Gay and Lesbian Elders: Estate Planning and End-of-Life Decisionmaking

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## CONTENTS

**INTRODUCTION**

2

I. **GAY AND LESBIAN ELDERS**

8

A. *Pre-Stonewall History*

9

B. *Demographic Overview*

12

C. *The View From the Closet*

17

II. **CHOSEN FAMILY**

20

A. *Marriage Equality*

21

B. *Property and Probate*

29

C. *Decision-Making Authority*

34

III. **FINANCIAL SECURITY AND BENEFITS**

39

A. *Social Security*

40

B. *Medicare/Medicaid*

42

C. *Pension and Other Death Benefits*

44

IV. **PLANNING IN THE FACE OF BIAS**

46

A. *Will Challenges*

47

B. *Capacity*

51

C. *The Importance of an Integrated Elder Care Plan*

53

**CONCLUSION**

57

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In April 2008, eighty-eight year-old Harold Scull fell at his Sonoma County home where he had lived for twenty years with his long-time partner, Clay Greene.\(^1\) Over Harold’s objections, Clay called 911, and their lives were turned upside down.\(^2\) Harold died four months later, alone in a nursing home.\(^3\) Clay, who was seventy-seven at the time, was placed in a secure assisted living facility for individuals suffering from dementia,\(^4\) and he only learned of Harold’s passing “several days after the fact.”\(^5\) By the time Harold died, County officials had sold all of the couple’s possessions, confiscated their cats, and assumed control over their finances.\(^6\) The

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\(^3\) Shih, supra note 1 (Harold died in August 2008).


life they had built together over the course of twenty five years had been quickly and unceremoniously dismantled.\(^7\)

The series of events set in motion by Clay’s 911 call were the subject of a lawsuit brought by Clay and Harold’s estate against county officials and other related parties.\(^8\) The plaintiffs alleged that the actions of the defendants were motivated by anti-gay bias and a desire for financial gain.\(^9\) To the contrary, representatives of the county asserted that Harold was the victim of domestic violence, and it was necessary to remove him from his residence for his own safety.\(^10\) The charge of anti-gay bias prompted a swift denial from the defendants,\(^11\) and Sonoma County launched a public relations campaign to assure tourists that the county does not countenance homophobia.\(^12\) Days before the trial was scheduled to begin in 2010, the county and the nursing home where Clay alleged that he had been restrained against his will settled the claims against them for an amount in excess of $600,000.\(^13\) Although the county denied that any

\(^7\) Id. (reporting that couple had spent 25 years together). The executor of Harold’s estate and a long-time friend of the couple described their relationship as follows: “They lived a fabulous life surrounded by beautiful things . . . They went to museums and traveled through Europe. They entertained and had lots of friends.” Perlman, supra note 2 (quoting Jannette Biggerstaff).

\(^8\) Petition, supra note 5.

\(^9\) Id.


\(^11\) See e.g., Pearlman, supra note 2.


discrimination or breach of fiduciary duty had occurred, it agreed to modify some of its procedures to prevent similar events in the future.\textsuperscript{14}

The story of Harold and Clay illustrates the stark power of the state to disrupt gay lives, as well as the continuing brutality of homophobia and the vulnerability of our elderly. According to the plaintiffs, state actors forcibly separated the long-term partners, without medical justification confined one to a secure dementia ward, took away their beloved pets to an uncertain fate, and liquidated their belongings -- all because one of the partners called 911 for assistance.\textsuperscript{15} The allegations made by Clay and Harold’s estate struck a powerful chord in the gay and lesbian community because they seem to confirm some of the deepest-seated fears of older gay men and lesbians.\textsuperscript{16} Granted, the allegations were not proven, but the fact this sort of scenario \textit{could} occur -- that partners could be separated and confined against their will -- weighs heavily on the minds of older gay men and lesbians.\textsuperscript{17} By any standard, the scenario is a

\begin{itemize}
\item[\textsuperscript{15}] Clay’s lawyer has reported that “the cats are dead.” Payne, \textit{supra} note 6.
\item[\textsuperscript{16}] Shih, \textit{supra} 1 (“For gay men and lesbians, the series of events outlined in the complaint hits very close to home”).
\item[\textsuperscript{17}] According to a 2006 Metlife survey of 1000 LGBT individuals age 40 to 61, a high percentage reported a deep concern that they would be discriminated against as they get older on account of their sexual orientation. Metlife, \textit{Out and Aging: the Metlife Study of Lesbian and Gay Baby Boomers}, \url{http://www.metlife.com/Applications/Corporate/WPS/CDA/PageGenerator/0.4773.P8899.00.html} (last visited March 29, 2010).
\end{itemize}
nightmare. As Clay later summarized the experience in an interview with the New York Times, “I was trash to them. I am going to end up in the dumpster.”18

Although Harold and Clay had not registered as domestic partners under California law, they had taken steps to secure their relationship by executing reciprocal wills and durable powers of attorney.19 Over the past twenty years, the gay and lesbian community has placed an increasing emphasis on estate planning documents. Beginning in the late 1980s, the Sharon Kowalski case and the first wave of the HIV/AIDS epidemic revealed the legal fragility of same-sex relationships and led to public education efforts that stressed the importance of estate planning documents, specifically durable powers of attorney.20 Without marriage equality or some parallel form of legal recognition, estate planning for same-sex couples gradually emerged as an essential aspect of relationship formation because estate planning documents enabled same-sex partners to give each other some measure of legal standing and protection. As a result, estate planning often plays a much larger role in same-sex relationships than in traditional family situations where estate planning is largely a tool for asset preservation and tax minimization. The experience of Clay and Harold, however, also illustrates that sometimes even the most carefully executed estate plan can prove inadequate to protect gay and lesbian elders and their chosen families.

18 Scott James, An Unlikely Plaintiff. At Issue? He Dears not Speak Its Name, N.Y. Times, May 6, 2010, at 19A.


The proactive and instrumental use of estate planning documents by same-sex couples to create family has received a good deal of attention from academics, practitioners, and advocates.\(^{21}\) but within this literature very little consideration has been given to the distinct set of concerns faced by gay and lesbian elders.\(^{22}\) The failure to address the specific estate planning needs of gay and lesbian elders reflects a larger silence regarding aging and the gay and lesbian community.\(^{23}\) Marginalized by ageism within the gay and lesbian community and homophobia within the senior community, the concerns of gay and lesbian elders have been overlooked and ignored.\(^{24}\) For example, the three signature issues of the contemporary gay and lesbian movement for civil rights – marriage equality, employment non-discrimination, and the repeal of the military’s Don’t Ask, Don’t Tell policy – do not speak directly to the needs of elders.\(^{25}\) The three issues of greater concern to gay and lesbian elders are the legal fragility of their “chosen family,” financial insecurity, and anti-gay bias and discrimination on the part of service providers and senior-specific venues.\(^{26}\)


\(^{24}\) *Id.* at 4 (explaining gay and lesbian elders are especially vulnerable because “[t]hey are unable to speak for themselves and others are unwilling to speak for them”).

\(^{25}\) *Id.* at 5-6 (describing “three signature issues” in greater detail).

\(^{26}\) *Id.* at 8 (characterizing these concerns as “legal fragility of chosen family, financial insecurity, and the availability of LGBT-positive housing and eldercare”).
Obviously, efforts to address these concerns will require significant legal and policy reform, as well as increased educational outreach efforts.\footnote{See generally id. (proposing cultural competency training, anti-bullying measures, and broad-based anti-discrimination protections).} In the meantime, however, gay and lesbian elders can use basic estate planning tools to serve as a partial bulwark against many of the inequities they currently experience. This Article outlines the ways in which estate planning tools can be used to help mitigate the cumulative force of anti-gay bias in succession laws, heteronormative aging policies, and decades of homophobic laws and regulations. With an emphasis on the seniors who are most at risk, this Article focuses primarily on the ways in which estate planning for gay and lesbian seniors differs from gay and lesbian estate planning generally and, therefore, does not address issues related to tax planning that would be applicable to more affluent testators.\footnote{Additionally, this Article does not address the particular needs and challenges faced by transgender elders. Many of the legal and policy reforms that would assist gay and lesbian elders, such as anti-discrimination protections, are equally applicable to transgender elders and gender identity. See generally Knauer, supra note 23.}

This Article is organized thematically around the three areas of core concern for gay and lesbian elders -- chosen family, financial insecurity, and anti-gay bias. The first section provides an overview of the current generation of gay and lesbian elders, including a summary of pre-Stonewall history and existing demographic information. The second section outlines the challenges associated with drafting an estate plan that favors chosen family over next of kin. The third section engages the topic of financial insecurity, discussing various benefits and government programs, such as social security and Medicaid planning. The fourth and final section discusses why an integrated elder care plan in an essential component of estate planning for gay and lesbian elders and how anti-gay bias and homophobia can threaten to derail even the
most well designed estate plan. A brief conclusion notes that estate planning is at best an imperfect solution to a much larger problem. Significant legal and policy reform will be necessary to ensure equity and dignity in aging regardless of sexual orientation.

I. GAY AND LESBIAN ELDERS.

In the United States, there are an estimated 1.6 million to 3.2 million gay men and lesbians who are 65 years of age or older. Until recently, gay and lesbian elders were rarely studied, but the existing research suggests that many of today’s gay and lesbian elders have a decreased likelihood of successful aging because they struggle with social isolation and financial insecurity. Fearful of encountering anti-gay bias, gay and lesbian elders retreat to the closet.

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29 There is no definitive estimate of the number of gay and lesbian elders in the U.S. The figures quoted in the text represent the number of seniors in the U.S. multiplied by the percentage of the general population who are thought to be gay or lesbian. In 2010 there were 40 million seniors in the U.S. Department of Health and Human Services Administration on Aging, Projected Future Growth of the Older Population, available at http://www.aoa.gov/AoARoot/Aging_Statistics/future_growth/future_growth.aspx (last visited July 29, 2010). Estimates of the percentage of the general population who are gay or lesbian range from between four percent to six percent. The 4 percent figure is based on studies conducted by the Williams Institute at UCLA, and it is the percentage used by the largest LGBT senior advocacy group, SAGE. SAGE and Movement Advancement Project, Improving the Lives of LGBT Older Adults, Mar. 2010, http://sageusa.org/uploads/Advancing%20Equality%20for%20LGBT%20Elders%20%5BFINAL%20COMPRESSED%5D.pdf, at 2. The higher six percent ceiling represents figures from state and federal health surveys reporting same-sex behavior. Jaime M. Grant, Outing Age 2010. Public Policy Issues Affecting Lesbian, Gay, Bisexual and Transgender Elders available at http://www.thetaskforce.org/downloads/reports/reports/outingage_final.pdf (last visited July 29, 2010) at 134. The estimates provided by the U.S. Administration on Aging (AoA) differ because the AoA defines senior status as starting at age 60 and includes transgender elders. AoA, Diversity, Lesbian Gay, Bisexual, and Transgender (LGBT), available at http://www.aoa.gov/AoARoot/AoA_Programs/Tools_Resources/diversity.aspx (last visited July 29, 2010). The AoA estimates that there are between 1.75 million and 4 million LGBT elders in the U.S. who are 60 years of age or older. Id.

30 See Knauer, supra note 23, at 8-16 (describing social isolation and financial insecurity).
and underutilize senior services. As long-time survivors of state-sponsored homophobia in the workplace, they lag behind their non-gay peers on all financial measures, such as income, savings, and home ownership. Many are estranged from their family of origin and rely on a single generational “chosen family” for support. For these gay and lesbian elders, estate planning can provide a much needed level protection and security, but, as Clay and Harold learned, such planning is not a failsafe nor will it be sufficient to make their designated beneficiaries family under the law in the absence of marriage or marriage equivalence.

A. Pre-Stonewall History.

Whenever discussing aging in the gay and lesbian community, it is important to remember that today’s gay and lesbian elders came of age at a time when homosexuality was criminalized and pathologized – long before the advent of Gay Liberation and notion that one should be open and proud. Homosexual acts were criminalized in all states, and a host of

31 For example, according to a 2001 study conducted by the Department of health and Human Services (HHS), gay and lesbian elders are only 20 percent as likely as their non-gay peers to take advantage of federally funded aging services, as well as other entitlements such as housing assistance and food stamps. Elizabeth King and Douglas Kimmel, SAGE: New York City’s Pioneer Organization for LGBT Elders, in Lesbian, Gay, Bisexual, and Transgender Aging: Research and Clinical Perspectives 266 (Douglas Kimmel, Tara Rose, and Stephen David eds., 2006).

