections against the will made by surviving spouses.


244. See id. (discussing Special Master’s discretion in awarding compensation).

245. See supra text accompanying notes 42-43 (discussing requirements under Hawaii and Vermont law).
the Special Master could disadvantage a surviving same-sex partner, the overall result under the Interim Final Rule is generally favorable to same-sex couples—at least to those same-sex couples who had the foresight to execute wills. Given that the statute creating the Compensation Fund specifically states that its purpose is "to provide compensation to any individual (or relatives of a deceased individual)," the regulatory guidance could have easily privileged "relatives" by establishing a distribution schedule that replicated state intestate laws and excluded same-sex partners, similar to the provisions found in employment-related survivor benefits discussed in Part II.B or the statutory limitations imposed with regard to wrongful death actions discussed in Part II.C. Indeed, the statutory language creating the Compensation Fund is remarkably vague regarding the identity of the ultimate recipients of the award. The only reference to "relatives" is in a parenthetical in its purpose clause. On the subject of distribution, section 406 of the statute creating the Compensation Fund seems promising with its heading of "Payments to Eligible Individuals," but its text only discusses the timing of payments and authorizes the payment of any compensation due to a deceased victim to the decedent's personal representative.

The focus on the victim’s estate and the deference to state probate law works to the benefit of a surviving same-sex partner where the partner had an adequate estate plan and the partner's next of kin are not likely to contest the will. Notwithstanding the intimations of some pro-gay advocates, the federal government has not acknowledged that the Interim Final Rule was drafted in this manner in order to accommodate surviving same-sex partners. Indeed, if


247. See id. (discussing distribution of final award). Interestingly, the statute imposes several time limitations with regard to the payment of the award, but is silent with respect to its intended recipient. See, e.g., Air Transportation Safety and Stabilization Act § 406(a) (requiring authorization of payment to take place within twenty days after Special Master determines amount of award).

248. Air Transportation Safety and Stabilization Act § 403. Section 403 recites that the purpose of the Compensation Fund is "to provide compensation to any individual (or relatives of a deceased individual) who was physically injured as a result of the terrorist-related aircraft crashes of September 11, 2001." Id.

249. Section 402(6) defines the term "eligible individual" as "an individual determined to be eligible for compensation" and references section 405(c), which limits the eligibility of claimants to those who were killed or injured in the September 11 attacks. Air Transportation Safety and Stabilization Act §§ 402(6), 405(c). Where the victim was killed, the victim’s personal representative is authorized to file the claim for compensation on behalf of the decedent. Id. at § 405(c)(2)(C).

250. At least one-quarter of all of the comments received during the initial public comment period addressed the question of whether surviving unmarried partners should be permitted to participate in the Compensation Fund. See Appendix, September 11 Victim Compensation Fund—Interim Final Rule, 66 Fed. Reg. 66,274, 66,288 (proposed Dec. 21, 2001) (summarizing variety of comments received). Until the issuance of the Interim Final Rule, it was not clear whether the payment to the personal representative was indeed intended as a payment to the estate or whether the Compensation Fund envisioned the personal representative as merely a convenient stakeholder who would then be directed to distribute the award in accordance with a set schedule, perhaps replicating state laws regarding the rules of intestate succession, but in any event favoring relatives as defined by
the focus on the estate were an effort to accommodate surviving same-sex partners through a regulatory sleight of hand, it is hopelessly flawed and underinclusive given the lack of relief offered to the surviving partners of victims who died intestate.\textsuperscript{251}

The discretion reserved by the Special Master to disregard the terms of a victim’s will in order to provide adequately for “a spouse, child or other relative” is potentially a problem for surviving same-sex partners who are beneficiaries under a victim’s will and otherwise stand to receive the award.\textsuperscript{252} Not surprisingly, the discretion reserved by the Special Master seems restricted to reallocating the award \textit{in favor} of a spouse, child, or other relatives.\textsuperscript{253} This suggests that the Special Master is not empowered to reallocate the payment of the award in a way that works to the detriment of a victim’s spouse, child or other relatives. For example, the Special Master apparently has the discretion to reallocate the payment of an award from a surviving partner who would otherwise have taken as the sole beneficiary under the victim’s uncontested will

\footnotesize{biology, marriage, and adoption.} Interestingly, the gay and lesbian advocacy groups supported this stakeholder approach in the first round of public comments. See Lambda Legal Defense and Education Fund, \textit{Comments on the Department of Justice’s Rulemaking Regarding the September 11th Victim Compensation Fund of 2001}, Nov. 21, 2001, available at http://www.lambdalegal.org/cgi-bin/iowa/documents/record?record=919 (last visited Feb. 14, 2002) (discussing role of personal representative). They urged the Special Master to distribute the award in accordance with the degree of harm suffered and to include surviving same-sex partners on an equal basis with spouses. \textit{Id.}

An article in LGNY, which bills itself as “the newspaper for lesbian and gay New York,” quoted the executive director of the Empire State Pride Agenda, a gay and lesbian organization working in New York state, to the effect that the White House intentionally drafted the regulations to accommodate same-sex couples. Paul Schindler, \textit{Bush Administration Mixes Message on Gay Partners}, LGNY, at http://www.lgny.com/017/web/BushOnPartners174.html (last visited Jan. 18, 2002). According to the article, the White House agreed not to exclude same-sex partners provided that Governor Pataki and Mayor Giuliani expressed their strong support for allowing same-sex partners to participate. \textit{Id.}

251. The primacy granted to the victim’s personal representative and the victim’s estate is just as easily explainable by reference to the overall nature of the Compensation Fund and considerations of administrative convenience. As explained above, the Compensation Fund operates, at least in part, as an alternative to the traditional survival action which is brought by a victim’s personal representative and is considered an asset of the victim’s estate. Accordingly, a payment to the victim’s estate to be distributed under the will or the rules of intestate succession is consistent with the general tort orientation of the Compensation Fund. In addition, both the number of anticipated claims and the speed with which the Special Master must resolve the claims point to the need to identify a single claimant for each victim and a relatively uniform method of payment. The personal representative is a natural choice because of the body of established law which governs the appointment of personal representatives and the fact that a personal representative acts in a fiduciary capacity. By deferring to state law, the Special Master avoids having to allocate each award among the various interested parties.

252. \textit{See September 11 Victim Compensation Fund—Interim Final Rule, \S\ 104.52, 66 Fed. Reg. 66274, 66287 (proposed Dec. 21, 2001)} (to be codified at 28 C.F.R. pt. 104) (stating Special Master may direct all or part of award to be distributed to spouse, children, or relatives).

253. \textit{Id.} The language provides that if the Special Master finds that the proposed distribution “does not appropriately compensate the victim’s spouse, children, or other relatives,” then the Special Master may direct that “all or part of the award be distributed to such spouse, children, or other relatives.” \textit{Id.}
and direct that the personal representative (probably the surviving partner) distribute the award to the victim’s “other relatives.” However, the Special Master does not appear to have the authority to do the reverse and reallocate an award that would otherwise pass under state intestacy laws to next of kin and direct that it be paid to the surviving same-sex partner.

In order for the Special Master to exercise his discretion in favor of a surviving same-sex partner, the partner would have to qualify as a “spouse,” a “child,” or “other relative.” Although neither the statute creating the Compensation Fund nor the Interim Final Rule defines these terms, it is safe to assume that the Special Master would respect the command of DOMA and limit the definition of “spouse” to include only an opposite-sex legal spouse.

The term “other relative” is also not defined in the statute creating the Compensation Fund or by the Interim Final Rule. In its strictest sense, the term “relative” does not include a surviving same-sex partner. However, a reading of “relative” that is restricted to relationships formed by biology or adoption is at odds with the pervasive use of the term “dependents” throughout the Interim Final Rule. As explained above, the term “dependent” is defined by reference to economic support and is independent of considerations of marriage, biology or adoption. The calculation of both economic and non-economic loss takes into account whether the victim had any “dependents,” not whether the decedent had any minor children or “other relatives” who qualified as dependents for federal income tax purposes. Given that “dependents” figure

