

ESTATE PLANNING FOR SAME-SEX COUPLES: PRACTICALITIES, PRECAUTIONS, PERILS, AND PROPOSALS

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I. INTRODUCTION

Gay and lesbian couples may experience a literal vertigo when attempting to understand and implement a comprehensive estate plan designed to protect against the unforeseen death of a partner,¹ or improbable dissolution of their relationship. While no couple wants to think about a partner or, in certain circumstances, a spouse dying, they really do not want to think their relationship might fail. These unfortunate situations, under today's patchwork of statutory protection mecha-

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¹ The word *partner* throughout this Article encompasses, unless otherwise specified, a same-sex spouse if such a designation is jurisdictionally appropriate.

nisms, test the mettle of a couple's estate plan and, unfortunately, can prove it ineffective against unexpected tragedy.

The laws of the state and county in which an estate plan is executed or where it is presented for recognition govern the basic elements of any given estate plan, regardless of the sexual orientation of the signatory.² However, issues of portability may arise if a gay or lesbian couple has been legally married, or if the state in which they executed their estate plan legally recognizes their relationship in a lesser fashion through a civil union or domestic partnership.³ The portability conflict appears when that couple moves from a state where their relationship enjoys some form of legal recognition to a state hostile to the interests of gay and lesbian couples.⁴

A basic estate plan is essential for all same-sex couples in order to shore up the gaps in protection that would be afforded to them if they were legally married.⁵ More sophisticated estate-planning techniques, such as irrevocable trust vehicles executed to transfer assets from a wealthier partner to a less wealthy partner and private domestic partnership agreements, implicate federal gift tax law in a way that creates inevitable tension between states that recognize same-sex marriage and the federal government—which is prohibited from such recognition by the Defense of Marriage Act.⁶

Historically, the courts that have been designated with the responsibility of interpreting and validating a married⁷ gay or lesbian decedent's estate plan—surrogate's courts or probate courts, in most

² See 95 C.J.S. *Wills* § 2 (2010).

³ See generally Peter F. Zupcofska, *When Couples are Same Sex, Drafting Considerations Differ*, 32 FAM. ADVOC. 18, 20 (2010) (discussing complications arising in estate planning for gay and lesbian couples). For the purposes of this analysis, unless the mobility issue arises, this Article assumes that the state in which the estate plan is executed is also the state in which the drafter resides.

⁴ See *id.* at 20.

⁵ See *id.*

⁶ See generally 28 U.S.C. § 1738C (2006) (providing that no state shall be required to recognize another state's same-sex marriage or relationship laws if its law does not recognize these relationships).

⁷ This reference to marriage assumes the same-sex marriage was valid where it was performed.

circumstances—have faced the same conflict as those involving interracial couples when antimiscegenation laws prohibited such marriages.⁸ Many of these courts, located in states which did not recognize interracial marriages, honored those marriages in the context of addressing probate, intestacy, and spousal election issues.⁹ As this area of law slowly develops, we may see similar outcomes to those same issues involving same-sex survivors' estate claims; however, the scarcity of case law in this particular area makes future outcomes difficult to predict.

The role of the nontraditional estate planner may appear to be similar to his or her traditional counterpart; however, a specific understanding of how the law fails to provide for the needs of lesbian, gay, bisexual, and transgender (LGBT) couples is required in order to create a comprehensive estate plan. An intimate knowledge of the clients, their finances, and their relationship to their families is essential in order to predict and forestall potential problems that may arise in the prosecution of their estate through the probate process. Ultimately, the nontraditional estate planner must not only be an advocate for his or her clients but also an educator, ensuring that clients understand the reasoning behind their planning strategy.

II. ELEMENTS OF A NONTRADITIONAL ESTATE PLAN

Ignorance is not an option for same-sex couples looking to protect their relationships and their families. The state laws of intestacy and the federal tax protections afforded to surviving spouses do not apply to unmarried same-sex couples.¹⁰ Attempting to provide even the most basic protections of an estate plan can prove disastrous at worst

⁸ See Tobias Barrington Wolff, *Interest Analysis in Interjurisdictional Marriage Disputes*, 153 U. PA. L. REV. 2215, 2221-24 (2005).