32 See infra text accompanying notes 72 - 77(discussing financial data).

33 See infra text accompanying notes 86- 91(defining “chosen family”).


criminal sanctions were used to police expressions of homosexuality, suppress sympathetic discussions of homosexuality, and inhibit the ability of homosexuals to socialize.\textsuperscript{36}

Homosexuality was classified as a severe form of mental illness that disqualified its sufferers from most employment, military service, and parenthood.\textsuperscript{37} For this pre-Stonewall generation, the closet was a non-negotiable way of life.\textsuperscript{38} There was no public pro-gay counter-narrative. Being exposed as homosexual could cost an individual his job and his family. It could also prompt medical intervention in the form of civil commitment, electro-shock therapy, and even a lobotomy.\textsuperscript{39}

The 1969 Stonewall riots are generally considered to mark the beginning of Gay Liberation and a new way of thinking and talking about sexuality that, for the first time, urged individuals to come out and declare themselves.\textsuperscript{40} In 1969, the youngest of today’s gay and

\textsuperscript{36} See Knauer, supra note 23, at 22 (discussing legal disabilities imposed on homosexuals prior to the Stonewall riots and the Gay Liberation movement).

\textsuperscript{37} See generally RONALD BAYER, HOMOSEXUALITY AND AMERICAN PSYCHIATRY: THE POLITICS OF DIAGNOSIS (1987) (describing history of controversy relating to declassification of homosexuality and its deletion from the Diagnostic and Statistical Manual III). The classification of homosexuality as a severe sociopathic personality disorder was used to justify a wide range of legal and social disabilities.

\textsuperscript{38} For example, a 2004 report on LGBT elders explained that “‘passing’ as heterosexual has been a lifelong survival strategy” for the pre-Stonewall generation. Funders for Lesbian & Gay Issues, \textit{Aging in Equity: LGBT Elders in America, available at \url{http://www.lgbtfunders.org/files/AgingInEquity.pdf}} (visited July 29, 2010), at 5.


\textsuperscript{40} Discussing this shift, Jagose explains, “Stonewall functions in a symbolic register as a convenient if somewhat spurious marker of an important cultural shift away from assimilationist
lesbian elders were 24 and the oldest were in their fifties and above.\textsuperscript{41} It was not until four years after Stonewall that the American Psychiatric Association finally declassified homosexuality as a mental illness in 1973.\textsuperscript{42} By that time, the youngest of today’s elders were 28 years of age and the oldest were approaching retirement. They had labored their entire adult life under the stigma of mental illness. Although these events heralded a period of increased visibility and acceptance, many gay and lesbian elders never ventured far from the closet, fearing the reactions of family and colleagues.\textsuperscript{43} Some elders who embraced the new discourse of pride and chose to live openly now report that they have become increasingly less forthcoming about their sexual orientation as they age.\textsuperscript{44} Many gay and lesbian elders affirmatively choose to be closeted in institutional settings or when dealing with health care providers for fear of reprisal and rejection.\textsuperscript{45} As one elder explained, “as strong as I am today when I am in front of the gate of the nursing home the closet door is going to slam shut behind me.”\textsuperscript{46}

\textsuperscript{41} In 2010, when this article went to press, the youngest gay and lesbian elders were born in 1945.

\textsuperscript{42} See BAYER, supra note 37 (describing circumstances surrounding de-classification).

\textsuperscript{43} Some seniors who have had same-sex relationships or who are primarily attracted to individuals of the same sex do not identify as gay or lesbian or even as homosexual, making it very difficult to assess their needs. Indeed, this may be the case with Clay. Scott James, \textit{An Unlikely Plaintiff. At Issue? He Dares Not Speak its Name}, N. Y. TIMES, May 6, 2010, at 19A.

\textsuperscript{44} A 2004 report on LGBT elders found that seventy-five percent of LGBT elders are not “completely open” about their sexual orientation with health care providers. Funders for Lesbian & Gay Issues, \textit{supra} note 38.

\textsuperscript{45} Jane Gross explains:


B. Demographics.

The available information on gay and lesbian elders is frustratingly incomplete, and there is almost no information on gay and lesbian elders with intersecting racial and ethnic identities.\textsuperscript{47} Taken together, however, existing research data, growing anecdotal accounts, and surveys produced by advocacy and industry groups paint a disturbing picture of the condition gay and lesbian elders. Gay and lesbian elders are more likely to be single than their non-gay peers, and they are more likely to live alone.\textsuperscript{48} Both of these factors place gay and lesbian elders at an increased risk of social isolation.\textsuperscript{49} In addition, gay and lesbian elders are likely to be estranged from their family of origin – a natural consequence of the pre-Stonewall views on homosexuality.\textsuperscript{50} They are also much less likely to have children than their non-gay peers.\textsuperscript{51} As

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\item The most common reaction, in a generation accustomed to being in the closet, is a retreat back to the invisibility that was necessary for most of their lives, when homosexuality was considered both a crime and a mental illness. A partner is identified as a brother. No pictures or gay-themed books are left around.


\textsuperscript{46} Gross, \textit{supra} note 45, at A1 (quoting LGBT elder).


\textsuperscript{49} Grant, \textit{supra} 29, at 10 (explaining that isolation occurs when a person cannot access needed social and medical support services).

\textsuperscript{50} \textit{See} Barker, \textit{supra} note 47, at 61-62.

\textsuperscript{51} In some studies on gay and lesbian elders, up to 90 percent of the respondents did not have children, compared with only 20 percent of non-gay elders generally. Sean Cahill, Ken South & Jane Spade, Policy Inst. of the Nat'l Gay & Lesbian Task Force Found., \textit{Outing Age: Public Policy Issues Affecting Gay, Lesbian, Bisexual, and Transgender Elders} (Nov. 9, 2000),
\end{enumerate}
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a result, gay and lesbian elders, as well as gay men and lesbians more generally, rely on what anthropologists have termed “chosen family” for emotional, physical, and financial support.\footnote{52}{See generally KATH WESTON, FAMILIES WE CHOOSE (1997). See also Douglas C. Kimmel, Issues to Consider in Studies of Midlife and Older Sexual Minorities, in GAY AND LESBIAN AGING, \textit{supra} note 47, at 267 (“family of choice”); see also de Vries & Blando, \textit{supra} note 48, at 8-11 (alternate family structure based on camaraderie and caring); Jacqueline S. Weinstock, Lesbian Friendships at and Beyond Midlife: Patterns and Possibilities for the 21st Century, in GAY AND LESBIAN AGING, \textit{supra} note 47, at 177-210 (“friends like family”).}

Chosen families, however, have two major drawbacks. First and foremost, they are not recognized as next of kin under the law and, therefore, have no legal standing in terms of property rights or decision making. Moreover, chosen family networks are at a significant disadvantage in terms of caregiving burdens because they tend to be comprised of individuals who are in the same age cohort.\footnote{53}{Intergenerational relationships are not common in the gay and lesbian community. See Andrew J. Hostetler, \textit{Old, Gay, and Alone? The Ecology of Well-Being Among Middle-Aged and Older Single Gay Men}, in Gay and Lesbian Aging, \textit{supra} note 47, at 143, 159.} This is problematic because aging policy in the U.S. assumes the existence of a multi-generational support network.\footnote{54}{See Urvashi Vaid, \textit{Preface} to Cahill, et al., \textit{supra} note 51. Caring for older relatives as they age is also a strong cultural value. As Barker explains: “The moral obligation of lineal kin to provide care for one another is a taken-for-granted cultural value underpinning much interaction within natal families and is reflected in both social theory distinguishing family from other social groups and throughout social policy.” Barker, \textit{supra} note 47, at 59.} Eighty percent of all long-term care is provided by informal unpaid caregivers who are most often younger relatives or spouses.\footnote{55}{Barbara Coleman and Sheel M. Pandya, AARP Public Policy Institute, \textit{Family Caregiving and Long-Term Care}, Nov. 2002, \url{http://assets.aarp.org/rgcenter/il/fs91_ltc.pdf}. A 2009 national study showed that relatives comprise 89 percent of all unpaid caregivers for individuals 50 years of age and older are relatives, and the average age of caregivers for individuals who are age 75 and older is 51 years of age. National Alliance for Caregiving, \textit{Caregiving in the U.S.: A Focused Look at Those Caring for the 50+}, available at \url{http://www.caregiving.org/data/FINALRegularExSum50plus.pdf} (last visited July 29, 2010), at}
the case of a single-generational chosen family, its members will age at the same time, thereby giving rise to reciprocal and overlapping caregiving responsibilities.

Gay and lesbian elders overwhelmingly report that they would prefer to “age in place” and express extreme trepidation over the prospect of moving to some form of congregate living facility, such as a nursing home or assisted living facility.56 This reaction reflects their fear that they will encounter anti-gay bias on the part of service providers or their non-gay peers, and studies show that this fear is not misplaced.57 Older gay men and lesbians report high levels of victimization over their lifetimes, and it is understandable that their fear of anti-gay bias would be amplified by the vulnerabilities associated with aging.58 This fear causes gay and lesbian elders to be closeted and underutilize senior services, including the very services that are designed to help seniors “age in place.”59 As a result, gay and lesbian elders are at a high risk for

19, 21. Of particular relevance to gay and lesbian elders is that fact that the majority of individuals who are “aging in place,” rely solely on informal (i.e., unpaid) caregiving. Id. at 38.

56 See Gross, supra note 45, at A1.

57 The data regarding anti-gay bias is limited, but it is increasingly confirmed by anecdotal evidence. See Cahill supra note 51, at 36-38 (discussing research). It is clear that seniors are the age cohort with the strongest anti-gay attitudes. A national survey by the Kaiser Family Foundation highlighted the differences in attitude between young people and individuals age 65 and older. Kaiser Family Foundation, Inside-OUT: A Report of the Experiences of Lesbians, Gays and Bisexuals in America and the Public’s Views on Issues and Policies Related to Sexual Orientation, available at http://www.kff.org/kaiserpolls/upload/National-Surveys-on-Experiences-of-Lesbians-Gays-and-Bisexuals-and-the-Public-s-Views-Related-to-Sexual-Orientation.pdf (last visited July 29, 2010). A much higher percentage of the 65 and older age cohort considered homosexuality to be morally wrong. Id. Not surprisingly, a high percentage in that age cohort also disapproved of gay-positive policy reform, such as same-sex marriage and parenting rights. Id.


59 Federal aging policy is coordinated by the Agency on Aging (AoA). It oversees a nation-wide aging network that includes 650 regional Area Agencies for Aging (AAAs). AAAs provide a
social isolation, especially after the death of a partner and as their chosen family members become increasingly infirm.\textsuperscript{60}

Since 1990, the Census Bureau has gathered information on same-sex partnered households.\textsuperscript{61} This data represents the largest national data set for gay and lesbian elders, but it is necessarily partial because it only covers \textit{partnered} households willing to self-report on a government form.\textsuperscript{62} Census data does include single gay men or lesbians or partnered gay men and lesbians who do not feel comfortable outing themselves to the federal government.\textsuperscript{63} Accordingly, Census data does not capture some of the most vulnerable gay and lesbian elders, namely those elders who are single or those partnered seniors who are too scared to report their status.\textsuperscript{64} Even with this caveat, however, the Census data provides an intriguing, albeit partial, glimpse into the day-to-day lives of gay and lesbian elders.