254. Id.
255. Id.
256. State law still controls to determine whether an opposite-sex couple is legally married because DOMA only federalized the definition of marriage to the exclusion of same-sex couples. 1 U.S.C.S. § 7 (Law. Co-op. 2001). Although it has been abolished in most states, including New York and Virginia, common law marriage is still recognized in Pennsylvania, where a number of the victims of the September 11 attacks were residents at the time of their deaths. See Staudenmayer v. Staudenmayer, 714 A.2d 1016, 1019-20 (Pa. 1998) (reaffirming Pennsylvania’s recognition of common law marriage). See also N.Y. DOM. REL. LAW § 11 (Consol. 2001) (requiring for purposes of New York law that marriage must be “solemnized”); Murphy v. Holland, 377 S.E. 2d 363, 366 (Va. 1989) (rejecting common law marriage under Virginia law). Thus, a surviving, unmarried, opposite-sex partner who could make a case for common law marriage would be considered a spouse for purposes of the Compensation Fund, as well as an intestate heir under Pennsylvania law. Conversely, the survivor of a same-sex couple, who had registered as domestic partners, joined in a civil union, married in a religious ceremony, or married under the laws of another country, would not be considered a “spouse” for purposes of the Compensation Fund because, for all federal purposes, marriage is restricted to one man and one woman. 1 U.S.C.S. § 7 (Law. Co-op. 2001). For that matter, the survivor same-sex partner would most likely not even be considered a relative. See supra text accompanying notes 47-49 (explaining how even distant relatives or the state can have rights superior to surviving same-sex partner).
257. See September 11 Victim Compensation Fund—Interim Final Rule, § 104.52, 66 Fed. Reg. at 66287 (defining various terms, but failing to define “other relatives”).
258. See supra note 191 for a description of the definition of “dependent” for federal tax purposes.
prominently in the calculation of loss, it is anomalous that the Special Master could exercise his discretion only on behalf of "children" and "other relatives," unless "other relatives" is construed to include dependents. This would give the Special Master the authority to reallocate an award if its proposed distribution under the victim's will or the rules of intestate succession did not, in the opinion of the Special Master, adequately compensate an individual who was a dependent for tax purposes, and could provide a limited degree of relief for surviving same-sex partners who also qualified as tax dependents.260

IV. STATE CRIME VICTIMS COMPENSATION BOARDS

Since September 11, the horrific events of that day have been regularly described as a tragedy or a disaster, but rarely as a crime. There is no doubt, however, that the attacks of September 11 were, among others things, a crime. The death certificates of those individuals killed in the September 11 attacks unequivocally list "homicide" as the cause of death,261 and Ground Zero, in addition to being the final resting place of thousands, is a sixteen-acre crime scene.262

Because the September 11 attacks were a criminal act and not a natural disaster, such as a flood or earthquake, the victims and their survivors are

---

260. The definition of children could be interpreted to include de facto children thereby covering non-biological children whom the victim had been co-parenting. This claim would be stronger if the non-biological child had qualified as a dependent for tax purposes, but it would not be precluded if he had not. Stepchildren are specifically included as eligible beneficiaries under the federal programs that compensate public safety officers and military personnel killed in the line of duty. See, e.g., 42 U.S.C.S. § 3796b (Law. Co-op. 2001) (defining "children" to include stepchildren). For example, the $250,000 death benefit payable to the surviving spouse, children, or parents of a public safety officer killed in the line of duty is subject to a relatively expansive definition of the term "child." 42 U.S.C.S. § 3796 (2001). The definition of child includes "any natural, illegitimate, adopted, or posthumous child or stepchild of a deceased public safety officer." 42 U.S.C.S. § 3796(b)(2) (Law. Co-op. 2001). Given that the amount of the presumed award for non-economic loss was set to approximate the benefits under these programs, there would be room to argue that de facto children should be included under the Compensation Fund. This is particularly true in light of the reliance of the Compensation Fund on state law because under the laws of some jurisdictions a non-biological child of a same-sex partner is considered the equivalent of a stepchild for purposes of second parent adoptions. See generally Melanie Jacobs, Micah Has One Mommy and One Legal Stranger: Adjudicating Maternity for Nonbiological Lesbian Coparents, 50 BUFF. L. REV. 431 (2002).

261. For example, John Keohane was killed by falling debris during the collapse of the South Tower as he and his partner of 17 years tried to flee the scene. Tobias Young, Petaluma Mother Recalls Son's Final Words, Sept. 20, 2001, available at http://www.pflag-nb.org/media/pressdemo/09-20-01.htm (last visited Jan. 18, 2002). Keohane's death certificate lists as the cause of death "blunt head trauma by homicide." Id. Keohane's partner survived. Id. However, Keohane's partner, Mike Lyons, later committed suicide on March 1, 2002—his 41st birthday. September 11, 2001: Gay Victims & Heroes, available at http://www.angelfire.com/fl3/uraniamanuscripts/sept11.html (last visited Apr. 12, 2002).

entitled to seek assistance from the state crime victims compensation boards.\textsuperscript{263} State crime victims assistance boards began appearing in the United States in the mid-1960s, and by 1992, every state and the District of Columbia had established a crime victims assistance board to compensate the victims of crimes for at least a portion of their economic losses.\textsuperscript{264} The state boards are funded in part by grants from the federal government and in part by fines and penalties levied on individuals convicted of state crimes.\textsuperscript{265} The assistance awarded by the state boards is modest in size, with maximum payouts ranging from a low of $10,000 to a high of $35,000.\textsuperscript{266} These awards are intended as emergency payments and are not designed to compensate the victim for amounts that would otherwise be recoverable in tort.\textsuperscript{267} The state boards take into account collateral sources because, as payors of last resort, their charge is to provide crime victims the minimum amount of needed assistance.\textsuperscript{268} Many of the legislative findings establishing these boards express the nature of victim compensation in terms of a "moral responsibility."\textsuperscript{269}

Survivors are generally eligible to receive compensation if they are either related to the victim or economically dependent on the victim for their "principal support."\textsuperscript{270} In the case of surviving same-sex partners who are not considered


\textsuperscript{264} Greer, supra note 263, at 333-34.

\textsuperscript{265} See 42 U.S.C.S. § 10602 (Law. Co-op. 2001) (authorizing funding of "eligible crime victim compensation programs"). See, e.g., VA. CODE ANN. § 19.2-368.18 (Michie 2000) (authorizing fines on individuals convicted of certain crimes to be used to fund Virginia Criminal Injuries Compensation Fund).

\textsuperscript{266} The website of the Office for Victims of Crime in the U.S. Department of Justice provides a comprehensive directory of the crime victim compensation schemes in place in every state. See Office for Victims of Crime Resource Center (OVCRC), Victim Compensation an Overview, at http://www.ojp.usdoj.gov/ovc/help/compdir/overview.htm (last visited Jan. 18, 2001) (noting lowest maximum award is $10,000). The maximum awards authorized by the programs in place in the three states discussed in this article are as follows: Virginia: $15,000, New York: $30,000, and Pennsylvania: $35,000. VA. CODE ANN. § 19.2-368.11:1F (Michie 2001); NY. EXEC. LAW § 631 (Consol. 2001); 18 PA. CONS. STAT. § 11.707(B)(1) (2001).

The payments available under these state victim compensation programs pale in comparison to the awards contemplated under the Compensation Fund. See Henriques & Barstow, supra note 124 (noting average estimated award from Compensation Fund will be $1.6 billion). However, the importance to a surviving partner of a cash payment of $15,000 or $35,000 relatively soon after the September 11 attacks should not be underestimated, particularly given the uncertainty created under the Compensation Fund with regard to the treatment of surviving same-sex partners.

\textsuperscript{267} See Mostaghel, supra note 159, at 86-89 (discussing difference between victim compensation programs and restitution).

\textsuperscript{268} See, e.g., N.Y. EXEC. LAW § 631 (Consol. 2001) (providing extensive rules regarding collateral offsets).

\textsuperscript{269} See, e.g., VA. CODE ANN. § 19.2-368.18 (Michie 2001) (expressing nature of victim compensation in terms of moral responsibility).

\textsuperscript{270} See NY EXEC. LAW § 624 (Consol. 2001) (providing person who was "dependent for his principal support upon a victim of a crime who died as a direct result of such crime" is eligible to file
related" to the victim, this means that they have to establish the requisite level of economic dependency in order to qualify for compensation. Each of the states where hijacked aircraft crashed on September 11—Virginia (Pentagon), New York (World Trade Center), and Pennsylvania (Shanksville)—has dealt differently with the question of whether surviving same-sex partners are eligible to receive benefits from their state compensation board. Virginia refused to alter its eligibility requirements in order to facilitate claims by same-sex partners. New York lowered its "principal support" standard which had required a showing by the survivor that she depended upon the victim for 75 percent of her support. For purposes of the September 11 attacks, the new rule provides that a survivor need only prove that she and the victim were "mutually interdependent." Pennsylvania added the category of "significant others" to the list of individuals who are automatically entitled to file for compensation by virtue of their relationship to the victim.

The result of these disparate approaches is a stunning lack of uniformity in the treatment of surviving same-sex partners. For example, although Sheila Hein was posthumously awarded the Defense of Freedom Medal of Freedom, along with the other civilian Defense Department workers who were killed or injured at the Pentagon, her partner of eighteen years, Peggy Neff, does not qualify for crime victim assistance under the Virginia state program. If, instead, Hein had worked at the World Trade Center or been a passenger aboard Flight 93, her partner would have been able to file a claim for assistance under either the New York or Pennsylvania programs. And, if Hein had lived

claim for assistance); 18 PA. CONS. STAT. § 11.701(A)(4) (2001) (providing person who was "dependent for principal support upon a deceased direct victim" is eligible to file claim for assistance); VA. CODE ANN. § 19.2-368.4.A.5 (Michie 2000) (providing person who was "legally dependent for his principal support upon a victim of crime who dies as a result of such crime" is eligible to file claim for assistance).