⁹ See *id.*

¹⁰ See 26 U.S.C. § 2056(a) (2006) (“For purposes of the tax imposed by section 2001, the value of the taxable estate shall, except as limited by subsection (b), be determined by deducting from the value of the gross estate an amount equal to the value of any interest in property which passes or has passed from the decedent to his surviving spouse, but only to the extent that such interest is included in determining the value of the gross estate.”). In layman’s terms, this describes an unlimited transfer of assets between spouses after death. See *id.* § 2056(a)-(b).

and unreliable at best, even in states recognizing same-sex marriages.¹¹ A comprehensive estate plan consists of multiple documents covering various legal issues, from health care to power of attorney authorizations.¹² However, the most effective estate plan must also take into consideration property ownership and its attendant tax complications, nonprobate asset designations,¹³ and wealth transfer strategies—both during and after a client's life. To begin to understand asset transfer after death, one must start with the last will and testament.

While most people have an understanding of the importance of preparing for the worst by drafting and executing a last will and testament, it would appear that the majority of Americans do not have a will.¹⁴ A recent study by Thompson Reuters showed that almost fifty-eight percent of participating individuals were without a will.¹⁵ While being the foundation of any estate plan, a last will and testament makes up only a minor part of the comprehensive plan needed to protect the rights of a same-sex couple.

An understanding of what assets a will protects is necessary before beginning the drafting process. Wills cover probate assets, or

¹¹ At the time of publication, according to the National Gay and Lesbian Task Force, only Massachusetts (2004), Connecticut (2008), Iowa (2009), Vermont (2009), New Hampshire (2009), and Washington, D.C. (2010), provide full marriage equality under their own laws. *Marriage/Partner Recognition*, NAT'L GAY & LESBIAN TASK FORCE, http://www.thetaskforce.org/issues/marriage_and_partnership_recognition (last visited Jan. 6, 2011); *Same-Sex Marriage, Civil Unions and Domestic Partnerships*, NAT'L CONFERENCE OF STATE LEGISLATURES, <http://www.ncsl.org/default.aspx?tabid=16430> (last visited Jan. 6, 2011).

¹² See TRACY ADLER CRAIG ET AL., *ESTATE PLANNING CLIENT STRATEGIES: LEADING LAWYERS ON UNDERSTANDING THE CLIENT'S GOALS, USING TRUSTS EFFECTIVELY, AND PLANNING IN A CHANGING ECONOMIC CLIMATE* 7-16 (2009).

¹³ In preliminary meetings with clients, I insist they immediately review all nonprobate asset designations, i.e., life insurance beneficiary designations, IRA and 401(k) beneficiary designations, as well as any brokerage accounts that may be converted to a transfer on death (TOD) account, to ensure that all such designations are accurate and up to date.

¹⁴ See *Most Americans Don't Have a Will, Says New Findlaw.com Survey*, WEST, June 30, 2008, <http://west.thomson.com/about/news/2008/06/30/findlaw-survey.aspx>.

¹⁵ *Id.* Age, income, and geographic region were variables in the study. *Id.* While information was not available specifically pertaining to LGBT individuals, it is reasonable to assume the lack of awareness regarding the importance of having a will applies across sexual orientation lines.

assets governed by the relevant probate process, in order to pass them to the designated beneficiary.¹⁶ These assets include real and tangible property, such as bank accounts and securities held solely in the decedent's name.¹⁷ For same-sex surviving partners, probate assets are often the cause of dismay, as they may be vulnerable to challenge in probate court by necessary parties to the probate action.¹⁸ In New York, necessary parties include intestate family members, those who would have received from the estate had the decedent failed to draft a will, and those individuals whose interests are adversely affected by the will, for instance, someone whose interest terminated with the drafting of a codicil to an existing will.¹⁹

The predetermined distribution of nonprobate assets provides a same-sex couple with a modicum of security, because they know these asset transfers will not be subject to challenge by homophobic, or other-

¹⁶ See N.Y. Surr. Ct. Proc. Act Law §§ 201(1), 205, 206(1) (McKinney 2010). One determines the relevant probate process by where the decedent was domiciled at the time of his or her death, or by where certain real property in the decedent's estate is located. See *id.*

¹⁷ See N.Y. Est. Powers & Trusts Law § 1-2.15 (McKinney 2010).