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\item See supra note 49 (describing social isolation).
\item The Census Bureau does not collect information on sexual orientation, but it does allow respondents to designate whether an individual living in the same household is an “unmarried partner.” It is then possible to calculate the number of same-sex partnered households by comparing the sex of the occupants with their status. M.V. Badgett and Marc A. Rogers, \textit{Left Out of the Count: Missing Same-Sex Couples in Census 2000} 5 (2003), \texttt{http://www.iglss.org/media/files/c2k_leftout.pdf}. Researchers believe that the number of same-sex partnered households reflected on the 200 Census reflects a significant undercount. \textit{Id.}
\item \textit{Id.}
\item \textit{Id.}
\item Researchers believe that any survey inquiring as to sexual orientation will result in an undercount due to the continuing stigma attached to homosexuality. Grant, supra note 29, at 136.
\end{enumerate}
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Based on the 2000 Census data, elder same-sex partnered households exist in 97 percent of the counties in the United States, and 15 percent of all same-sex partnered households are in locations classified as rural. The largest number of elder same-sex partnered households are found in states with the largest number of elder different-sex married couples: California, Florida, and New York. Elder same-sex partnered households earn less income that their different-sex married peers. Specifically, they have 34.7 percent less income from retirement savings than elder different-sex married couples. Compared to their non-gay peers, they are less likely to own their home, and, when they do, its median value is lower and they are more likely to be still paying a mortgage. In addition, elders in same-sex partnered households are more likely than their non-gay peers to report a disability in each of the categories queried on the Census, including hearing, vision, mobility, and memory.

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66 *Id.* Grant, *supra* note 29, at 33-34.

67 *Id.* at 33.


69 *Id.* at 5.

70 *Id.* at 6.

The Census data also shows that same-sex partnered households are significantly more likely to live at or near the poverty line than their peers who are in different-sex marriages. According to the Census data, elder same-sex partnered households are 72 percent more likely to be receiving supplemental social security income and 84 percent more likely to be receiving public assistance. Elder female same-sex partnered households are nearly twice as likely to live below the poverty line as their non-gay peers. Elder female same-sex partnered households have close to 20 percent less income than different-sex married couples. Elder female same-sex partnered households also have considerably less income from retirement plans, and they are 21 percent less likely to have any income from interest, rentals and dividends. The findings with respect to financial status are especially disturbing because the Census data should capture the gay and lesbian elders who are most likely to be the best off financially because they are partnered.

C. The View From the Closet.

In terms of family support, disability, and financial security gay and lesbian elders are a vulnerable population, but their risk of isolation is greatly exacerbated by the closet. The brief


74 Albelda, supra note 72, at ii.

75 Goldberg, supra note 73, at 7.

76 Id. at 10.

77 In addition, marginalized groups have historically been underrepresented in the Census. Badgett and Rogers, supra note 61.
thumbnail of pre-Stonewall history and quick summary of demographic data illustrates that gay and lesbian elders differ from both younger gay men and lesbians, as well as non-gay seniors. For example, many gay and lesbian elders hold distinct views on homosexuality and identity that do not correspond to those held by later generations. Studies suggest that gay and lesbian elders do not necessarily identify as “gay” and even those who do self-identify are more likely to be closeted. Clay provides a case in point. In interviews, Clay refers to Harold as simply his “friend” and disclaims any knowledge about the fight over same-sex marriage in California or the controversy generated by Proposition 8. It is unclear whether Clay’s reticence is due to an individual worldview where he and Harold were special “friends” or whether he is simply using a euphemism to maintain the open secret of the closet. In either event, the resulting silence on the part of gay and lesbian elders makes it very difficult to develop a needs assessment strategy or engage in outreach efforts. As explained in Part II, the closet can also complicate relations between a surviving partner and the partner’s family of origin, especially where the family was not aware of the true nature of the relationship.

78 For example, one study found, “21 percent of the older gay men think of themselves as homosexual rather than as gay queer or something else.” Todd W. Rawls, Disclosure and Depression Among Older Gay and Homosexual Men: Findings from the Urban Men’s Health Study in GAY AND LESBIAN AGING: RESEARCH AND FUTURE DIRECTIONS 126 (Gilbert Herdt and Brian de Vries, eds. 2004). The same study also showed a strong correlation between age and self-identification as gay, reporting that “19.8% of the men in their 60s self-identify as homosexual, and 51.3% 70 years of age and older think of themselves as homosexual, rather than as gay.” Id.

79 James, supra note 18.


81 As one study notes, “The difficulty in undertaking change in an environment in which older gays and lesbians are profoundly silent cannot be underestimated.” William Kanapaux, Homosexual Seniors Face Stigma, 4 GERIATRIC TIMES (Nov./Dec. 2003) (quoting a report on LGBT seniors in 43 THE GERONTOLOGIST 192–202 (2003)).
In addition, research suggests that pre-Stonewall history continues to inform the way gay and lesbian elders approach their relationships with medical professionals.\(^{82}\) Long classified as mentally ill, gay and lesbian elders express trepidation over interacting with medical service providers. Gay and lesbian elders often fail to disclose their sexual orientation and will avoid encounters with medical professionals to the extent possible.\(^{83}\) Researchers also report that gay and lesbian elders are hesitant to pursue intergenerational friendships because they fear being perceived as a predatory older homosexual – a stereotype popularized in the 1940s and 1950s by the American Freudians.\(^{84}\) Finally, the fear of encountering ant-gay bias can cause gay and lesbian elders to underutilize social services, thereby increasing their risk of social isolation.\(^{85}\)

\(^{82}\) For example, Barker notes that older lesbians are “especially wary and fearful of health care and other service providers with their power to disrupt everyday life.” Barker, supra note 47, at 54.


\(^{85}\) See King & Kimmel, supra note 31, 266 (citing 2001 HHS study indicating gay and lesbian elders are only 20 percent as likely as their non-gay peers to take advantage of federally funded aging senior services and other entitlements such as housing assistance and food stamps).
II. CHOSEN FAMILY.

In her 1991 book, Families We Choose: Lesbians, Gays, Kinship, anthropologist Kath Weston explained that gay men and lesbians were uniquely without family in the traditional sense of the term because their homosexuality distanced them from their family of origin and they would most likely not have children of their own unless they were from a prior heterosexual relationship. Both of these observations were especially true of the pre-Stonewall generation who came of age during a period that was a fearful time for homosexuals. Today, it is common to talk about when and on what terms a gay man or lesbian chooses to “come out” to his or her family, friends, and co-workers. For the pre-Stonewall generation, however, a public avowal of homosexuality was not an option because disclosure could have severe repercussions, including blackmail, loss of job, and medical intervention. The secrecy surrounding one’s homosexuality often resulted in gay men and lesbians being estranged from their family of origin – something that post-Stonewall gay men and lesbian continue to struggle with to this day.

In place of a traditional multi-generational family formed through marriage, biology, or adoption, gay men and lesbians created alternative family or fictive kinship networks with other

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86 In a Chapter titled “Exiles from Kinship,” Weston explained:

Looking backward and forward across the life cycle, people who equated their adoption of a lesbian or gay identity with a renunciation of family did so in the double-sided sense of fearing rejection by the families in which they had grown up, and not expecting to marry or have children as adults.

WESTON, supra note 31, at 24.

87 Id. at 44).

88 See Barker, supra note 47, at 61 (describing shame experienced by family members). See also WESTON, supra note 31, at 44 (noting possibility of medical intervention).

89 See Barker, supra note 47, at 61-62 (discussing estrangement from family of origin).
gay men and lesbians that were based on affinity rather than biology or marriage. As homosexuality continues to gain greater acceptance and more same-sex couples choose to parent, it is possible that the importance of chosen family will decrease over time, but, for the current cohort of gay and lesbian elders, chosen family remains their primary source of support. In terms of estate planning, the reliance on chosen families means that none of the default rules designed to privilege next of kin will apply because every potential beneficiary or fiduciary is a legal stranger, with the exception of partners in the states that recognize same-sex marriage. Moreover, this group of potential beneficiaries and fiduciaries are also likely to be older because chosen family networks tend to be comprised of individual in the same age cohort. This factor eliminates the benefits associated with inter-generational lifetime giving and further complicates fiduciary designations.

A. Marriage Equality.

Much of the scholarship on estate planning for gay men and lesbian focuses on how to pass property to a surviving same-sex partner or make sure that the partner has the authority to

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90 Douglas Kimmel provides the following explanation: “It is widely thought that most older lesbians, gay men, bisexuals, and transgendered persons develop groups of friends who function as if they were kin; this has been termed a family of choice and is thought to provide more support, in many cases, than the individual’s biological or legal ‘family’.” Douglas C. Kimmel, Issues to Consider in Studies of Midlife and Older Sexual Minorities, in GAY AND LESBIAN AGING, supra note 47, at 268; see also de Vries & Blando, supra note 48, at 8-11 (family of caring); Jacqueline S. Weinstock, Lesbian Friendships at and Beyond Midlife: Patterns and Possibilities for the 21st Century, in GAY AND LESBIAN AGING, supra note 47, at 177-210 (“friends like family”).

91 For a discussion of the increasing trend among gay men and lesbian to form recognized families see Weinstock, supra note 90, at 194-200. Some comments have referred to the increase in intentional parenting within same-sex couples as the “gayby boom.” See Erica Goode, A Rainbow of Differences in Gays’ Children, N.Y.TIMES, July 17, 2001, at F18 (stating trend “has been called the ‘gayby boom’”).
direct health care decisions. This emphasis reflects the important role that estate planning documents can play in relationship formation for gay men and lesbians. The advent of same-sex marriage has not eliminated the importance of such planning, and couples should continue to view reciprocal wills, powers of attorney, and advance directives as an essential way to safeguard their relationship and protect the interests of the survivor. Even couples who reside in a state with marriage equality (or equivalence) should never rely on the default settings that privilege spouses in terms of property and decision-making authority because the couple may move to a non-marriage jurisdiction or they may own property in a non-marriage jurisdiction. In addition, same-sex marriage laws have been repealed or otherwise invalidated, meaning that their state could become a non-marriage jurisdiction.

Despite the gains that have been made with respect to marriage equality, same-sex partners remain legal strangers in a majority of the states. When this article went to press in the summer of 2010, five states and the District of Columbia had legalized same-sex marriage, two 


93 The states are: Connecticut, Iowa, Massachusetts, New Hampshire, and Vermont. In 2008, the Connecticut State Supreme Court ruled in favor of same-sex marriage. Kerrigan v. Comm’r of Pub. Health, 957 A. 2d 407, 411–412 (Conn. 2008) (holding state statutory prohibition against same-sex marriage violated substantive due process and equal protection rights guaranteed under the state constitution). The D.C. City Council passed the Religious Freedom and Marriage Equality Amendment Act in 2009. In 2009, the Iowa State Supreme Court unanimously ruled in favor of same-sex marriage. Varnum v. Brien, 763 N.W. 2d 862 (Iowa 2009). Applying intermediate scrutiny, the court held that the state anti-marriage law violated the Equal Protection clause of the Iowa state constitution because the law did not further any substantial state interests. Id. In 2003 the Massachusetts Supreme Court ruled 4-3 in Goodridge v. Department of Public Health that the right to marry was protected under the state constitution. Goodridge v. Dep’r of Pub. Health, 798 N.E.2d 941, 948 (Mass. 2003). In 2009, the Vermont legislature overrode the Governor’s veto and passed a marriage equality law. The law took effect on September 1, 2009. Nine years earlier, Vermont had been the first state to grant marriage equivalence through the creation of the parallel status of “civil union.” In 1999, the Vermont
states recognized same-sex marriages performed in other states, states offered a parallel status that grants same-sex partners all the rights and responsibilities of spouses, and six states provided a lesser quantum of rights. The vast majority of states still had laws

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95 These states are: California, Nevada, New Jersey, Oregon, and Washington. Same-sex marriages were mandated by the California State Supreme Court in 2008. In re Marriage Cases, 183 P. 3d 384, 452 (Cal. 2008) (holding an individual’s homosexual orientation is not sufficient basis for withholding or restricting fundamental right to marry guaranteed under California state constitution). Marriages began taking place in June of 2008. In November 2008, voters approved Proposition 8, a ballot proposition that amended the California state constitution to restrict marriage to a union between a man and a woman. In 2009, the California State Supreme Court ruled that the approximately 18,000 marriage that took place before Proposition 8 remained valid. Strauss v. Horton, 46 Cal. 4th 364 (Cal. 2009). California currently has the marriage equivalent status of “registered domestic partners.” In 2006, the Supreme Court of New Jersey held that limiting access to the protections and benefits of civil marriage to opposite-sex couples violated the state constitution, but it did not require the state to permit same-sex couples to marry. Lewis v. Harris, 908 A.2d 196, 200 (N.J. 2006). In response, the New Jersey state legislature enacted the Civil Union Act. N.J. STAT. ANN. § 37:1–29. Prior to that, in 2004 New Jersey had extended limited rights to same-sex partners and different-sex partners over 62 years of age who registered as “domestic partners.” Nevada enacted a comprehensive domestic partnership law in 2009. NEV. REV. STAT. ANN. § 122A et seq. In 2007, Oregon enacted its domestic partnership law, the Oregon Family Fairness Act. 2007 OR. LAWS ch. 99, § 2. The law took effect on February 4, 2008. Washington state first enacted relationship recognition in 2007. WASH. REV. CODE. § 26.60.010 (2008). On April 17, 2009, the Washington state legislature passed a bill extending full marriage rights to domestic partners. In 2009, the law withstood an attempt to repeal it through a citizen’s referendum

96 These states are: Colorado, Hawaii, Maine, Rhode Island, and Wisconsin. In 2009, Colorado enacted the Designated Beneficiary Agreement Act that grants limited rights to “designated beneficiaries.” COLO. STAT. 2009. § 15-22-101. In 1993, the Hawaii Supreme Court ruled in Baehr v. Lewin that prohibiting same-sex couples from marrying constituted gender
prohibiting same-sex marriage, and the federal Defense of Marriage Act (DOMA) ensured that same-sex couples were considered legal strangers for all federal purposes.