271. According to the director of the Virginia Criminal Injuries Compensation Fund, the Governor of Virginia does not have the authority to change the eligibility requirements by executive order, and any change necessarily would have had to come from the legislature. Rhonda Smith, A Loss Compounded: Partners of Sept. 11 Victims Encounter Hurdles, WASH. BLADE, Dec. 10, 2001, available at http://tampabaycoalition.homestead.com/files/12/11LossCompoundedPeggy.htm (last visited Jan. 25, 2002). The Virginia legislature was unwilling to take up the issue. Id. In both New York and Pennsylvania, changes in the eligibility requirements with regard to victims of the September 11 attacks were made by executive order.

272. See infra text accompanying notes 307-09 (discussing change enacted by Governor Pataki’s executive order).

273. See infra text accompanying notes 310-12 (discussing requirement of mutual interdependence as applied to surviving same-sex partners of victims of September 11 attacks).

274. See infra text accompanying notes 329-44 (discussing category of "significant other").


276. See infra text accompanying note 281 (quoting letter denying eligibility to file claim for compensation).

277. As explained below, with regard to victims of the September 11 attacks, New York has replaced its "principal support" test for eligibility with a requirement that the partners had been "mutually interdependent." See infra text accompanying notes 307-12 (discussing executive order 113.30). Also adopting a special rule for victims of the September 11 attacks, Pennsylvania provides
in Pennsylvania, the state-funded agency charged with coordinating September 11 victim services would have been willing to "go to bat" for her partner and to assist her with her claim wherever it was filed.278

A. Virginia: "We Don't Look Too Kindly on Those Types of Relationships"279

The Commonwealth of Virginia established the Virginia Criminal Injuries Compensation Fund in recognition of its "moral responsibility" to provide "aid, care and support" for the innocent victims of crime and "their dependents."280 This "moral responsibility" apparently does not extend to any losses experienced by Peggy Neff as a result of the death of her partner, Sheila Hein. The Virginia Criminal Injuries Compensation Fund promptly rejected Neff's claim for assistance with a letter stating simply: "We regret to inform you that you are not eligible to file a claim for benefits under the Virginia Victims of Crime Act."281

The Virginia Criminal Injuries Compensation Fund provides compensation for victims of crimes committed in the Commonwealth.282 Compensation includes amounts for burial expenses, lost wages, counseling expenses, and

that "significant others" are eligible for compensation. See infra text accompanying notes 329-344 (providing overview of Pennsylvania's September 11 Victim Assistance Program).

278. See infra text accompanying note 337 (quoting website of state-funded organization charged with coordinating aid for victims of September 11 attacks).

279. See Brooke A. Masters, Exclusion Adds to Pain of Loss: Virginia Law Denies Benefits to Domestic Partners of Sept. 11 Attack Victims, WASH. POST, Nov. 25, 2001, at C03 (quoting neighbor of Neff paraphrasing response Neff received when she called requesting assistance from various aid agencies and organizations as surviving same-sex partner).


282. See VA. CODE ANN. § 19.2-368.2 (Michie 2000) (defining crime as act committed in Commonwealth of Virginia that would be crime under Code of Virginia or common law). There was, of course, no question that Hein's death had been caused by a criminal act which occurred in Virginia. Flight 77 had barreled into the west side of the Pentagon on September 11, 2001, at 9:45 a.m. killing fifty-nine people aboard the aircraft and 184 people on the ground. Don Van Natta & Lizette Alvarez, Attack On Military; A Hijacked Boeing 757 Slams Into The Pentagon, Halting The Government, N.Y. TIMES, Sept. 12, 2001, at A5. See also Scioli & Cushman, supra note 1 (describing Flight 77).

In recognition of the singular nature of acts of terrorism, Virginia law also provides compensation for Virginia residents who are victims of "foreign terrorism." See VA. CODE ANN. § 19.2-368.2 (defining "victim" to include "a person who is injured or killed as a result of foreign terrorism"). The Virginia statute also covers any Virginia resident who is injured or killed as a result of a crime committed outside the state, but only if the state in which the crime occurred does not have a similar victim compensation program eligible to receive funds under the federal Victims of Crime Act, and its compensation program does not provide assistance to nonresidents. Id. § 19.2-368.4C.
moving expenses, with a maximum award of $15,000. Neff was not eligible to file for compensation as Hein’s survivor because she was not Hein’s spouse, parent, child, or grandparent, nor was she “legally dependent” upon Hein for her “principal support.” Although she had been Hein’s partner for the last 18 years, Neff was not sufficiently related to Hein to qualify for compensation. The fact that, without Hein, Neff could not make the mortgage payments on the home they had shared together did not make Neff “legally dependent” on Hein, nor did the fact that Neff had recently given notice at her place of employment and was planning a career change. As it turns out, Neff and Hein were not “legally” anything more than strangers.

Even though Neff was not “legally dependent” on Hein for her “principal support” within the meaning of the Virginia statute, she and Neff led lives that were emotionally and financially interdependent. They bought a house together in Hyattsville, Maryland, and they heeded the advice of lesbian and gay legal advocates and each signed a will designating the other as executor and primary beneficiary. Each partner also executed a medical power of attorney in favor of the other. Hein’s mother explained that the couple was “as good as married as far as I can see.” Even Secretary of Defense Donald Rumsfeld recognized Neff as Hein’s “partner” in his letter of condolence.

As is generally the case with decisions of state crime victims compensation boards, Neff has the right to appeal the decision of the Virginia board. However, the director of the Virginia Criminal Injuries Compensation Fund has publicly commented on Neff’s prospect of success on appeal and has stated that the eligibility requirements are “probably not” subject to “interpretation.”

---

283. See id. § 19.2-368.11:1D (describing types of expenses); see also id. § 19.2-368.11:1F (providing minimum and maximum awards).
284. See id. § 19.2-368.4A (describing individuals eligible for awards from fund). Persons eligible to pursue a claim include the following close relatives: “a surviving spouse, parent, grandparent, sibling or child, including posthumous children[.]” Id. § 19.2-368.4A.2.
285. See id. § 19.2-368.4(A)(5) (requiring claimant to have been legally dependent on victim for principal support). This requirement is more restrictive than that imposed by many states, including Pennsylvania and New York, in that the claimant must have relied on the victim for “principal support,” but need not have been “legally dependent” on the victim. See, e.g., 18 PA. CONS. STAT. § 11.701(A)(4) (2001) (providing individual who was “dependent for principal support upon a deceased direct victim” is eligible for compensation).
286. Neff told The Washington Post that she intends to “do whatever it takes to keep to the house.” Masters, supra note 279 (quoting Neff).
287. Lombardi, supra note 281.
288. Id.
289. Id.
290. See Masters, supra note 279 (quoting Hein’s mother, Clio Stearns).
291. Id. The military even assigned Neff a “casualty officer.” Id.
293. See Smith, supra note 271 (quoting director: “I would never discourage anyone from going through the appeals process”).
unlikely that a Virginia court would interpret the term “spouse” to include Neff, given the state’s resilient sodomy statute and its anti-marriage statute.\(^{294}\) Public appeals to the Governor of Virginia and the state legislature to change the law have been unsuccessful, and Neff does not intend to appeal the decision of the board.\(^{295}\)

Neff is fortunate, because as the executor and beneficiary of Hein’s will, she will be entitled to receive any award paid on Hein’s behalf from the federal Compensation Fund, subject to the Special Master’s discretion to reallocate the award in favor of relatives.\(^{296}\) Neff probably does not have to worry about relatives objecting to the proposed distribution thanks to the strong relationship she enjoys with Hein’s mother.\(^{297}\) Despite careful planning, Neff has had to rely on the goodwill of Hein’s mother in two important instances. First, as it turns out, Hein neglected to complete the beneficiary designation form on $150,000 of life insurance she had purchased through her job with the Army.\(^{298}\) As Hein’s next of kin, the policy proceeds are now payable to Hein’s mother.\(^{299}\) Second, Neff was not permitted to claim her partner’s remains until she presented a power of attorney signed by Hein’s mother,\(^{300}\) notwithstanding the fact that she was named as executor of Hein’s will.\(^{301}\) Fortunately for Neff, Hein’s mother was willing and able to sign, but as illustrated in Part II, other surviving partners may not be able to count on the generosity (or even the civility) of the deceased partner’s relatives.\(^{302}\) Relations with in-laws can be a notorious source of friction.

\(^{294}\) See supra note 28 (citing Virginia’s sodomy statute and anti-gay marriage legislation).

\(^{295}\) A Washington Post editorial urged the governor of Virginia to remedy this situation, pointing to Governor Pataki’s executive order. A Sad Twist to a Deep Loss, WASH. POST, Nov. 28, 2001, at A34.

\(^{296}\) Because Hein executed a will naming Neff as executor and beneficiary, Neff is in a very good position to present a claim under the Compensation Act. See supra text accompanying notes 173-92 (describing eligibility requirements). Neff refers to the will as her “saving grace.” Lombardi, supra note 281. Although Neff reports that she “never wanted to be political,” she has lobbied the Justice Department regarding the treatment of surviving same-sex partners under the Compensation Fund. Id. Neff has been invited to speak by the California-based National Center for Lesbian Rights. Id. Reflecting on her new found status as a national spokesperson, Neff has remarked, “This is my new job: to tell people, ‘Make a will!’” Id.