¹⁸ See, e.g., N.Y. Surr. Ct. Proc. Act Law § 1410 (McKinney 2010). Personal belongings that a couple may have accumulated over many years are probate assets, and therefore, are vulnerable to the whim of family members, unless there is a valid will authorizing a surviving partner to distribute those assets either to him or herself as the surviving partner or to designated beneficiaries. See, e.g., *id.*; *id.* § 1001. When taking probate action, each state that requires notification of necessary parties has a different statutory reference to define a necessary party. See, e.g., *id.* § 1410. New York's definition states, "[a]ny person whose interest in property or in the estate of the testator would be adversely affected by the admission of the will to probate may file objections to the probate of the will or of any portion thereof . . ." *Id.* Some states do not require the notification of necessary parties to a probate action, making the challenge to a will far less likely. See 95 C.J.S. *Wills* § 554 (2010).

¹⁹ See N.Y. Surr. Ct. Proc. Act Law § 1410 (McKinney 2010) (stating who may contest a will); see also N.Y. Est. Powers & Trusts Law § 4-1.1 (McKinney 2010) (stating how a decedent's property must be disposed of when a will does not exist). Also, the term *codicil* refers to an amendment to a will. BLACK'S LAW DICTIONARY 294 (9th ed. 2009); see also N.Y. Est. Powers & Trusts Law § 1-2.1 (McKinney 2010) (defining a codicil). A codicil requires the same procedural protocols in drafting and execution as the actual will itself, in order to be deemed valid. See 95 C.J.S. *Wills* § 315 (2010).

wise unsupportive, intestate distributees.²⁰ Examples of nonprobate assets include assets or real property owned as joint tenants with right of survivorship (JTWROS), real property owned as tenants by the entirety (TBE),²¹ assets held in a revocable trust, and assets held in the following designated beneficiary accounts²²: in trust for accounts, TOD accounts, life insurance policies, Totten trust accounts,²³ IRAs, 401(k)s, annuities, and health savings accounts.²⁴

Medical visitation and decision-making authorizations are essential parts of any nontraditional estate plan. Priority visitation directives (PVD), or visitation authorizations, inform a health care provider or facility who is authorized to visit if a person is hospitalized.²⁵ An effective PVD prioritizes the designee above any family members that may seek access to a hospitalized partner.²⁶ In reality, hospital personnel in

²⁰ See Kimberly J. Koide & Rosemarie S.J. Sam, *Trusts and Estates Primer*, HAW. B.J., Nov. 2010, at 4, 10. Descent and distribution are determined statutorily. See, e.g., N.Y. EST. POWERS & TRUSTS LAW § 4-1.1 (McKinney 2010). In New York, ESTATES, POWERS AND TRUSTS LAW § 4-1.1 prioritizes descent and distribution. *Id.*

²¹ See 41 C.J.S. *Husband and Wife* § 23 (2010). Property owned as TBE is an ownership structure reserved for married couples. *Id.* Its distinguishing and most important feature lies in the protection of an individual spouse's ownership interest from the creditors of the other spouse, which will be discussed in more detail later in this analysis. *Id.*; see *infra* text accompanying notes 106-07.

²² Van Foreman McClellan, *Inter Vivos Transfers: Will They Stand Up Against the Surviving Spouse's Elective Share?*, 14 OKLA. CITY U. L. REV. 605, 609 (1989). It is important to note that should the primary beneficiary predecease the account holder and there is no secondary beneficiary designation, the assets held in such an account may become part of the probate estate, if that is the policy of the account administrator. See John H. Langbein, *The Nonprobate Revolution and the Future of the Law of Succession*, 97 HARV. L. REV. 1108, 1137 (1984). Each organization has different rules regarding lapsed designations. See *id.* It is essential that a nontraditional estate planner stress the importance of current and accurate primary, secondary, and, in many circumstances, tertiary beneficiary designations.

²³ *In re Totten*, 71 N.E. 748, 752 (N.Y. 1904). The New York Court of Appeals established these trust accounts for depository accounts or securities. *Id.*

²⁴ See McClellan, *supra* note 22.

²⁵ See *Protecting Your Visitation & Decision-Making Rights*, HUMAN RIGHTS CAMPAIGN, <http://www.hrc.org/issues/protect-your-visitation-and-decision-making-rights.htm> (last visited Jan. 6, 2011) [hereinafter *Protecting Your Visitation & Decision-Making Rights*].