It remains to be seen whether partnered gay and lesbian elders will take advantage of same-sex marriage laws or other forms of legal recognition at the same rate as younger gay men and lesbians. When same-sex marriage was legalized in California for a brief period of time in 2008, the first couple to wed under the new law was Del Martin and Phyllis Lyon who had been discrimination and violated the Equal Rights Amendment to the state constitution. *Baehr v. Lewin*, 852 P.2d 44 (Haw. 1993). While an appeal following a remand was pending, the voters amended the state constitution to provide that the definition of marriage was the exclusive jurisdiction of the legislature. *HAW. CONST.*. art. I, § 23. The state legislature enacted “reciprocal beneficiary” legislation that extends approximately 60 rights and responsibilities commonly associated with marriage to reciprocal beneficiaries. *HAW. REV. STAT. ANN.*. § 572C-5. In 2009, the Maine legislature passed marriage equality legislation. The legislation was repealed before it took effect by a voter referendum in November 2009. Five years earlier, Maine had enacted legislation establishing a state-wide domestic partner registry and extending to same-sex couples certain health-care decision-making authority and inheritance rights equivalent to spouses. 22 M.R.S. § 2710. This law remains in effect. In 2009 Rhode Island enacted legislation that grants a “domestic partner” the right to make burial decisions. The House voted to override the Governor’s veto by an overwhelming majority (67-3). In 2009, the Wisconsin legislature passed domestic partner legislation that grants same-sex couples 43 rights and protections, including inheritance rights and health-care decision making authority. 2009 *WISC. ACT* 28.

Forty-four states prohibit same-sex marriage. Human Rights Campaign, Statewide Marriage Prohibitions (Nov. 17, 2008), http://www.hrc.org/documents/marriage_prohibitions.pdf (last visited July 30, 2010). Eighteen states have laws that could prohibit civil unions and domestic partnerships as well. *Id.* These states are: Alabama, Arkansas, Florida, Georgia, Kentucky, Idaho, Louisiana, Michigan, Nebraska, North Dakota, Ohio, Oklahoma, South Carolina, South Dakota, Texas, Utah, Virginia and Wisconsin. *Id.*


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

*Id.*
together over 50 years and were both in their 80s. Del and Phyllis, however, are not necessarily representative of gay and lesbian elders more generally. They were an extraordinary couple who had shared a life of activism beginning in the 1950s when they founded the first lesbian organization in the U.S. in 1954, the Daughters of Bilitis, Despite Del and Phyllis’ example, there are a number of reasons why gay and lesbian elders might fail to take advantage of relationship recognition. They might be closeted to the point where they would not feel comfortable going to the courthouse to apply for a marriage license or register as domestic partners. They might be of a generation for whom state-sponsored marriage is viewed with suspicion. They might question why they should bother to get married after 20, 30 or 40 years together. Or, one of the partners might suffer from diminished capacity, such that marriage or registration is no longer an option.

In this regard, Clay and Harold provide a poignant counterpoint to Del and Phyllis. When Harold fell outside his Sonoma County home in April 2008, California had not yet begun issuing marriage licenses to same-sex couples, but it did offer full marriage equivalence in the form of “registered domestic partnerships.” Clay and Harold had not registered as domestic partners.

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101 The level of capacity required in order to marriage is relatively low. See e.g. *DeMedio v. DeMedio*, 215 Pa. Super. 255 (1969)(examining wife’s mental capacity and ability to understand contract of marriage at time of ceremony); 23 PA. CONSOL. STAT. 1304(c) (West 2010) (mandating that individuals who are “weak minded, insane [or] of unsound mind” are ineligible for marriage license without court approval).

102 The history of relationship recognition in California is confusing. Prior to In re *Marriage Cases*, the California legislature had gradually moved toward the legal recognition of same-sex relationships. In 2004, the legislature extended to “registered domestic partners” a number of rights traditionally reserved for spouses, including inheritance rights, certain health care
partners\textsuperscript{103} and, in an interview with the \textit{New York Times}, Clay seemed disinterested in the prospect of legalized same-sex marriage.\textsuperscript{104} Far from a poster boy for gay rights, Clay referred to Harold as his “friend,” and told the interviewer, “We weren’t a married couple. Why are you making a big deal out of this? We were just roommates.”\textsuperscript{105} Clay and Harold did have reciprocal estate planning documents, but the documents could be executed in the privacy of a lawyer’s office and did not require Clay or Harold to disclose the nature of their relationship to county officials or other third parties.\textsuperscript{106}

As same-sex marriage and marriage equivalence becomes more common, it remains to be seen what meaning will attach when couples fail to marry or register.\textsuperscript{107} It is possible that the

decision-making authority, and standing to sue for wrongful death. CAL. CIV. PRO. CODE § 377.60 (2004). The next year, the legislature expanded these rights and obligations to allow “registered domestic partners” substantially all the rights and responsibilities enjoyed by spouses under California law. CAL. FAM. CODE §§ 297, 297.50, 290, 298.5 (West 2004) (establishing procedure for “registered domestic partners”).

\textsuperscript{103} Payne, \textit{supra} note 19.

\textsuperscript{104} James, \textit{supra} note 18.

\textsuperscript{105} \textit{Id.}

\textsuperscript{106} \textit{Id.}

\textsuperscript{107} It also bears mentioning that marriage should not be entered into lightly even at an advanced age. Recent reports indicate the rate of divorce among older individuals is increasing. See Deirdre Bair, \textit{The 40 Year Itch}, N.Y. TIMES, June 3, 2010, at 27. This trend should not be surprising given gains in life expectancy and the diminished stigma attached to divorce. \textit{Id.} In the absence uniform marriage equality, divorce or dissolution can pose special challenges for same-sex couples. Today, it is easier for a same-sex couple to get married than it is to get divorced because states do not impose residency requirements on marriage (or marriage equivalence), but they do impose such restrictions on divorce. Many same-sex couples who live in non-marriage jurisdictions have traveled out-of-state to get married. When they return home, they are not legally married, but nor can they get divorced. They cannot simply travel back to the state where they were married and file for divorce because they would have to first satisfy the residency requirements. The same is true for married same-sex couples who find that they have to move to a non-marriage jurisdiction. They might not be married in their new state, but neither can they divorce. The fact that they cannot divorce in their home state may have little practical effect provided they do not venture to a marriage jurisdiction, but the separated couple will find
family of a same-sex partner could point to this failure as proof that they were not actually partners or that perhaps the relationship was not serious. A case out of Washington state involving gay elders illustrates how the closet can complicate matters for a surviving same-sex partner who suddenly has to face the incredulous family of his long-time partner. Robert Schwerzler and Frank Vasquez had been together for 28 when Robert died at age 78 without a will.\textsuperscript{108} The two men had owned a burlap bag recycling business in Puyallup, Washington, but the bulk of the property had been titled in Robert’s name.\textsuperscript{109} As his next of kin, Robert’s siblings asserted their rights to the property and defended their actions on the ground that Frank was just a roommate.\textsuperscript{110} Robert had not been “out” to his family about his sexual orientation or the true nature of his longstanding relationship with Frank.\textsuperscript{111} Ultimately, the Washington Supreme Court awarded the estate to Frank on an equitable theory akin to the doctrine of equitable adoption, but only after several years of litigation and publicity.\textsuperscript{112}


\textsuperscript{109} \textit{Id.}

\textsuperscript{110} \textit{Id.}

\textsuperscript{111} Although not required to legally, the siblings justified their claim to Robert’s estate, including the home he had shared with Frank, by asserting that two men were not partners. \textit{Id.} With respect to whether the two men were gay, Robert’s brother testified that “[c]ertainly, there was nothing being done in public.” \textit{Id.}

\textsuperscript{112} Vasquez v. Hawthorne, 33 P.3d 735, 736 (Wash. 2001) (upholding a same-sex partner’s equitable claim against the estate of his deceased partner). \textit{See also}, Sam Skolnik, \textit{Same-Sex Estate Rights Backed: State High Court Says Gays May be Entitled to Partners’ Property in Absence of a Will}, \textsc{Seattle Post-Intelligencer}, Nov. 2, 2001, at B1.
As mentioned above, even those same-sex couples who live in jurisdictions with relationship recognition should execute estate planning documents because relationship recognition is not portable and their marriage (or other equivalent status) will not be respected in states that do not have an analogous status. Take for example, an elder same-sex couple who are legally married in Massachusetts, but would like to spend their retirement in warmer climes. In the United States, their options are limited, although there is always sunny Spain if they would like to consider something international. The laws of the traditional retirement havens of Arizona and Florida are hostile to same-sex relationships and consider same-sex partners to be legal strangers. Southern California might be an alternative, but California law regarding same-sex marriage is confusing at best.

The current patch work of marriage laws in the U.S. is further complicated by the fact that laws recognizing same-sex relationships often remain under attack through citizen initiatives and court challenges. For example, voters most recently overturned same-sex marriage laws in California and Maine where marriage is now restricted to unions between men and women.

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115 Both states have laws prohibiting same-sex marriage. See supra note 97.

116 In 2009, the California State Supreme Court ruled that the approximately 18,000 marriage that took place in California before Proposition 8 remained valid, as are same-sex marriage performed elsewhere during that period. Strauss v. Horton, 46 Cal. 4th 364 (Cal. 2009).

117 Jesse McKinley and Laurie Goldstein, Bans in Three States on Gay Marriage, N.Y. TIMES, Nov. 6, 2008 (California); Abby Goodnough, A Setback in Maine for Gay Marriage, but Medical Marijuana Expands, N.Y. TIMES, Nov. 4, 2009.
In the District of Columbia, same-sex marriage has been the subject of constant court challenges since it was passed by the city council in 2009.118

B. Property and Probate.

The desire to provide for a surviving partner is no doubt an important consideration for coupled gay and lesbian elders, but it is also important to remember that a significant percentage of gay and lesbian elders are aging without the assistance of a partner.119 The remainder of this section discusses how to provide for chosen family who are not related by marriage (or its equivalence), blood, or adoption. Given the current uncertainty regarding marriage equality in the U.S., this discussion applies with equal force to same-sex partners.

A central goal of estate planning is to ensure that the decedent’s property is transferred to the desired beneficiaries. All property titled in the decedent’s name at the time of death becomes the decedent’s probate estate and is distributed either under the decedent’s will or, in the absence of a valid will, in accordance with the laws of intestate succession.120 It is possible to title property in such a way as to avoid probate through the use of trusts, joint ownership, and transfer

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119 See Kimmel, supra note 52, at 265, 275 (discussing importance of having a partner). On the importance of a partner, Kimmel explains that “[a] partner may also serve as a buffer against losses and someone who can aid with challenges of aging.” Id. More specifically, Kimmel notes that “A partner may also be a caregiver, a reason for living, or a spiritual soul mate who promotes successful aging just by being around.” Id.