\(^{297}\) See Lombardi, supra note 281 (reporting Hein’s mother “considers Neff a daughter and has tried to preserve Neff’s preeminent role in Hein’s life”). The Washington Post reported that Neff received $7,900 of emergency assistance from the Red Cross and assistance with the mortgage payment from the National Association of Realtors. Id. Neff was studying to take the test to earn her real estate license. Id.

\(^{298}\) Masters, supra note 279.

\(^{299}\) Hein’s mother has pledged to help Neff and does not wish to benefit from her daughter’s death. See id. (reporting Hein’s mother “says she doesn’t want to inherit money from her only daughter and plans to help Neff!”).

\(^{300}\) Masters, supra note 279.

\(^{301}\) See supra text accompanying notes 106-119 for a description of the difficulties which can arise even when surviving partners are named as executor.

for any couple, let alone when the family ties that usually bind are strained by homophobia and grief. 303

B. New York: Mutual Interdependence and a Nexus of Factors

Of the three state boards directly effected by the September 11 attacks, the New York State Crime Victims Board clearly has responsibility for the largest number of victims, with 2,827 dead at the World Trade Center site and an uncertain number injured. 304 Based on New York law at the time of the September 11 attacks, Peggy Neff would not have fared much better before the New York Crime Victims Board than she did before the Virginia Criminal Injuries Board. 305 In 1997, the New York appellate courts upheld a decision of the board ruling that a surviving same-sex partner was ineligible for benefits because he did not qualify as a “spouse,” and he had failed to establish that his deceased partner was his “principal” source of financial support. 306

In response to intense lobbying by gay and lesbian advocacy groups, Governor Pataki signed Executive Order 113.30 on October 10, 2001, which, specifically for the survivors of victims of the World Trade Center attacks, suspended the requirement that a survivor must establish that the victim was the source of her “principal support.” 307 Pursuant to this Executive Order, a surviving same-sex partner of a World Trade Center victim is eligible to file a claim for assistance if she can show that she and her partner lived a life of “mutual interdependence.” 308 With regard to the victims of other crimes, the

303. For example, Lambda Legal Defense and Education Fund reports that the surviving same-sex partner of a victim of the World Trade Center attacks is going to be forced to move from the home she shared with her partner by the deceased partner’s relatives. See id. (describing difficulties that can arise between victim’s same sex partner and victim’s biological family). See supra note 66 for a description of the situation of “Denise” who lost her partner “Laura” in the attack on World Trade Center.

304. See Dead and Missing, supra note 4 (calculating number of deaths).

305. See N.Y. EXEC. LAW § 622 (Consol. 2001) (authorizing creation of board).


308. Id. Under New York law, the notion of recognizing a same-sex relationship built on some form of “mutual interdependence” as a “family” can be traced to the ground-breaking 1989 decision in Braschi v. Stahl Associates Co. 543 N.E.2d 49 (N.Y. 1989). In considering whether a surviving same-sex partner was a member of the deceased partner’s “family” for purposes of the New York City Rent and Eviction Regulations governing rent-controlled tenants, the court applied a broad and inclusive definition of family that was not restricted to “legally recognized relationships based on blood, marriage, or adoption.” Id. at 54 n.1. The court concluded that a surviving same-sex partner could qualify as a member of the deceased partner’s “family” based on a variety of factors, including “the exclusivity and longevity of the relationship, the level of emotional and financial commitment, the manner in which the parties have conducted their everyday lives and held themselves out to society, and the reliance placed upon one another for daily family services.” Id. at 55. After disaggregating the notion of family, the court noted that the fact that the plaintiff and the decedent had “interwoven
Executive Order lowered the percentage required to show "principal support" from seventy-five percent which had been established by board opinion to fifty percent.309

Under Governor Pataki's Executive Order, if Sheila Hein had been killed in the World Trade Center attacks, Peggy Neff would have been eligible to file a claim for assistance with the New York Crime Victim's Board as long as she could show that she and Hein had been mutually interdependent.310 The illustrative list provided in the Executive Order includes four factors: "common ownership of property, common householding, shared budgeting and the length of the relationship between such person and the victim."311 Based on what has been reported about Neff and Hein's life together, it seems likely that Neff would have had little difficulty proving that she and Hein had been mutually interdependent. A showing of mutual interdependence would have qualified Neff for an award of up to $30,000 for lost earnings, and reasonable burial expenses, as well as unlimited counseling.312

Governor Pataki's action was roundly celebrated by gay and lesbian advocates as representing an official recognition of same-sex partners.313 The press reported consistently that Governor Pataki had signed an Executive Order granting same-sex partners equal benefits under the state victims' compensation program.314 However, Executive Order 113.30 never mentions same-sex partners.315 Governor Pataki did not alter the definition of spouse to include same-sex partners nor did he include same-sex partners as a class of individuals eligible to file for benefits without a showing of financial need.316 Instead, he

social lives," were financially interdependent, and had named each other as beneficiaries suggested "that these men were much more than mere roommates." Id. at 55. These factors were later codified in the New York City rent regulations. See N.Y. RENT & EVICT. § 2104.6(d)(3) (McKinney 2001) (defining family member for purposes of rent and eviction regulations). Considerations of "mutual interdependence" also form the core eligibility requirement for domestic partnership policies or registries. See Knauer, supra note 38, at 546-48 (describing typical factors necessary to qualify as domestic partner).

310. For a discussion of the history of the term "mutually interdependent" see supra note 308.
313. This was particularly true in the gay and lesbian press. Empire State Pride Agenda, Gay Rights Organization Praises Governor Pataki for Order Granting Equal Benefits to Gay Partners of Those Killed in World Trade Center Attacks, available at http://www.prideagenda.org/pressrelease/pr-10-12-01.html (last visited Jan. 18, 2002).
316. N.Y. EXEC. LAW § 624.1(b) (Consol. 2001). The statute designates that the following individuals are eligible to file a claim for assistance without a showing that they were financially dependent upon the victim: "a surviving spouse, grandparent, parent, stepparent, child or stepchild." Id. For example, a surviving spouse is not required to show that she and her spouse were
merely lowered the requisite level of need that must be established before an individual not related to the victim by marriage, biology, or adoption can file a claim for assistance.\footnote{317} For a surviving same-sex partner of a victim of the World Trade Center attacks, this means that she will have the opportunity to show that she and the victim had been mutually interdependent.\footnote{318} For a surviving same-sex partner of a victim of any other homicide, it means that she will have to prove that the victim provided at least fifty percent of her support, rather than at least seventy-five percent.\footnote{319} While an improvement over the former rule, the lowered percentage still imposes a showing of penury that is not required of a surviving spouse.\footnote{320} It remains the case that a surviving same-sex partner will be eligible for compensation only where there was an income disparity between the partners and the high income partner is the one who is murdered.

C. Pennsylvania: "We'll Go to Bat for You"\footnote{321}

Flight 93 was the last of the four hijacked aircraft to crash on September 11 when it slammed into a field outside of Shanksville, Pennsylvania at 10:10 a.m., killing all forty passengers and crew on board.\footnote{322} Among the stories that gripped

interdependent. A spouse is eligible to file a claim for assistance regardless of the length or strength of the marriage. She is not required to prove her eligibility by establishing the economics of her relationship with the victim or its domesticity. When reviewing a claim filed by a spouse, the question of economic need arises only indirectly—to the extent the New York Crime Victims Board considers itself a payor of last resort and, therefore, will deduct certain collateral payments from the final award. See \textit{N.Y. EXEC. LAW} § 631.4 \textit{(Consol. 2001)} (providing for reduction of award in case of certain enumerated payments.).

\footnote{317} N.Y. EXEC. LAW § 624(c) (Consol. 2001).

\footnote{318} Exec. Order No. 113.30, \textit{supra} note 307.

\footnote{319} \textit{Id.} The case of Roy Secord of Manhattan illustrates that this new threshold will continue to result in the denial of claims for victim compensation from surviving same-sex partners. Secord arrived home one day and discovered the body of his partner who had been stabbed 20 to 30 times and beaten with "a pot and an iron." Larry Neumeister, \textit{Slayings of Gays Often Brutal; Fueled by Rage Instead of Guns, Knives And Clubs Frequently Used}, BERGEN REC. (Newark, NJ), Dec. 21, 1994, at A31. The state arrested an individual whom Secord and his partner had hired to do some painting. \textit{Id.} The state accepted a plea of manslaughter over Secord's objection, and Secord complained that he was "not given equal time as a spouse would be given." \textit{Id} (quoting Secord). This treatment continued when Secord filed a claim for assistance with the New York Crime Victims Board. See Secord v. Fischetti, 653 N.Y.S.2d 551, 552 (N.Y. App. Div. 1997) (denying claim). Secord's claim was denied based on the finding that he did not qualify as a "spouse" nor was Secord dependent upon his deceased partner for his "principal support." \textit{Id.}

Secord would not have fared any better under the new liberal interpretation of "principal support" mandated by Governor Pataki's Executive Order which would require Secord to prove that he received at least fifty percent of his support from the victim. Exec. Order No. 113.30, \textit{supra} note 307. Even employing a calculation most favorable to Secord, he still would have come up short—two dollars a month short, to be exact. Thus, Governor Pataki's new fifty percent rule would not have helped Secord, despite clear evidence that his partner was the primary wage earner.