120 Individuals who are qualified to take by intestate succession are also restricted by marriage, biology, or adoption. See UNIF. PROBATE CODE §2-102A (spousal share in separate property states); UNIF. PROBATE CODE §2-103 (share of heirs other than spouse); UNIF. PROBATE CODE §2-114 (status of children by adoption and effect of the marital status of the parents with respect to the child).
on death designations. In addition, there are a number of benefits that pass outside of probate directly to the beneficiaries, such as insurance proceeds and various other death benefits. These are discussed in Part III below.

In the United States, approximately two-thirds of all decedents die intestate. When this occurs, the rules of intestate succession prescribe the order of distribution. Subject to some state-by-state variation, the lion’s share of the estate generally goes to the surviving spouse, if any, and then to surviving children. If the decedent left no surviving spouse or children, the estate is distributed to parents and then to progressively more distant relatives, along lines clearly defined by blood or adoption. The intestacy rules are designed to approximate what most individuals would have wanted had they executed a will. Although the rules of intestate succession are considered to be a default setting, in actuality, they control the distribution of the majority of estates. As discussed in Part III and Part IV, they also can have considerable influence beyond the probate estate because the order of distribution established for intestacy purposes is often used to determine eligibility for death benefits and identify individuals who are entitled to exercise certain health care decision making authority.

121 The purpose of probate is to transfer title to the property owned by the decedent to the beneficiaries named under the will and settles all debts against the estate.
123 UNIF. PROBATE CODE §2-102A (spousal share in separate property states);
124 UNIF. PROBATE CODE §2-103 (share of heirs other than spouse).
125 Id.
126 The General Comment to the provisions governing intestate succession in the Uniform Probate Code 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, Part 1, General Comment (1991).
The rules of intestacy are designed to capture the so-called natural objects of a testator’s bounty, but the rules for intestate succession leave little room for chosen family. There are only two ways under the rules of intestate succession to make your chosen family count as legal family -- marriage and adoption. As discussed above, same-sex marriage is only available in a handful of jurisdictions and presumably should be reserved for individuals who are in an intimate relationship. At first glance, adult adoption may appear to be a solution to the problem presented by chosen families and their lack of legal standing, but it is not without drawbacks.

127 In the vast majority of states where the decedent is not survived by a spouse, the rules of intestate succession distribute the decedent’s property to his closest relatives in the following priority: children, parents, siblings, nieces and nephews, grandparents, aunts and uncles, first cousins, and so on. See Unif. Probate Code § 2-103 (share of heirs other than surviving spouse). The Uniform Probate Code does not include intestate heirs beyond descendants of grandparents. Unif. Probate Code § 2-103(4). Although a surviving spouse will generally receive the bulk of the estate, the share is reduced in certain circumstances if the decedent is survived by parents, children who are not also the children of the surviving spouse, or stepchildren who are the children of the surviving spouse. Id. If a decedent is not survived by any relatives within the prescribed degrees of relationship, all property will escheat to the state. See Unif. Probate Code § 2-105 (priority of the state when no surviving relative within prescribed degree of relationship).

128 See supra notes 93 and 94 (listing states that recognize same-sex marriage).

129 In the 1898 case of Collamore v. Learned, the Massachusetts Supreme Court declared that it was a “perfectly proper” to use adult adoption in order to secure inheritance rights. Collamore v. Learned, 171 Mass. 96 (1898). At least one court, however, has disallowed adult adoption in the context of a same-sex relationship on public policy grounds. In 1984, New York’s highest court disallowed the application of a 57 year old gay man to adopt his 50 year old male partner In re Robert Paul P., 63 N.Y.2d 233 (1985) (holding that a sexual relationship was inconsistent with a parent-child relationship). The court held that the proposed adoption was “a patently incongruous application of our adoption laws,” and the sexual nature of the relationship between the parties was “repugnant” to the parent-child dynamic. Id. In addition, parties considering this step must also investigate the applicability of state criminal incest laws.
Unlike marriage, adoption is forever, and an adoptive parent can never divorce his or her adopted child.\textsuperscript{130}

Used instrumentally, adult adoption allows an individual to add a member of his chosen family (including his partner) to his legally recognized family tree, thereby qualifying the chosen family member as a child who stands in priority above all other next of kin for intestacy purposes and a host of other considerations, such as standing to sue for wrongful death or be appointed as an administrator or guardian.\textsuperscript{131} Adult adoption can also forestall will challenges from collateral kin that are discussed in greater detail in Part IV below.\textsuperscript{132}

To avoid the application of the intestate rules, a decedent must leave a valid will. For gay and lesbian testators, however, there are some instances where it may be advisable to avoid probate entirely. One major reason to avoid probate is that wills are subject to challenge by next of kin.\textsuperscript{133} Another reason is that in certain jurisdictions there can be considerable fees and delay associated with probate.\textsuperscript{134} In order to avoid (or minimize) probate, an individual must divest himself of the property during his lifetime, something that can be impracticable in the case of younger individuals. One way to accomplish the necessary divestment is through the use of an

\textsuperscript{130} Even a same-sex spouse living in a non-marriage state with an out-of-state marriage can theoretically move, establish residency, and then sue for divorce. This option is not available to adoptive parents.

\textsuperscript{131} See John G. Culhane, A “Clanging Silence”: Same-Sex Couples and Tort Law, 89 KY. L.J. 911, 953-54 (2001) (outlining history and statutory origin of wrongful death actions). If a decedent dies intestate, the law prescribes the order of priority for appointment of an administrator of the decedent's estate. See UNIF. PROBATE CODE §3-203(a)(1) (listing surviving spouse as first priority).

\textsuperscript{132} See infra text accompanying notes 202-16.

\textsuperscript{133} Id..

inter vivos trust where an individual transfers title to his or her property, in trust, to a trustee who then holds the property for the settlor’s lifetime benefit. The settlor can serve as the trustee, although the designation of a co-trustee or an alternate trustee allows for continuity in the event the settlor experiences diminished capacity.\textsuperscript{135} At the settlor’s death, the remaining property is distributed under the terms of the trust and passes to the intended beneficiaries outside of probate.\textsuperscript{136} Short of establishing an inter vivos trust, it is also possible to title property such that it transfers automatically by operation of law when the grantor dies. With real estate, this result can be accomplished through the use of a joint tenancy with right of survivorship.\textsuperscript{137} Securities can be registered with “transfer on death” instructions,\textsuperscript{138} and bank accounts can similarly be titled with “payable on death” designations.\textsuperscript{139}

The benefits that are usually gained from such strategic lifetime giving may be limited in the case of gay and lesbian elders because lifetime giving is typically directed down the generational ladder. For gay and lesbian elders whose intended beneficiaries are in the same age cohort, lifetime giving would work at cross purposes as everyone tried to divest their property at the same time. More importantly, any lifetime giving between elders would have to be evaluated carefully in light of the Medicaid impoverishment rules. For example, if a grantor/elder adds a

\textsuperscript{135} For a discussion of the use of inter vivos trusts in the context of privacy concerns see Frances H. Foster, Trust Privacy, 93 CORN. L. REV. 555 (2008).

\textsuperscript{136} In this situation, the settlor of the trust would also execute a will that would “pour over” any property held by settlor at the time of death into the trust. UNIF. PROBATE CODE § 2-511

\textsuperscript{137} See Langbein, supra note 134, at 1112 (discussing joint tenancy as will substitute).


\textsuperscript{139} UNIF. PROBATE CODE §6-201, \textit{et seq.} (1991) (describing rules governing multi-party bank accounts);
friend to the deed of his house as a joint tenant with right of survivorship, and the elder dies first, the friend receives the property by operation of law and the property is protected from any claims from the grantor’s next of kin. As discussed in Part III below, however, there could be dire consequences if the friend’s health were to fail and he needed to qualify for Medicaid in order to get long-term care. Under the Medicaid impoverishment rules, a Medicaid lien would attach to the property and would have to be satisfied at the friend’s death.\textsuperscript{140}

\textit{C. Decision-Making Authority}

Advances in medical technology have greatly increased the likelihood that individuals will experience a period of incapacity prior to death, such that durable powers of attorney and advance directives are now essential elements of any estate plan.\textsuperscript{141} When an individual is incapable of expressing his or her desires regarding medical care, these documents help ensure that the individual’s wishes are respected by service providers. In addition, an individual can appoint a surrogate to act on his or her behalf in the event of incapacity, designate a guardian, or direct the terms of end-of-life care.\textsuperscript{142} If an individual fails to execute these documents, the law looks to next of kin to make the necessary decisions and provides another series of default settings that generally follow the rules of intestate succession and rank next of kin in descending order of priority.\textsuperscript{143}

\textsuperscript{140} See infra text accompanying notes 180-87.


\textsuperscript{142} Monahan and Lawhorn, \textit{supra} note 141.

\textsuperscript{143} Knauer, \textit{supra} note 92, at 46-49.
The single generational aspect of chosen families may also complicate the fiduciary designation on Durable Powers of Attorney and Advance Directives. In a traditional estate plan, an individual would appoint his or her spouse and then a child or perhaps even a grandchild to serve as the alternate. Gay and lesbian elders may not have this level of multi-generational support. When the grantor of the power, the attorney in fact, and the alternate attorney in fact are all in the same generation, the grantor should consider naming more than one alternate to guard against the possibility that the attorneys in fact may not be able to serve due to death or incapacity. When the named attorneys in fact are unable to serve and the grantor does not have the capacity to appoint another, the law calls for the appointment of a guardian in accordance with a prescribed order of priority that favors relatives.\textsuperscript{144} Advance Directives have greater staying power than Durable Powers of Attorney because the wishes of the declarant under an Advance Directive continue in force regardless whether the named surrogate decision maker is available or able to serve.\textsuperscript{145}

The major shortcoming of estate planning documents is that they are not sufficient to grant beneficiaries or fiduciaries all of the rights enjoyed by next of kin. A prime example of this is the area of burial and cemetery arrangements where the state law has traditionally vested decision making authority in the next of kin.\textsuperscript{146} In 2008, Mark Goldberg struggled through bureaucratic red tape for over four weeks before he was eventually able to claim the bodily

\textsuperscript{144} But see UNIF. PROBATE CODE §5-310(7) (now including “an adult with whom the respondent has resided for more than six months before the filing of the petition” as the last named person).

\textsuperscript{145} Monahan and Lawhorn, supra note 141.

\textsuperscript{146} See Jennifer E. Horan, Note, “When Sleep at Last Has Come”: Controlling the Disposition of Dead Bodies for Same-Sex Couples, 2 J. GENDER RACE & JUST. 423 (1999) (discussing difficulty encountered by surviving same-sex partners).
remains of his partner of 17 years, Ron Hanby. Rhode Island law at the time prescribed a list of relatives in descending order of priority, who were authorized to claim remains. The list did not include executors or other fiduciaries nor did it include same-sex partners. Under this law, Mark was not permitted to claim Ron’s remains despite the fact that they had been legally married in Connecticut, and they had a full complement of reciprocal estate planning documents. Ron was not survived by any next of kin, and, as a result, his remains were unclaimed for 32 days. After Mark’s ordeal, the Rhode Island legislature amended its law to include domestic partners on the list of next of kin who are now authorized to claim remains.