\footnote{320} See \textit{supra} note 316 for the proposition that a surviving spouse need only prove relationship and not dependency.

\footnote{321} See infra text accompanying note 334-37 for a quote from the website of a state-funded organization charged with coordinating aid for victims of September 11 attacks.

\footnote{322} When Flight 93 crashed, no one doubted that it had fallen short of its intended target.
the nation and the world in the first days after September 11 were the accounts of the cell phone calls placed from the passengers and crew aboard Flight 93 as it reversed its westerly course and began what is assumed to have been its approach to the capitol. One of the first reports told of a thirty-one year-old, six-foot-five, former rugby playing son who called his mother and, in the tension of the moment, announced, "Hi mom. This is Mark Bingham." It was from these last phone conversations with spouses, parents, and even a GTE operator, that a picture began to emerge of a critical mass of passengers and crew who were determined to stop the hijackers. They became known as the "Heroes of Flight 93," but only belatedly, and somewhat begrudgingly, did the mainstream media acknowledge that at least one of the heroes, Mark Bingham, was gay.

Mark Bingham left many grieving friends and relatives, but he did not leave a surviving partner. However, had he done so, the partner would have been eligible to file a claim for compensation with the Victims Compensation Division of the Pennsylvania Bureau of Victims Services (the "Bureau of Victim Services") as Bingham's surviving "significant other." Shortly before Governor Tom Ridge assumed his duties as Director of Homeland Security, he "oversaw the creation of a state-level fund to assist" Pennsylvania residents who were victims of the September 11 attacks and the survivors of the crash of Flight 93, known as the "PA Sept. 11 Victim Assistance Program." For purposes of

---

Jodi Wilgoren & Edward Wong, United Flight 93; On Doomed Flight, Passengers Vowed to Perish Fighting Explain That the Engagement Order Had Been Given, N.Y. TIMES, Sept. 13, 2001, at A1. Initially, there was some confusion over whether the plane had been headed for the Presidential retreat of Camp David. Matthew L. Wald, Monitoring the Flights; Controllers Say Flow of Information on Hijacked Planes' Course Was Slow and Uneven, N.Y. TIMES, Sept. 13, 2001, at A5. Although the actual intended target is unknown, the consensus is that Flight 93 was on route to Washington, D.C. Senator John McCain acknowledged his debt to one of the passengers, Mark Bingham, when the Senator delivered the eulogy at a memorial service for Bingham on September 22, 2001, the text of which is available on the Senator's official website. Eulogy in Honor of Mark Bingham Delivered by Senator John McCain, at http://www.senate.gov/~mccain/bingham.htm (last visited Feb. 14, 2002). Senator McCain stated in the eulogy that he believed Flight 93 was headed for the Capitol. Id. 323. Wilgoren & Wong, supra note 322.

324. See Clines, supra note 12 (reporting details of Bingham's final call to his mother). Bingham said, "Hi Mom: This is Mark Bingham; I want to let you know that I love you." Id. Bingham's mother repeated his story on the CBS morning show on September 12, 2002. Veale, supra note 12.

325. Wilgoren & Wong, supra note 322.

326. See Nieves, supra note 20 (discussing controversy over whether Bingham's sexual orientation is relevant or even appropriate matter for public comment).

327. Friends and family have established and maintain a Mark Bingham memorial website, available at http://markbingham.org (last visited Apr. 25, 2002).


329. See infra text accompanying notes 330-37 for a discussion of the "significant other" category.

the assistance program, "significant others" are included as part of the class of individuals who are eligible to file a claim for assistance by virtue of their relationship to a deceased victim of the September 11 attacks.\textsuperscript{331} As a result, the "significant other" of an individual killed in the crash of Flight 93 would be eligible for up to $35,000 in assistance from the Bureau of Victim Services, including lost wages and counseling and funeral expenses.\textsuperscript{332}

Curiously, this rather remarkable change in the Pennsylvania victim compensation scheme received virtually no media attention.\textsuperscript{333} The "significant other" category, however, is clearly mentioned on the website of the PA Sept. 11 Victim Assistance Program.\textsuperscript{334} Under "Frequently Asked Questions," the PA Sept. 11 Victim Assistance Program explains that members of a victim's "immediate family" are eligible for assistance.\textsuperscript{335} It then defines "immediate family" by way of a parenthetical which includes "significant other."\textsuperscript{336} With regard to the category of "significant other," PA Sept. 11 Victim Assistance Program states: "There may not be legal ties, but we would certainly go to bat for you."\textsuperscript{337}

Like Governor Pataki's "mutual interdependence" measure, the addition of "significant other" did not effect a permanent change in the eligibility requirements for crime victim assistance in Pennsylvania and only effects compensation payable by reason of the attacks which occurred within the Pennsylvania's inclusion of "significant other").

\textsuperscript{331} The website provides that a "significant other" of a person missing or killed in the September 11 attacks is considered a "victim" and, therefore, is eligible to file for assistance. PA Sept. 11 Victim Assistance Program, Frequently Asked Questions, available at http://www.pasept11.org/faqs.htm (last visited Jan. 25, 2002). The category of "significant other" is included in a parenthetical defining "immediate family member," noting that such family members include "(spouse, child, grandparent, significant other)." \textit{Id.}

\textsuperscript{332} See 18 PA. CONS. STAT. § 11.707(B)(1) (2001) (stating award shall not exceed $35,000).

\textsuperscript{333} Again, perhaps not surprisingly, it was reported in the gay and lesbian press. \textit{See}, e.g., Human Rights Campaign, \textit{Same-sex families Can File Claims for Federal Victim Compensation Fund But Success Remains Unclear}, at http://www.hrc.org/newsreleases/2001/011219fund.asp (last visited Jan. 19, 2002) (urging fund be administered with compassion and citing Pennsylvania's inclusion of "significant other").

\textsuperscript{334} In response to the question of who qualifies for assistance from the fund, the website provides:

A "victim" of the terrorist attacks of September 11 is:

\begin{itemize}
  \item A member of the immediate family (spouse, child, grandparent, significant other) of a person who is missing or killed and who resides in PA
  \item Someone who was injured in the destruction who resides in PA
  \item A family member of any person killed in the United Flight 93 crash in Western Pennsylvania, regardless of where they live.
\end{itemize}


\textsuperscript{335} \textit{Id.}

\textsuperscript{336} \textit{Id.}

\textsuperscript{337} \textit{See id.} (answering question of "[w]ho is a ‘victim’ of the terrorist attacks?").
However, the approach adopted in Pennsylvania differs from the approach adopted in New York because the addition of the category of "significant other" focuses on the type of personal relationship the individual enjoyed with the victim instead of the financial obligations existing between the claimant and the victim. As under Virginia and New York law, Pennsylvania law sets forth two general classes of individuals who are eligible to file a claim on behalf of a deceased victim: relatives and individuals dependent on the victim for "principal support." The categories of relatives who are automatically eligible to file a claim under Pennsylvania law are more limited than those recognized under either the comparable Virginia or New York statute, with only the surviving spouse, parent or child eligible to file for compensation. Assuming that Pennsylvania intended to add a class of individuals who were automatically eligible based on their relationship with the victim, the label "significant other" seems a rather idiosyncratic choice—an almost quaint alternative to the weightier and more popular term "domestic partner." A search of the Pennsylvania Administrative Code reveals that the term appears no fewer than ten times, in each instance applying to one with whom an individual presumably has a romantic relationship short of marriage—an interesting and perhaps important distinction for same-sex partners in a state which still recognizes common law marriage. Although the term is not defined by case law or legislative or administrative pronouncement, it seems to be used, at least by the executive branch, in Pennsylvania to denote a committed nonformalized relationship between adults.

---


339. Obviously, a showing of financial interdependence may be evidence of a relationship between the claimant and victim that would qualify the claimant as the victim's significant other.

340. 18 PA. CONS. STAT. § 11.701(A)(3)-(4) (2001). Pennsylvania's principal support standard for individuals who are not automatically eligible to file is identical to the one found under New York law. Both the New York and the Pennsylvania standards are more lenient than the Virginia support standard which requires the claimant to have been "legally dependent" on the victim for her "principal support." VA. CODE ANN. § 19.2-368.4.A.5 (Michie 2001).