149 Edgar, supra note 147.

150 Id.

151 The new law extends the right to make burial decisions to “domestic partners” who satisfy two out of four relationship indicators, all of which require a level of economic interdependence (e.g., partnership agreement, joint ownership, beneficiary designations). The law adds the category of “domestic partner” to the traditional list of next of kin who are authorized to make burial arrangements and gives them equal priority with spouses. It does not require partners to register or designate each other in advance, but instead allows the surviving partner to prove his or her relationship after the fact. In 2009 the Governor of Rhode Island vetoed the burial legislation because he saw it as part of “a disturbing trend” that furthers the “erosion of the principles surrounding traditional marriage.” Governor Carcieri, Veto Message. available at http://www.projo.com/news/2009/pdf/veto_s0195_funeral_directors.pdf (last visited July 30, 2010). The legislature overrode the Governor’s veto by an overwhelming margin. Katherine Gregg, PROVIDENCE JOUR. Jan. 5, 2010, available at http://newsblog.projo.com/2010/01/lawmakers-over-ride-governors.html (last visited July 31, 2010).
If Ron had been survived by next of kin, they would have taken priority over Mark, despite the fact that Ron and Mark were legally married in Connecticut and a number of other jurisdictions.\textsuperscript{152} States have begun to enact legislation to grant individuals the power to control their funeral and burial arrangements, but the approach has been far from uniform.\textsuperscript{153} Some states provide that a decedent’s written instructions concerning burial must be honored.\textsuperscript{154} Other states allow the appointment of a funeral planning agent who has decision making authority,\textsuperscript{155} and other states have adopted some combination of the two.\textsuperscript{156} In some instances, state law requires individuals to execute a separate document,\textsuperscript{157} but other states, such as Vermont, have incorporated the power in their advance directive forms.\textsuperscript{158} The increasing willingness of states to protect the decedent’s wishes means that many estate plans will now include a fourth document dedicated to funeral and burial instructions. The form this document should take is state-specific, but even testators who reside in states that have not yet adopted legislation should consider executing a generic form expressing their wishes in order to serve as indicia of intent.

\textsuperscript{152} When Ron died on October 2, 2008, his marriage would have been recognized in Massachusetts, California and Connecticut. \textit{See supra} notes 93 - 95.

\textsuperscript{153} For example, Alabama generally restricts authority to next of kin with the exception of individuals designated in a “pre-need” funeral contract or the executor of the decedent’s will. CODE OF ALA. §34-13-11 (2010). \textit{See generally} \textit{Who Has the Right to Makes Decisions About Your Funeral,} Funeral Consumers Alliance, available at \texttt{http://www.funerals.org/your-legal-rights/funeral-decision-rights} (last visited July 30, 2010).

\textsuperscript{154} \textit{See e.g.} CODE OF WASH. 68.50.160 (2010) (personal preference law).

\textsuperscript{155} \textit{See e.g.} N.H. RSA 290:17 (2010) (authorizing designated agent).

\textsuperscript{156} \textit{See e.g.} 21 OK STAT. §1151: (combined personal preference and agent law)

\textsuperscript{157} \textit{See e.g.} R.I. GEN. LAWS § 5-33.3-4 (2010) (form prescribed by statute).

\textsuperscript{158} \textit{See e.g.} 18 VT. STAT § 9700 \textit{et seq.} (2010) (advance directives for health care and disposition of remains).
should that intent later be challenged by next of kin or in case the jurisdiction subsequently enacts enabling legislation.

Hospital visitation authorizations are another type of document that have become a common feature of gay and lesbian estate planning. Necessitated by hospital policies that restrict visitors to “family members,” it is unclear whether these documents carry any legal force. In Langbehn v. Memorial Hospital, a federal district court dismissed a claim brought by a surviving partner who was denied access to her dying partner despite the fact that she was her partner’s attorney in fact and authorized to make all medical decisions. In 2010, President Obama issued a Presidential Memorandum to the Secretary of HHS affirming the rights of patients at hospitals that receive Medicare and Medicaid to receive visitors of their choosing. The Presidential Memorandum directs the Secretary to initiate rulemaking to “to ensure that hospitals that participate in Medicare or Medicaid respect the rights of patients to designate visitors.” The Memorandum further provides “that that participating hospitals may not deny visitation privileges on the basis of race, color, national origin, religion, sex, sexual orientation, gender identity, or disability.” Although this proposed regulatory reform is very encouraging, much remains to be seen regarding implementation and the extent to which hospitals can impose restrictions based on medical necessity.

159 Langbehn v. Memorial Hospital, 661 F. Supp. 2d 1326 (S.D. Fla 2009).
160 Id.
162 Id.
163 Id.
III. **Financial Security and Benefits**

According to Census data, elder same-sex partnered households lag behind their non-gay peers in terms of all the important financial indicators, including income, retirement savings, and home ownership. The disparity is most striking at the lower rungs of the economic ladder where elder same-sex partnered households are more likely to live in poverty than their non-gay peers and elder female same-sex partnered households are almost twice as likely to live in poverty. To some extent, this financial insecurity represents the inevitable effect of a lifetime of discrimination, but is it aggravated by the affirmative legal barriers that prohibit the recognition of same-sex relationships and the reluctance of gay and lesbian elders to utilize available services due to their fear of encountering anti-gay bias.

This section discusses how gay and lesbian elders fare with respect to social security benefits, Medicaid long-term care, and pension benefits. In each case, same-sex partners are treated less favorably than different-sex spouses, and there are no provisions for chosen family. Advocates for marriage equality have just begun to quantity the “costs” of the legal barriers

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164 The financial insecurity experienced by many gay and lesbian elders contradicts the stereotype of gay affluence that was popularized by anti-gay groups during the Culture Wars of the 1990s. *See Didi Herman: The Antigay Agenda: Orthodox Vision and the Christian Right* 116-19 (1997).

165 As explained in Part I, homosexuality was classified as a serious mental illness, sodomy was criminalized, and there were no anti-discrimination protections. To the contrary, in many instances there were affirmative policies against homosexual employees. Congress began hearings in 1950 to establish the risk posed by homosexual federal employees. Allan Berube, *Coming Out Under Fire: The History of Gay Men and Women in World War II* 265-68 (1990). The hearing led to the recommendations the government, through the FBI, should coordinate information and move to “get sex perverts out of Government and keep them out.” *Id.* at 268. President Eisenhower issued an Executive Order in 1953 authorizing the termination of federal workers for “sexual perversion.” *Id.* at 269. These policies were replicated on the state level and by private employees. *Id.* at 269-70. It was not until 1982 that the first state amended its anti-discrimination laws to include sexual orientation. *See Wis. Stat. § 111.36(1)(d) (2010).*

166 *See supra* note 31 (citing HHS study).
erected by DOMA.\textsuperscript{167} It seems clear, however, that gay and lesbian elders are disadvantaged in terms of retirement and estate planning with respect to the whole host of federal spousal benefits, such as social security benefits, the Medicaid “spend down” rules, survivor veterans benefits, favorable tax treatment, and pension benefits.

\textbf{A. Social Security}

Social security benefits represent a significant source of retirement income in the U.S. As of 2005, 71 percent of seniors rely on Social Security payments for at least half of their income, whereas 40 percent of elders rely on Social Security for 90 percent of their income or more.\textsuperscript{168} For 26 percent of seniors, Social Security is their \textit{only} source of income.\textsuperscript{169} The amount of Social Security an individual receives is a function of how long they worked and how much they were paid.\textsuperscript{170} As a result, individuals who experienced long periods of unemployment or underemployment will receive smaller benefit payment. According to the Census data, elder female partnered households rely more heavily on social security income as a percentage of their

\textsuperscript{167} Bennett and Gates, \textit{supra} note 68. There are estimated to be 1138 federal statutory provisions under "which marital status is a factor in determining or receiving benefits, rights, and privileges." Letter from Dayna K. Shah, Associate General Counsel, United States General Accounting Office, to Honorable Bill Frist, Majority Leader, United States Senate, Jan. 23, 2004, \textit{available at} http://www.gao.gov/new.items/d04353r.pdf (last visited July 31, 2010).


\textsuperscript{169} \textit{Id.}

\textsuperscript{170} In order to be considered “fully insured” for Social Security purposes, an individual must have worked a specified number of quarters. 42 U.S.C. § 414(a) (2010). The amounts of an individual's social security payments are then determined by the individual's reported wages and self-employment income. 42 U.S.C. § 403(a) (2010).
overall income than different-sex married couples. They also receive, on average, 15 percent less in social security benefits than their non-gay peers.

DOMA mandates that same-sex partners are not entitled to social security spousal benefits, even if the partners are legally married under state law. The spousal survivor benefits provide additional financial security by allowing the surviving spouse to receive the benefit that had been paid to the deceased spouse if that amount is greater than what the survivor would be entitled to in his or her own right. In 2000, it was estimated that the exclusion of surviving same-sex partners costs gay and lesbian elders $124 million annually in foregone benefits. A more recent Congressional Budget Office (CBO) Report estimated that 30 percent of same-sex couples would receive higher benefits, if federal law recognized same-sex marriage and all partnered same-sex couples chose to marry. The CBO Report estimated that by 2014 this change would amount to an increase in benefits of $350 million annually.

The disparity in treatment between same-sex couples and different-sex married couples raises obvious questions of equity and uniformity because the spousal benefits are determined by

171 Goldberg, supra note 73, at 7-9.
172 Id.
173 See supra note 98 (discussing DOMA).
175 Cahill, South and Spade, supra note 51, at 43.
177 Id.
the amount the worker paid into the program. A worker in a same-sex marriage who pays the same amount as a similarly situated worker in a different-sex marriage is entitled to fewer benefits because his or her partner is not eligible for survivor benefits. This application of DOMA has been challenged by a federal lawsuits brought by legally married same-sex couples in Massachusetts who are being denied federal spousal benefits.

**B. Medicare/Medicaid**

Currently, Medicare does not cover the cost of long-term care in a skilled nursing facility or nursing home. The extremely high cost of long-term care has made Medicaid the only viable payment option for many middle-income seniors who did not purchase long-term care health insurance. The income and asset thresholds imposed by Medicaid have given rise to a new and controversial method of middle class estate planning, referred to as the Medicaid “spend down” where individuals have to spend or transfer their assets in order to qualify under the asset and income limitations imposed by the regulations. One important exception to the Medicaid asset limits and the “spend down” rules are the provisions for spousal impoverishment that are designed to ensure that a healthy spouse is not left destitute after qualifying the other spouse for

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178. In order to be considered "fully insured," an individual must have worked a specified number of quarters. 42 U.S.C. § 414(a) (2000). The amounts of an individual's social security payments are then determined by the individual's reported wages and self-employment income. 42 U.S.C. § 403(a) (2000). Accordingly, periods of unemployment or underemployment will adversely impact the amount of an individual's benefits. This is particularly important in the case of LGBT elders whose earning potential and employment options could have been compromised by homophobia and past discrimination.


181. *Id.*
Medicaid. These provision include exempting the marital home, prohibiting a Medicaid lien from attaching to the marital home until after the death of the non-institutionalized spouse, and allowing the non-institutionalized spouse to keep one-half (or more) of the couple’s joint assets.

Needless to say, these spousal protections do not apply to same-sex couples due to DOMA. For same-sex couples, the result of the disallowance will depend on how their assets are titled and which partner requires long-term care. Unlike married different-sex couples, same-sex couples may not be able to exclude their home, and, if they are to exclude their home, a Medicaid lien will attach at the death of the institutionalized spouse. The non-institutionalized partner will also not be entitled to one-half of their joint assets.

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182 See 42 U.S.C. § 1328b (exempting certain resources including residence, car, qualifying irrevocable trusts, limited burial expenses, and life insurance policies).

183 See Ctrs. for Medicare & Medicaid Servs., 2010 SSI and Spousal Impoverishment Standards, available at http://www.cms.gov/MedicaidEligibility/Downloads/1998-2010SSIFBR122909.pdf (last visited July 31, 2010). States are required to attempt to recover expenses paid for Medicaid benefits. A Medicaid lien attaches to the estate of the Medicaid recipient at his or her death, but does not apply to property owned by the surviving spouse. Most importantly, a Medicaid lien cannot be recovered during the lifetime of the recipient or surviving spouse. 42 U.S.C. §1396p(a) (2010) (“Any adjustment or recovery ... may be made only after the death of the individual’s surviving spouse, if any ... and only at a time ... when he has no surviving child who is under age 21, or ... is blind or permanently and totally disabled ... ”). In addition, no lien may be attached to the residence if a qualified sibling, son, or daughter of the decedent resides in the home. § 1396p(b)(2)(B). See generally Diane Lourdes Dick, The Impact of Medicaid Estate Recovery on Nontraditional Families, 15 U. Fla. J. L. & Pub. Pol’y 525 (discussing liens in the context of nontraditional families).