344. This understanding is confirmed by the RANDOM HOUSE WEBSTER'S DICTIONARY which defines "significant other" as a "spouse or co-habiting lover." RANDOM HOUSE WEBSTER'S DICTIONARY 558 (2d ed. 1998).
V. PRIVATE CHARITABLE ORGANIZATIONS: PRIORITY TO THE WIDOWS? 345

In the wake of the September 11 attacks, the nation's shock and grief swiftly galvanized into a resolute patriotism which manifested itself in an unparalleled outpouring of charitable donations. Less than five weeks after the September 11 attacks, the amounts donated or pledged for the various September 11 relief efforts exceeded $1 billion. 346 With the major focus centered on the World Trade Center site, volunteers rushed to the scene, many traveling great distances. 347 In-kind donations arrived in lower Manhattan by the truck-full—tons of dog food for the rescue and cadaver dogs, mountains of blankets, and clothing. 348 People across the country lined up to donate blood—sometimes waiting for hours—for the expected legions of injured. 349

As the better known national disaster relief agencies, such as the American Red Cross and the Salvation Army, mobilized to provide assistance to victims and rescue workers, scores of new charitable organizations were formed to address specific needs, such as the Twin Towers Fund for uniformed personnel, 350 Windows of Hope for the food service workers, 351 and the Cantor

345. The Reverend Lou Sheldon, founder of the pro-family organization Traditional Values Coalition urged relief agencies to openly discriminate against surviving same-sex partners. Edsall, supra note 22. In an interview with The Washington Post, Sheldon explained that relief agencies "should be first giving priority to those widows who were at home with their babies and those widowers who lost their wives." Id. (quoting Sheldon). According to Sheldon, all emergency aid "should be given on the basis and priority of one man and one woman in a marital relationship." Id.

346. Diana B. Henriques, Snapshots of Confusion, Heartbreak, Compassion and Spirit, N.Y. TIMES, Nov. 12, 2001, at G1 (reporting that by October 18, 2001 "fund-raising totals are staggering, nearing $1 billion").


348. Jim Dwyer, Donated Goods Deluge the City and Sit Unused, N.Y. TIMES, Sept. 16, 2001, at A1. The New York Times reported that "scores of tractor-trailers have pulled up from across the country to unload tons of donations, mainly for the rescue workers at ground zero but also for the families who lost loved ones when the twin towers collapsed." Vivian S. Toy, At a Westbury Warehouse, Tons for Relief, N.Y. TIMES, Oct. 7, 2001, § 14L1, at 8. The donations included "crates of Bowser Dog Treats and Milk-Bone dog biscuits, there were dog beds and dog booties in a wide range of colors and styles." Id. See also Henriques, supra note 346 (describing myriad of relief efforts initiated in response to attack on World Trade Center).


Fitzgerald Fund for the devastated bond trading firm which had offices on the 101st, 103rd, 104th, and 105th floors of the North Tower and lost more than 675 people. Concerned that the interests of surviving same-sex partners and gay victims would not be protected by the private relief efforts, a group of gay and lesbian organizations started the September 11 Gay & Lesbian Family Fund in order "to help offset discrimination faced by gay life partners." 353

The sheer number of different private charitable organizations involved in the relief effort precludes any comprehensive treatment of their policies with respect to surviving same-sex partners. Instead, this section focuses on the policies of the Red Cross which stands out with respect to the amount of donations received—over $600 million for its Liberty Fund 354—and the fact that it is the first national disaster agency to issue guidelines specifically recognizing same-sex partners. 355

Between September 11 and November 9, 2001, the Red Cross provided direct assistance totaling $143.4 million to individuals affected by the September

---


In addition to these institutional charitable efforts, many families have organized charitable funds to commemorate loved ones lost in the September 11 attacks. See Kelly Crow, Dreams of Summer Camp Take the Form of Reality, N.Y. TIMES, Nov. 12, 2001, at G10 (describing organization created by fiancée of 29-year old bond broker from Cantor Fitzgerald killed in September 11 attacks).


354. Deborah Sontag, Who Brought Bernadine Healy Down? The Red Cross: A Disaster Story Without Any Heroes, N.Y. TIMES MAGAZINE, Dec. 23, 2001, at 32. The Red Cross is also notable for the controversy sparked regarding its proposed handling of the Liberty Fund. Id. at 55. Under public pressure, the Red Cross retreated from its position that it would bank some of the donations to the Liberty Fund for future disasters. Id. It also was criticized for collecting too much blood from donors which in the end had to be destroyed. Id. at 38.

11 attacks. \textsuperscript{356} This included temporary shelter, counseling, cash assistance, and thirteen million meals. \textsuperscript{357} Its goal was to distribute a total of $317.5 million to September 11 victims before the end of 2001. \textsuperscript{358} The Red Cross estimated that the relief assistance would reach over 34,500 families, and gay and lesbian advocacy groups wanted to make sure that when the Red Cross talked about “families” it included same-sex partners. \textsuperscript{359}

Shortly after September 11, gay and lesbian advocacy organizations began receiving complaints that relief agencies were not adequately addressing the needs of surviving same-sex partners. \textsuperscript{360} A consortium of organizations launched a lobbying effort to secure recognition of surviving same-sex partners under the various federal, state, and private assistance schemes. \textsuperscript{361} The size and scope of the Red Cross’ relief activities made it a natural and important target. \textsuperscript{362} The lobbying efforts quickly sparked a minor firestorm when the Reverend Lou Sheldon opined in an interview with The Washington Post that surviving same-sex partners should not be eligible for emergency assistance. \textsuperscript{363} Reverend Sheldon argued that aid organizations should award assistance “on the basis and priority of one man and one woman in a marital relationship.” \textsuperscript{364} He charged that lesbian and gay advocacy groups were “taking advantage of this national tragedy to promote their agenda.” \textsuperscript{365} According to Sheldon, the attempt to secure emergency aid for the victims of the September 11 attacks was an integral part of the larger homosexual agenda to “redefine what marriage is and how marriage functions and who enters into marriage.” \textsuperscript{366}

Unlike the Salvation Army, which had earlier that year reversed its decision

\textsuperscript{357} Id.
\textsuperscript{358} Id.
\textsuperscript{361} Lambda Legal Defense and Education Fund, the New York Based, Empire Pride Agenda, and the New York City Gay and Lesbian Anti-violence Project met with CEO of the Red Cross in Greater New York. Id. The purpose of the meeting was “to discuss the inequitable and inconsistent treatment being given to gays and lesbians applying for relief assistance.” Id.
\textsuperscript{362} See supra text accompanying notes 356-59 (discussing extent of Red Cross relief efforts in wake of September 11 attacks).
\textsuperscript{363} Edsall, supra note 22.
\textsuperscript{364} Id.
\textsuperscript{365} Id.
\textsuperscript{366} Id. For a discussion of how many conservatives were quick to distance themselves from remarks made by Reverend Falwell linking lesbians and gay men to the September 11 attacks see supra note 19. Sheldon’s remarks provoked condemnation from lesbian and gay advocacy groups. See, e.g., National Gay and Lesbian Task Force, Sheldon’s Remarks ‘Divisive and Inhumane,’ at http://www.ngltf.org/news/printed.cfm?releaseID=419 (last visited Jan. 19, 2002) (stating “[i]t is divisive and inhumane to suggest that relief workers turn their backs on any victim of this horrible tragedy”).
to offer domestic partnership benefits under pressure from pro-family organizations, the Red Cross proved impervious to the pro-family attack. 367 When the Red Cross issued its family guidelines in December 2001, it reaffirmed its commitment to “using a broad and inclusive definition of family.” 368 The guidelines list sixteen nonexclusive factors designed to assist field agents in determining “what constitutes a family according to existing Red Cross policy.” 369 The Red Cross also confirmed its basic non-discrimination policy with respect to disaster relief, stating that the goal of the Red Cross was “to meet the disaster-related needs of all persons, regardless of race, ethnicity, gender, religion, or sexual preference or orientation.” 370 Finally, the Red Cross expressed regret over instances where its family policy was not “applied fairly and appropriately,” 371 presumably validating the charges of unfair treatment lodged by the gay and lesbian advocacy groups.

Although the Red Cross guidelines specifically mention “same gender couples” and two of the factors refer to domestic partner status, the guidelines were not developed solely to standardize the recognition of same-sex partners. 372 Same-sex couples are only one of the many types of non-traditional families embraced by the Red Cross policy. Recognizing that “families come in many different forms,” the Red Cross notes that, in connection with the September 11 attacks, it has provided assistance to “those who were unmarried, living together, or in committed relationships, persons not living together who nonetheless relied on a victim’s support, and roommates of victims, all regardless of gender or sexual orientation.” 373 Under the guidelines, a family relationship can be asserted based on three distinct types of claims, any one of which may be sufficient to establish a family relationship: mutual interdependence, reciprocal beneficiaries, and pre-existing status as domestic partners. 374

367. See Christopher Heredia, Salvation Army Says No Benefits For Partners, SAN FRAN. CHRON., Nov. 14, 2001, at A22 (noting organization rescinded an early decision to allow regional offices to establish their own policies regarding employee benefits).


369. Id.


371. Id.

372. Lambda Legal Defense and Education Fund, Red Cross Issues Guidelines on Relief Assistance to Lesbian and Gay Survivors of September 11, available at http://www.lambdalegal.org/cgi-bin/iowa/documents/record?record=926 (last visited Jan. 19, 2002) (stating Red Cross recognizes “traditional married families, as well as the committed relationships and domestic partnerships of many couples, including same-gender couples, who have been living together or who can demonstrate financial interdependence”).