185 For a discussion of different scenarios see Movement Advancement Project, supra note 29, at 17.

186 Id.

187 Each state establishes a minimum income level that can be retained by the non-institutionalize spouse. See Ctrs. for Medicare & Medicaid Servs., 2010 SSI and Spousal Impoverishment Standards, available at
C. Pension and Other Death Benefits

For survivors, pension and retirement fund benefits can provide a significant source of financial support. Benefits payable under retirement plans are considered nonprobate assets, which means that they do not pass under the employee’s will nor are they subject to the rules of intestate succession if the employee dies intestate. As a result, they are immune from the types of claims discussed in Part IV that can be brought by family members. One major drawback, however, is that an employee does not always have power to designate a beneficiary of his or her own choosing. A number of recent cases have called attention to the fact that some plans limit permissible beneficiaries to spouses or close family members, thereby making it impossible for a surviving same-sex partner or other member of the employee’s chosen family to receive the retirement benefit.  

This problem occurs when the pension plan provides that a surviving spouse is the only permissible beneficiary. In 2005, William (Bill) Swensor died unexpectedly at the age of 66 and was survived by his partner of 51 years, Marvin Burrows. Bill and Marvin had started dating when they were just 15 and 17, respectively. Bill and Marvin were registered domestic partners.


189 Grant supra not 29, at 56.

190 National Center for Lesbian Rights, Press Release, Union Changes Policy To Provide Equal Pension Benefits To Domestic Partners: After Two-Year Struggle, Gay Man Receives Deceased Partner's Pension Benefits, Aug. 22, 2007, available at http://www.nclrights.org/site/PageServer?pagename=press_unionbenefits_082207 (last visited July 31, 2010). As a teenager, Bill was kicked out of his home when his father found out about his relationship with Marvin, and Bill moved in with Marvin and his mother. Kelly Griffith, 40+
partners and were married in San Francisco in 2004 during a brief period of civil disobedience when the city had issued marriage licenses to same-sex couples. Bill was a member of the International Longshore and Warehouse Union (ILWU), but when Marvin applied to receive Bill’s health and pension benefits, his request was denied. Without Bill’s income, Marvin struggled financially and lost the house that he had shared with Bill for 35 years. Although Marvin made repeated requests and received the support of the National Center for Lesbian Rights, the only alternative was to change the terms of the pension plan. Two years after Bill’s death, the ILWU was able to re-negotiate the terms of the contract to provide pension benefits for domestic partners and made the coverage retroactive to Bill’s date of death.

A somewhat more high profile case is currently the subject of a federal lawsuit, OPM v Gill. Rep. Gerry Studds (D-MA) died in 2006 and was survived by his husband, Dean Hara, whom he had legally married in Massachusetts. Dean did not qualify for any federal spousal

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191 *Id.*

192 *Id.* (married in 2004); National Center for Lesbian Rights, *supra* note 186 (registered domestic partners).

193 *Id.*

194 *Id.*

195 *Id.*

196 Damien Cave, *Gerry Studds Dies at 69; First Openly Gay Congressman*, N.Y.TIMES, Oct. 15, 2006. Rep. Studds served twelve terms in Congress. *Id.* He was the first openly gay member of Congress. *Id.*
benefits because, according to DOMA, he did not qualify as a spouse.\textsuperscript{197} He is currently a plaintiff in a federal lawsuit, \textit{OPM v. Gill}, challenging the Constitutionality of DOMA.\textsuperscript{198}

\textbf{IV. DRAFTING IN THE FACE OF BIAS.}

Gay and lesbian elders are marginalized by ageism in the gay and lesbian community and homophobia within the senior community.\textsuperscript{199} To the larger society, the very notion of a gay or lesbian elder may seem like an \textit{oxy moron} because seniors are widely held to be asexual, whereas homosexual are often portrayed as hyper-sexual.\textsuperscript{200} Accordingly, gay and lesbian elders are buffeted on all sides by stereotypical notions and blanket assumptions that fail to capture the complex nature of their identities. This problem is further compounded for gay and lesbian elders with intersecting identities and those who are otherwise marginalized.

Even the most meticulous planning can be subverted by unstated assumptions and the favored status enjoyed under the law by next of kin. After a gay or lesbian elder has died,


\textsuperscript{198} \textit{Id.}

\textsuperscript{199} On the impact of ageism within the gay and lesbian community, Hostetler notes: “The sexualized nature of so much of gay public life, paired with ageism and the fear of becoming (or being seen as) ‘old, gay, and alone,’ turns out to be a powerful deterrent to community.” Hostetler, \textit{supra} note 54, at 169. For a discussion of homophobia within the senior community see Knauer, \textit{supra} note 23, at 36-40.

\textsuperscript{200} With respect to the de-sexualized view of seniors, Barker explains:

\begin{quote}
Huge cultural roadblocks and assumptions abound about the impropriety of sexual activity or desire in old age. This general tendency to de-sex and de-sexualize the elderly as well as to depict them as a bundle of health problems waiting to happen, if not already being manifest, results in a view of old people as androgynous, dependent, and ineffectual. This reticence about sex occurs with respect to all older people, not just sexual minorities, and has been a long-standing issue besetting studies of sexuality.
\end{quote}

Barker, \textit{supra} note 47, at 53. \textit{See id.} at 54 (discussing “assumed hypersexuality of the young and male sexual minority person”).
disappointed and incredulous heirs can challenge wills and burial instructions, leaving a surviving partner and chosen family out in the cold.\textsuperscript{201} As evident from the story of Clay and Harold, a collection of state actors can also disrupt the lives of gay and lesbian elders through court ordered guardianships. They can liquidate an elder’s personal property in order to finance long-term care, and they can place an elder in a secure facility against his will simply because they do not respect the life choices that the elder has made.

\textbf{A. Will Challenges}

Wills are subject to challenge on a number of grounds, each of which asserts that the will, as drafted, does not reflect the actual intent of the testator. These grounds include lack of mental capacity, undue influence, fraud and duress. The testator’s next of kin have standing to challenge a will provided that have a pecuniary interest in the will, that is, provided they would gain financially if the will were set aside.\textsuperscript{202} As a result, disappointed heirs will have legal standing to challenge any non-normative testamentary disposition. When that non-normative disposition is to a same-sex partner or chosen family member, homophobia, stereotypes about seniors, and the closet can all help to facilitate claims of lack of capacity and undue influence. Shocked family members can also claim that the will must be a forgery or the result of fraud or duress.

\textsuperscript{201} \textit{See} Starkey, \textit{supra} note 45, at B06 (quoting a fifty-nine-year-old lesbian discussing her concern that she could be mistreated by her partner’s family after her partner's death, who said: “you can’t know how people are”).

\textsuperscript{202} \textit{See} In re Getty Estate, 149 Cal. Rptr. 656 (1978) (holding contingent trustee lacked standing to challenge the will of J.P. Getty because she did not have a “pecuniary interest” in the outcome) (1978). In the absence of marriage or its statutory equivalent, when a surviving same-sex partner is the primary beneficiary under the will, the decedent's intestate heirs will have standing to challenge the will because they would take under the rules of intestacy if the will were disregarded.
In order to execute a valid will, an individual must be “of sound mind,” that is, he must possess testamentary capacity. This legal standard requires a three-fold finding that the testator understood the nature of his action, the extent of his property, and his intended disposition. Given the widespread incidence of dementia among the senior population, the estates of elders are generally vulnerable to claims of lack of capacity brought by disappointed heirs. For this reason, estate planners dealing with elderly clients will often go to great lengths to memorialize and substantiate their clients’ capacity, including monitoring medication to make sure a client is functioning at peak when the documents are signed, securing the equivalent of a doctor’s note, and videotaping the execution of the documents.

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203 For example, the uniform Probate Code provides: “An individual 18 or more years of age who is of sound mind may make a will.” Unif. Probate Code § 2-501.

204 In Estate of Reichel, the Pennsylvania Supreme Court articulated the standard for testamentary capacity as follows:

Testamentary capacity exists when the testator has intelligent knowledge of the natural objects of his or her bounty, the general composition of the estate, and what he or she wants done with it, even if memory is impaired by age or disease, and the testator need not have the ability to conduct business affairs.

Estate of Reichel, 484 Pa. 610, 614 (1979). For obvious reasons, testamentary capacity is measured at the time the testator executes the will, as opposed to when the will speaks at the death of the testator. In re Ziel's Estate, 467 Pa. 531 (1976).

205 One recent study found that the prevalence among individuals age 71 and older was 13.9 percent. Brenda L. Plassman et al, Prevalence of Dementia in the United States, 29 Neuroepidemiology 125 (2007). The percentage increased to 37.4 percent for individuals aged 90 and older. Id. at 128.


207 Id. (noting “Signs of disorientation and confusion could be due to a host of medical conditions and medication factors that are reversible”)

208 Id. (noting “the attorney may want to consider referring the client for a geriatric medical evaluation to ensure there are no medical problems which may be transiently affecting capacity”)

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Gay and lesbian elders are especially susceptible to claims that they lack the necessary mental capacity because a non-normative disposition to a surviving partner or a chosen family member can provide added proof that the elder lacked capacity. Although courts traditionally have gone to great lengths to disclaim that mere eccentricity or foibles are necessarily indicative of lack of capacity, in some instances, the mere fact of a non-traditional disposition may be sufficient to bring into question the capacity of the testator. In other words, a non-traditional disposition may be perceived as so outside the realm of the plausible that the nature of the disposition itself may suggest that the testator was not of “sound mind.”

The doctrine of undue influence represents another way that disappointed family members can challenge a will benefitting a surviving same-sex partner or other members of a chosen family. In many ways, the doctrine of undue influence seems tailor-made to invalidate wills that favor non-marital romantic partners. Undue influence exists where a beneficiary induces the testator to favor that beneficiary over the testator’s heirs, whom the law considers the

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209 Id. at (discussing “videotaping as documentation”).

210 In Estate of Wright, the court upheld the testamentary disposition of an individual known for objectively bizarre behavior. Estate of Wright, 60 P.2d 434, 438 (Cal. 1936). The court explained: “testamentary capacity cannot be destroyed by showing a few isolated acts, foibles, idiosyncrasies, moral or mental irregularities or departures from the normal unless they directly bear upon and have influenced the testamentary act.” Id.

211 As noted earlier, when a will names a surviving same-sex partner as a beneficiary, the testator’s surviving intestate heirs automatically have standing to contest the will because they would stand to take from the testator’s estate if the will were set aside.

212 See UNIF. PROB. CODE §2-501 (stating who may make a will). Next of kin used claims of lack of capacity during the first wave of the HIV/AIDS epidemic to challenge the wills of gay men who died from HIV/AIDS because, at the time, a high percentage of persons with HIV/AIDS developed dementia or other neurological conditions. Thomas J. Maier, AIDS Victims’ Bitter Legacy; Lovers And Relatives Battle For Estates In Disputes Over Wills, NEWSDAY, Oct. 2, 1988, at 4.
natural objects of the testator’s bounty. A court will set aside a will that is the result of undue influence because it does not represent the true intent of the testator because the beneficiary is said to have substituted his will for that of the testator. In some jurisdictions, undue influence is easier to prove where the beneficiary and the testator were in a “confidential relationship,” as would be the case with a same-sex partner. Upon a showing of a confidential relationship, the burden can shift to the proponent of the will to prove the absence of undue influence. The surviving same-sex partner is then faced with the task of proving that he did not influence the testator's disposition.

The potential that next of kin could bring claims of lack of capacity or undue influence presents an unenviable Catch-22 for same-sex partners. Currently, a surviving same-sex partner only qualifies as an intestate heir in a handful of states and, therefore, an individual must name his same-sex partner as a beneficiary of his will in order to secure property and other decision-making rights. The problem is that the very fact that the testator designates his same-sex partner, as opposed to his next of kin, may signal a lack of capacity or the existence of undue influence.

As discussed above in Part II, this is one of the reasons that gay and lesbian elders may wish to minimize the amount of their property that is subject to probate.

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213 See generally, Ray D. Madoff, Unmasking Undue Influence, 81 MINN. L. REV. 571 (1997) (critiquing traditional undue influence doctrine). Madoff describes undue influence as “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.” Id. at 578.

214 A confidential relationship can include an attorney-client or other fiduciary relationship, as well as any non-marital sexual or romantic relationship.

215 See e.g. Estate of Reichel, 484 Pa. at 614 (after clear and convincing showing of confidential relationship, burden shifts to proponent of the will to disprove undue influence, provided certain other requirements are satisfied).