The majority of the factors are designed to elicit evidence of "financial interdependence."\textsuperscript{375} In this way, the guidelines closely parallel a standard domestic partnership policy or ordinance which typically requires the individuals who wish to be recognized as domestic partners to provide proof of their economic "interdependence."\textsuperscript{376} This is markedly different from the state crime victims compensation boards, where eligibility for a non-relative is based solely on economic need.\textsuperscript{377} The crime victims boards' insistence on economic dependence means that family ties can only run one way—from the dependent partner to the responsible partner. This construction will make, at best, half a family.\textsuperscript{378} The Red Cross guidelines are principally interested in evidence of joint ownership or joint responsibility for debt.\textsuperscript{379} Perhaps recognizing that bare title to property does not always reflect the understanding of the parties, the guidelines will also accept "an affidavit by a creditor able to testify to partners' financial interdependence."\textsuperscript{380}

Five of the sixteen factors involve beneficiary designations.\textsuperscript{381} The emphasis on beneficiary designations is consistent with the statutorily created category of "reciprocal beneficiary" under Hawaii law.\textsuperscript{382} In addition, domestic partnership laws and policies often include reciprocal beneficiary designations as one of the factors individuals can point to in order to establish a domestic partnership.\textsuperscript{383} Beneficiary designations are considered an important indicia because they are presumed to reveal something about the nature of the relationship and the level of commitment. This expressive use of beneficiary designations is very different from benefiting a surviving same-sex partner simply in the name of testamentary autonomy, as was the case with the federal Compensation Fund. Under the Red Cross' guidelines, beneficiary designations are significant for what they mean, not what they do.

\footnote{bin/iowa/documents/record?record=926 (last visited Jan. 19, 2002). The guidelines stress proof of a registered domestic partnership "is only one way to prove a relationship." \textit{Id.}}

\textsuperscript{375} \textit{Id.}

\textsuperscript{376} \textit{See supra} note 308 (discussing notion of financial or economic interdependence).

\textsuperscript{377} \textit{See supra} note 270 and accompanying text (discussing "principal support" requirement).

\textsuperscript{378} \textit{See supra} note 319 (illustrating "principal support" requirement may deny eligibility even where deceased partner was primary wage earner).


\textsuperscript{380} \textit{Id.}

\textsuperscript{381} \textit{Id.} Unlike Hawaii law, the beneficiary designations are not required to be actually reciprocal, and it is sufficient in most cases if the survivor was named as a beneficiary by the deceased partner. \textit{Id.} For example, factor 10 provides: "Designated beneficiary under the deceased [sic] life insurance policy, retirement benefits account or will or executor of each other's will or primary beneficiary of the other's will." Lambda Legal Defense and Education Fund, \textit{Red Cross Issues Guidelines on Relief Assistance to Lesbian and Gay Survivors of September 11}, available at http://www.lambdalegal.org/cgi-bin/iowa/documents/record?record=927 (last visited Jan. 19, 2002). Other beneficiary designations include: healthcare power of attorney, "government benefits," and general power of attorney. \textit{Id.}

\textsuperscript{382} For a discussion of reciprocal beneficiaries see \textit{supra} note 61.

\textsuperscript{383} \textit{See supra} note 61 (describing requirements for domestic partnership registration).
Finally, the Red Cross guidelines consider whether the parties have been recognized as domestic partners by either a government or by a private employer.\textsuperscript{384} It makes sense that the Red Cross considers pre-existing domestic partner status as evidence of a family relationship because, typically, part of a domestic partnership application is a recital of mutual interdependence. What is unusual is the Red Cross’ willingness simply to accept the judgment of the other entity, whether it be a local, state, or foreign government or simply a private employer. The two major drawbacks of domestic partnership are that it tends to grant relatively few rights and it is almost never portable.\textsuperscript{385} In fact, in 1996 Congress went to great lengths to ensure that if same-sex marriage were ever recognized by one of the several states, it would not have to be recognized by sister states and would be disregarded for federal purposes.\textsuperscript{386}

The Red Cross’ cross-boarder approach to defining family incorporates the two dominant standards for establishing a domestic partnership: economic interdependence and reciprocal beneficiary designations. In addition to using these standards to make its own determination, the Red Cross accepts a determination made by another entity which may or may not have used the same standards of economic interdependence or reciprocal beneficiary designations. In this way, the Red Cross has adopted a national (or even international) view of what constitutes a family that is diametrically opposed to the restrictive view expressed and reinforced by DOMA.\textsuperscript{387}

Instead of espousing a single view of family, the Red Cross has embraced all the different iterations of family as they relate to the legal recognition of same-sex partners. Unlike the Compensation Fund, the Red Cross guidelines do not simply defer to state law and apply the rules in effect for the jurisdiction in which the victim was a resident at the time of his death.\textsuperscript{388} In an attempt to enunciate a “broad and inclusive definition of family,”\textsuperscript{389} the Red Cross guidelines incorporate the various standards used to recognize same-sex relationships and apply them regardless of whether the applicable standards reflect controlling local law.


\textsuperscript{385} See Knauer, \textit{supra} note 38, at 337 (discussing limitations of domestic partnership ordinances).

\textsuperscript{386} 1 U.S.C.S. § 7 (Law. Co-op. 2001).

\textsuperscript{387} See \textit{id.} (limiting meaning of “marriage” to legal union between man and woman and defining “spouse” as only a person of opposite sex who is husband or wife).

\textsuperscript{388} For example, the Compensation Fund will recognize a Vermont civil union insofar as the victim was a resident of Vermont and the distribution of his estate is governed by Vermont law which recognizes same-sex partners who have entered into civil unions. However, the Red Cross guidelines would give effect to a Vermont civil union entered into by a couple who no longer live in Vermont.

VI. CONCLUSION

In the United States, the status of same-sex partners varies widely from jurisdiction to jurisdiction, municipality to municipality, and employer to employer. Therefore, it is not surprising that the three state crime victims compensation boards effected by the September 11 attacks have each dealt with the issue of same-sex partners differently.\textsuperscript{390} Virginia, with its sodomy law and anti-marriage legislation, refused to consider extending its “moral responsibility”\textsuperscript{391} to compensate crime victims to include surviving same-sex partners who did not satisfy its strict definition of financial dependency.\textsuperscript{392} Pennsylvania, with no sodomy law, but with anti-marriage legislation, included the ambiguous category of “significant other” within the class of those eligible to file compensation claims without showing economic dependence.\textsuperscript{393} New York, with no sodomy law, no anti-marriage legislation and state-wide domestic partnership benefits for public employees, greatly expanded the definition of economic dependence to include a concept of interdependence.\textsuperscript{394} The changes made by Pennsylvania and New York applied only to victims of the September 11 attacks, indicating that perhaps the singular nature of the events did cause same-sex relationships to be viewed, at least momentarily, in a different light.\textsuperscript{395}

In contrast, the Compensation Fund’s reliance on state law has allowed the federal government to avoid making any express decision regarding surviving same-sex partners. For purposes of the Compensation Fund, a surviving same-sex partner will qualify as a beneficiary if she was named in the victim’s will or if, in the absence of a will, she and the victim resided in one of the two states which include surviving same-sex partners as intestate heirs, Hawaii or Vermont.\textsuperscript{396} Where a surviving same-sex partner does qualify as a beneficiary, the amount of the presumptive award will be considerably less than that payable to a surviving

\textsuperscript{390} For a general discussion of state crime victims compensation boards see supra text accompanying notes 264-78.

\textsuperscript{391} VA. CODE ANN. § 19.2-368-18 (Michie 2001).


\textsuperscript{395} See supra text accompanying note 338 for a discussion of limited applicability for victims of September 11 attacks.

\textsuperscript{396} See supra text accompanying notes 242-45 for a summary of rules regarding determination of recipients of awards from the Compensation Fund.
spouse\textsuperscript{397} and the award will be subject to the Special Master's discretion to reallocate the award in favor of the "spouse, children or other relatives."\textsuperscript{398} On balance, the unwillingness to adopt a federal standard regarding eligibility may not be such a bad result given that the command of DOMA could have produced a standard which excluded same-sex partners entirely.\textsuperscript{399} In addition, the reliance on state law to determine eligibility is not without administrative merit and is consistent with the intended purpose of the awards from the Compensation Fund to serve as an alternative to tort damages.\textsuperscript{400}

Despite its arguable benefits, the hands off approach adopted by the federal government with regard to surviving same-sex partners inscribes a lack of uniformity on the federal level and ensures the disparate treatment of similarly situated surviving partners under the Compensation Fund. In the case of a victim who left a surviving spouse, the couple's state of residence and whether or not the victim died intestate will likely have little bearing on whether the surviving spouse qualifies as a beneficiary. However, for surviving same-sex partners, these two factors, and little else, are of great importance. For example, in the case of a same-sex couple who lived in New York, the surviving same-sex partner will not qualify as a beneficiary if her partner died intestate, but she would qualify if the couple had lived in Hawaii or Vermont.\textsuperscript{401} The fact that the couple had registered as domestic partners under a local ordinance, were recognized as domestic partners by their respective employers, or perhaps had previously entered a valid civil union while living in Vermont, would all be irrelevant.

Since the publication of the Final Rule, the federal government, pointing to its reliance on state law, has become increasingly dismissive and defensive when discussing the status of same-sex partners under the Compensation Fund. For example, the Special Master now asserts that complaints regarding the treatment of surviving same-sex partners should be directed to state officials and not to the Compensation Fund—doubtless, a position that provides little comfort for a surviving partner.\textsuperscript{402} According to the Special Master, he was not able to address the question of surviving same-sex partners in his regulations because he

\textsuperscript{397} This is because although the surviving partner may qualify as a beneficiary under the Compensation Fund, she will not qualify as a surviving "spouse." The existence of a surviving spouse increases the amount of the presumptive award for economic loss and increases the non-economic loss by a flat $100,000. \textit{See supra} text accompanying notes 197-202 (discussing difference in amounts of presumptive awards).

\textsuperscript{398} September 11 Victim Compensation Fund—Interim Final Rule, § 104.52, 66 Fed. Reg. at 66287.

\textsuperscript{399} 1 U.S.C.A. § 7 (West 2001).

\textsuperscript{400} \textit{See supra} text accompanying notes 157-64 for a discussion of the nature of Compensation Fund and its combination of the elements of wrongful death and survival actions.

\textsuperscript{401} \textit{See supra} text accompanying notes 242-45 for a summary of the rules regarding the determination of recipients of awards under Compensation Fund.

\textsuperscript{402} The Special Master included this advice in his official statement accompanying the Final Rule. \textit{Statement of Special Master, September 11 Victim Compensation Fund—Final Rule, 67 Fed. Reg. at 11243.} The Statement provides: "While many have voiced criticisms of some of the potentially applicable state laws, those criticisms are more properly directed toward state officials." \textit{Id.}
had no choice but to follow state law.\textsuperscript{403} Not only is the tone of this argument increasingly disturbing, but the claim itself is disingenuous. There are many instances where the Compensation Fund refuses to adhere blindly to state law. Most notably, the regulations expressly reserve to the Special Master the discretion to ignore state law and reallocate a proposed distribution in favor of the “spouse, children, or other relatives.”\textsuperscript{404} In addition, the Final Rule defines the term “dependent” by reference to a federal income tax standard, not to state law.\textsuperscript{405} Finally, the measure of damages and the type of damages awarded do not rely on state law tort law.\textsuperscript{406}

Perhaps even more problematic is the sharp contrast between the Special Master’s out of hand dismissal of complaints regrading the eligibility of surviving same-sex partners and his solicitous remarks regarding the status of claims brought by the surviving spouses and family members of victims who were in the United States illegally—individuals whose interests the Attorney General has pledged to safeguard.\textsuperscript{407} The disparity in the treatment afforded illegal immigrants and that afforded U.S. citizens who were in same-sex relationships became starkly clear during an interview on the Sunday morning news program of “Meet the Press” when host Tim Russert, asked Special Master Kenneth Feinberg two back-to-back questions about the status of both groups.\textsuperscript{408} The exchange bears quoting in its entirety:

\begin{quote}
MR. RUSSELT: What about illegal immigrants who were working hard in the World Trade Center? They are fearful that if they come forward and make a claim, they’ll be deported.

MR. FEINBERG: They will not be, and here the attorney general, as
\end{quote}

\textsuperscript{403} In his official statement accompanying the Final Rule, the Special Master asserted that “[r]eliance on state law is necessary[.]” \textit{Id.}

\textsuperscript{404} September 11 Victim Compensation Fund—Interim Final Rule, § 104.52, 66 Fed. Reg. at 66287.

\textsuperscript{405} September 11 Victim Compensation Fund—Final Rule, § 104.3(b), 67 Fed. Reg. at 11245 (clarifying that federal income tax standard determines who qualifies as “dependent”).

\textsuperscript{406} For example, the type of non-economic loss awarded for the victim’s pain and suffering under the Compensation Fund is not compensable under New York law. See supra text accompanying note 116 (discussing state law limitations on damages for pain and suffering).

\textsuperscript{407} The Special Master reports that the “Attorney General, in consultation with Immigration” has determined that “undocumented aliens who come forward,” as well as their families, “will not suffer any consequences.” See NBC News Transcripts, \textit{Meet the Press}, Mar.10, 2002, available in LEXIS, News Library, curwan file (quoting Special Master Kenneth Feinberg). Referring to the Attorney General’s cooperation as “fabulous,” the Special Master explained that this was an instance where the Attorney General had “stepped up,” presumably to the proverbial plate. \textit{Id.}

The willingness of the Attorney General to embrace undocumented aliens is particularly remarkable in light of the criticism leveled against the Department of Justice regarding its crackdown on immigrants in connection with the War on Terrorism. See generally, Clancy Sigal, \textit{John Ashcroft’s Palmer Raids}, N.Y. TIMES, Mar. 13, 2002, at A25 (comparing Ashcroft’s crackdown to Attorney General Palmer’s raids during 1920s “Red Scare”).

he has in so many of these areas that I've been working on, stepped up. The attorney general of the United States and the administration have been fabulous in the support of this program. The attorney general, in consultation with Immigration, etc., undocumented aliens who come forward, the families will not suffer any consequences. They are covered by this program. They will get a check. The employer, where we need the economic information about the undocumented alien, will not be penalized. Now, if they have some other reason that the Immigration Service is looking for them, a felony or some other crime, they won't get immunity from that, but in terms of this program, absolutely they are protected and I urge them to participate with no consequence.

MR. RUSSERT: People who were engaged to be married, fiances or gay domestic partners, they're left out of the program.

MR. FEINBERG: No, no—they're left out of my program to the extent that their own state doesn't include them. I cannot get into a position in this program, which has a one-and-a-half or two-year life start second-guessing what the state of New York or the Commonwealth of Massachusetts or the state of Virginia or New Jersey, how they treat same-sex partners, domestic live-ins, etc. I simply say this: What does your state law say about who is eligible? If your state law makes you eligible, I will honor state law. If it doesn't, I go with the state. Otherwise, Tim, I would find myself getting sued in every state by people claiming that I'm not following how the state distributes money. I can't get into that local battle. I've got to rely on state law.\textsuperscript{409}

As explained above, Mr. Feinberg's own regulations grant him the discretion to override state law, thereby placing him at risk of "getting sued in every state[]."\textsuperscript{410}

The comparison between the treatment of undocumented aliens and U.S. citizens who were in same-sex relationships is not meant to imply that undocumented aliens should be ineligible to participate in the Compensation Fund.\textsuperscript{411} However, as suggested in the Introduction, the decision to allow claims by and on behalf of undocumented aliens, but not surviving same-sex partners \textit{qua} partners, does produce an unsettling picture of "which families count when

\textsuperscript{409} Id.

\textsuperscript{410} Id.

\textsuperscript{411} It also does not mean to suggest that the two groups of undocumented aliens and individuals in same-sex relationships are necessarily mutually exclusive. A surviving same-sex partner of an undocumented alien would be in the same position as a surviving same-sex partner of a U.S. citizen. Moreover, it is overly simplistic to compare undocumented aliens to only U.S. citizens. A more accurate comparison would be between undocumented aliens and individuals who are U.S. citizens or who are in the country legally. The latter category would include resident aliens, valid visa holders, and tourists. The difference in treatment, however, is most stark when undocumented aliens are compared with U.S. citizens, particularly given the degree to which the United States restricts immigration and values notions of shared nationality.
the United States is at its most generous, most united, and most injured. 412 It illustrates
the powerful uniting force of heteronormativity which, apparently, can
trump nationality and even the zealously enforced U.S. immigration laws. 413

The Red Cross family guidelines provide a forward-looking alternative to
the myopic views of family adopted by state and federal relief efforts. Instead of
settling on one defining feature, such as economic dependence or testamentary
wishes, the Red Cross aggregated all of the various indicia of family ties into a
non-exhaustive sixteen-factor list designed to encompass an inclusive and
expansive definition of family. 414 As a result, a surviving partner who can show
economic interdependence or reciprocal beneficiary designations, or registered
domestic partnership status or recognition by an employer or a civil union or a
foreign domestic partnership, would qualify for survivor benefits. 415 Under these
criteria, all of the hypothetical surviving same-sex partners discussed throughout
this Article would qualify for assistance, regardless of whether their partners
left a will and regardless of their state of residence.

In his Statement accompanying the Final Rule, the Special Master
acknowledged the anomalous result produced by the application of such a broad
definition of family. 416 The Statement quoted what was characterized as a
"rhetorical" question from a commentator who took issue with the eligibility
standards for the Compensation Fund. 417 The commentator asked, "Why am I
eligible to recover money from certain private charities, but yet am ineligible
under the [Compensation] Fund?" 418 Given the rhetorical nature of the
question, the question went unanswered.

412. See Introduction, supra.
413. This could lead to the conclusion, as suggested in the Introduction, that a "questions of
sexual orientation remain destined to divide us as a country." See Introduction, supra.
414. See supra text accompanying notes 368-87 for a description of Red Cross family guidelines.
415. See supra text accompanying notes 368-87 for a description of Red Cross family guidelines.
Reg. at 11243. The Statement then asserts that "[r]eliance on state law is necessary[.]") Id.
417. Id.
418. Id.