216 See supra notes 93-95 (listing states with marriage or marriage equivalence).
B. Capacity

An estate plan that excludes next of kin in favor of chosen family may raise questions of testamentary incapacity. However, gay and lesbian elders are also vulnerable to claims of incapacity during their lifetimes. This was the case with Clay and Harold where a broader finding of incapacity effectively silenced their identities and erased their past. Under the protective and authoritative care of the court-appointed guardian, Clay and Harold really were just “friends” – former roommates.217

Contemporary guardianship law is an exercise of parens patriae authority that is typically within the jurisdiction of county probate judges.218 There are two general types of guardianships: a guardian of the estate who is responsible for handling the management of the ward’s assets and financial concerns and a guardian of the person who is responsible for making personal life decisions on behalf of the ward regarding his physical well being.219 As fiduciaries, guardians are accountable for their actions and, in many jurisdictions, they are required to file annual reports with the court detailing their administration.220 Guardianship used to be an all of.

217 Guardianship law, as an exercise of parens patriae authority, can be traced to the statute of De Praerogativa Regis enacted during the reign of Edward II in 1325 under which the sovereign recognized a fiduciary responsibility to safeguard the assets of an individual who had “happened to fail of his wit.” See O’Sullivan, supra n. 11, at 690 (describing nature of parens patriae authority).

218 See UNIF. PROBATE CODE § 5-301 et seq. (Guardianship of Incapacitated Person); UNIF. PROBATE CODE § 5-401 et seq. (Protection of Property of Protected Person).

219 The powers of a guardian of the estate are generally the same as those extended to trustees and personal representatives. See e.g. UNIF. PROBATE CODE § 5-401 et seq. The powers of a guardian of the person extend to basic decisions regarding the care, maintenance and custody of the incapacitated person. See e.g. UNIF. PROBATE CODE § 5-301 et seq.

220 See UNIF. PROBATE CODE § 5-371 (reports regarding incapacitated person); UNIF. PROBATE CODE § 5-420 (reports regarding property of protected person).
nothing proposition, but recent reforms have introduced the concept of a limited guardianship that is adapted to the ward's particular circumstances and is designed to preserve the maximum level of autonomy consistent with the ward's abilities.\textsuperscript{221}

Capacity doctrines typically take into account an individual’s ability to engage in deliberative decision-making and, in some instances, the perceived reasonableness of the individual’s actions. Thus, the relative value assigned to a particular decision or action may ultimately determine whether an individual has the requisite capacity to engage in the activity. If next of kin, a health care professional, nursing home administrator, or even a judge views senior sexuality as aberrational, rather than a healthy component of successful aging, then expressions of sexuality could be interpreted as evidence of lack of capacity.\textsuperscript{222} In other words, the myth of the asexual senior could become the standard against which choices and behavior are evaluated.

The danger of such imbedded bias is even greater in the case of gay and lesbian elders where a finding of a lack of capacity has the potential to silence not just sexual autonomy, but also identity.\textsuperscript{223} The myth of the asexual senior presumes a heterosexual past. Seniors may be currently asexual, but they are assumed to have been previously heterosexual. This blanket assumption can operate to invalidate the choice of a same-sex partner. If senior sexuality is viewed as unusual, then senior homosexuality could be seen as downright deviant or abnormal.


\textsuperscript{223} \textit{Id.} at 341-47 (discussing outsider critique of capacity doctrine).
In the case of closeted gay and lesbian elders, the elder’s family of origin might see homosexual behavior or interests as such a complete departure from the normal that it could only be the result of diminished capacity. Obviously, gay and lesbian elders will not fare well under this sort of reasoning because the mere sex of their partner can serve as proof of incapacity.

C. The Importance of an Integrated Elder Care Plan

The story of Clay and Harold illustrates what can happen when closeted elders attempt to age in place without an inter-generational support network. In his Petition, Clay averred that prior to the accident, “Plaintiff Greene and the Decedent enjoyed a quiet, retired life, which they planned to continue until their deaths.” 224 Although that may have been their goal, the harsh reality of aging in the U.S. is that many elders require intensive long-term care for an extended period before death. 225 The cost of such care is considerable, and it is not covered by Medicare. 226 Accordingly, elders must use savings to finance this care and, when the savings are depleted, they must become impoverished in order to qualify for Medicaid. 227 Estate planning for gay and lesbian elders should include developing an integrated elder care plan that may require the assistance of financial advisers and medical service providers, as well as the coordination of both formal and informal caregivers. For individuals who desire to age in place, the goal of the plan would be to maximizing the elder’s autonomy and ability to live independently for as long as possible.

224 Petition, supra note 5.
225 See Ezra Klein, The Economics of Dying in One Graph, WASH. POST, July 19, 2010 (illustrating out-of-pocket health care spending in last year of life).
226 See Metlife, supra note 17, at 12. The study reports that “in planning for their own future care needs, LGBT baby boomers’ most serious worries are financial, with one-third reporting that how to pay for care is of most concern.” Id.
227 See text accompany notes 180 – 187 (discussing Medicaid).
Aging in place successfully often requires assistance from family, and this presents obvious problems for gay and lesbian elders who are much more likely not to have children or may be estranged from their children and other relatives. Single generational chosen families may also be limited in how much support they can provide as their members age together and require increasing amounts of support. As a result, gay and lesbian elders may be more likely than their non-gay peers to require home health care assistance or residential care in a senior living facility. That being said, gay and lesbian elders are extremely fearful of encountering anti-gay bias and tend to under utilize the very services that can help enable them remain independent.

Gay and lesbian seniors who do enter senior-specific housing report strong pressure to remain closeted. As noted earlier, the silence of gay and lesbian elders makes it exceedingly difficult to identify their needs and take steps to remedy their social isolation, but it also exacts a heavy toll on elders. In a recent *New York Times* article, Dr. Melinda Lantz, chief of geriatric psychiatry at Beth Israel Medical Center in New York, explained that “there is something special

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229 See supra note 31 (discussing HHS study).

230 A 2000 advocacy study explains this pressure as follows:

As GLBT old people enter assisted living situations, nursing homes, independent elderly housing or retirement communities, they are often presumed heterosexual and may feel the need to go back into the closet; often their long-term relationships are devalued and not recognized. Even if they have lived openly in the past, they may suddenly find themselves in situations where disclosing their sexual makes them vulnerable to discrimination or even abuse. The lack of sensitivity to sexual orientation in housing and supportive care programs for elders often places GLBT elders in vulnerable and uncomfortable circumstances. Cahill, South and Spade, *supra* note 51, at 53.
about having to hide this part of your identity at a time when your entire identity is threatened.” She notes that closeted seniors face “a faster pathway to depression, failure to thrive and even premature death.”

In terms of housing, gay and lesbian elders overwhelmingly report a preference for options that cater to the needs of gay and lesbian elders. In one study, 67 percent of the participants stated that they would prefer to live in a “LGBT-only retirement community.”

The market has recently begun to respond to this demand by creating offering gay-friendly senior housing developments. Although these proposed projects have garnered considered press coverage, relatively few of them have actually opened and are serving clients, and demand far outstrips supply.

For gay and lesbian elders who can no longer live independently and do not have access to gay-friendly housing, it is important to choose a facility with an anti-discrimination policy that

231 Gross, supra note 45.
232 Id.
233 Nancy Orel, Community Needs Assessment: Documenting the Need for Affirmative Services for LGB Older Adults, in LESBIAN, GAY, BISEXUAL, AND TRANSGENDER AGING: RESEARCH AND CLINICAL PERSPECTIVES 233 (Douglas. Kimmel, Tara Rose, and Steven David, eds. 2006). Orel explains that elders “the primary reason [for their preference] was the belief that if their sexual orientation were known, they would not be welcomed in existing retirement communities.” Id.
236 Grant, supra note 29 at 96-99. See also Catherine Trevison, Gay Retirement Homes Still Difficult to Market, St. Paul Pioneer Press (Minn.), Mar. 20, 2008, at 7E (noting some developments have "difficulty filling")
237 See Marech, supra note Error! Bookmark not defined., at A1.
includes sexual orientation, if one is available. Although close to one-half of the states now provide anti-discrimination protections in employment,\textsuperscript{238} not all of the laws extend to housing or public accommodations.\textsuperscript{239} Ideally, a facility should have a non-discrimination policy, cultural competency training for staff, and anti-bullying policies to control the homophobic behavior of other residents.\textsuperscript{240}

Although gay and lesbian elders fear encountering anti-gay bias on the part of the staff, other residents can also be a source of anti-gay harassment and gay and lesbian elders have reported being shunned by their non-gay peers on account of their homosexuality.\textsuperscript{241} Senior housing facilities have also been charged with mistreating gay and lesbian elders in order to placate the prejudice of other residents. For example, nursing homes will apparently move residents who are gay or perceived to be gay to so-called “memory” wards because the disabled

\textsuperscript{238} Twelve states and the District of Columbia have laws prohibiting discrimination on account of sexual orientation and gender identity. These states are: California, Colorado, Illinois, Iowa, Maine, Minnesota, New Jersey, New Mexico, Oregon, Rhode Island, Vermont, and Washington. Nine additional states prohibit discrimination on account of sexual orientation. These states are: Connecticut, Delaware, Hawaii, Maryland, Massachusetts, Nevada, New Hampshire, New York, and Wisconsin. Human Rights Campaign, \textit{Statewide Employment Laws \\ & Policies} (July 26, 2010), For example, anti-discrimination protections must be expanded to include senior-specific venues and housing. Human Rights Campaign, \textit{Statewide Employment Laws \\ & Policies} (July 26, 2010), \texttt{http://www.hrc.org/documents/Employment_Laws_and_Policies.pdf}

\textsuperscript{239} Some of the anti-discrimination laws only apply to employment, whereas other laws, such as the New Jersey Law Against Discrimination ("LAD"), are very broad. \textit{See e.g.}, N.J. STAT. ANN. §§10:5-1-10:5-49 (West 2010) (codification of New Jersey's laws against discrimination).

\textsuperscript{240} For a discussion of anti-bullying principles see Knauer, \textit{supra} note 23, at 55-56.

\textsuperscript{241} Gross \textit{supra} note 55. (“Elderly gay people ... living in nursing homes or assisted-living centers or receiving home care, increasingly report that they have been disrespected, shunned or mistreated in ways that range from hurtful to deadly, even leading some to commit suicide.”).
residents of those wards will not be able to complain.\textsuperscript{242} In 2007, the \textit{New York Times} reported that an elderly gay man was moved to a dementia ward after other residents and their families had complained.\textsuperscript{243} The gay elder was not suffering from dementia, and he eventually hanged himself.\textsuperscript{244} This story brings to mind Clay’s allegation that he was confined to a secure dementia ward against his will.\textsuperscript{245} Although Clay was fortunate to be released, he remains fearful that county workers will come to his home and harm him.\textsuperscript{246} As a result of his experience, his lawyer explains that Clay is now “a scared little rabbit.”\textsuperscript{247}

\textbf{CONCLUSION}

At a time when gay men and lesbians enjoy an unprecedented degree of acceptance, many gay and lesbian elders are facing the challenges of aging in silence, isolated from the gay and lesbian community and ignored by the senior community. They are grappling with the legal fragility of their chosen families, financial insecurity, and the fear of encountering antigay bias in senior-specific venues. Significant legal and policy reform will be necessary to address these concerns, but, in the meantime, there are certain planning steps that gay and lesbian elders can take to protect their chosen families and themselves. These include a will, \textit{inter vivos} trust, a durable power of attorney, an advance medical directive, burial instructions, and an integrated

\footnotesize{\noindent 242 This practice brings to mind Clay’s allegation that he was confined to a secure dementia ward against his will. Petition, \textit{supra} note 5. See Gross, \textit{supra} note 45, at A1 (reporting that facilities move gay residents to placate homophobic residents).

243 \textit{Id.}

244 \textit{Id.}

245 Petition, \textit{supra} note 5.

246 James, \textit{supra} note 18.

247 \textit{Id.}}
elder care plan. The story of Clay and Harold reminds us, however, that these steps are an
imperfect solution to the crisis in aging currently experienced by our gay and lesbian elders.