²⁶ *Non-traditional Family Estate Law*, ALBERT W. CHIANESE & ASSOCS., <http://dentalmallawyer.com/NontraditionalFamilyEstatesLaw.htm> (last visited Jan. 6, 2011).

states or cities that are adverse to gay and lesbian families may simply refuse access to a hospitalized partner. However, without some form of documentation, an unrelated person may have little or no chance of seeing their loved one in a hospital, even in a situation where there is no discrimination.²⁷

A dangerous precedent regarding visitation was set in 2009 in the case of *Langbehn v. Public Health Trust of Miami-Dade County*.²⁸ While on vacation in Florida with her partner and their three children, Lisa Pond collapsed and was taken to a Miami hospital.²⁹ Hospital personnel informed Pond's partner, Janice Langbehn, that she was in an antigay city and state and would receive no information regarding her partner's condition, even though she presented the hospital a medical power of attorney form authorizing Langbehn to make medical decisions for Pond.³⁰ The implications of that decision reach beyond the Miami LGBT community. The court ruled that Jackson Memorial Hospital had no obligation to allow visitors, regardless of the visitor's relationship to the patient, essentially putting the rights of any visitor in the hands of whoever is on call at the hospital that night.³¹ The court also ruled the hospital was under no obligation to allow anyone into their trauma unit, a place where visitation is, arguably, critical.³²

Ostensibly, most hospitals should honor medical powers of attorney designating same-sex individuals as those with the right to make medical decisions for their hospitalized partner, if the documents are created in compliance with state drafting and execution standards. One

²⁷ See *Protecting Your Visitation & Decision-Making Rights*, *supra* note 25.

²⁸ *Langbehn v. Pub. Health Trust of Miami-Dade Cnty.*, 661 F. Supp. 2d 1326, 1337-38 (S.D. Fla. 2009) (holding that the hospital had no duty to allow visitation for health care surrogates).

²⁹ *Id.* at 1331.

³⁰ *Id.* at 1331-32.

³¹ See *id.* at 1337-38 ("Although this is necessarily an *Erie* guess, I predict that the Florida Supreme Court would hold that doctors at a trauma unit do not have a freestanding legal duty, untethered to informed consent by a patient or health care surrogate, to allow visitation with a patient who is in critical condition and undergoing treatment-as was Ms. Pond from 3:30 p.m. to about 6:30 p.m.-or to allow visitation with a terminal patient-as was Ms. Pond from 6:30 p.m. to 11:30 p.m.-who is going to be transferred to a regular room where visitation will be permitted.").

³² See *id.*

critical consideration is providing one's partner with access to protected health information (PHI) to enable the partner to make an informed decision regarding health care. The Health Insurance Privacy and Accountability Act (HIPAA) of 1996 prohibits the dissemination of PHI to unauthorized individuals.³³ It is crucial that any medical power of attorney contain a HIPAA waiver in order for the designee to have full access to their partner's medical file.³⁴

In order to protect a partner from family protests about end-of-life care, every estate plan should contain a living will defining which treatments the signatory wants for him or herself in an end-of-life situation.³⁵ Thanks to the Supreme Court of the United States, a competent person may refuse lifesaving treatment if he or she so decides.³⁶ In the absence of a document making an alternative designation, or a living will, the decision whether to provide or withhold lifesaving treatment falls on next of kin.³⁷ Same-sex couples must provide additional powers to their partners regarding end-of-life decision making.³⁸ One answer to this problem lies in a specific authorization, contained in partner A's medical power of attorney, allowing partner B to interpret and override partner A's end-of-life directive.³⁹ This effectively provides for the situation where partner A has an end-of-life condition which would oth-

³³ Health Insurance Portability and Accountability Act, Pub. L. No. 104-191, § 1177, 110 Stat. 1936, 2029 (1996).

³⁴ See *HIPAA Frequent Questions: Personal Representatives and Minors*, U.S. DEP'T OF HEALTH & HUMAN SERVS., <http://www.hhs.gov/hipaafaq/personal/220.html> (last visited Jan. 6, 2011).

³⁵ Robert D. Fleischner, *Advance Directives for Mental Health Care: An Analysis of State Statutes*, 4 PSYCHOL. PUB. POL'Y & L. 788, 791 (1998). For example, a living will might define an end-of-life situation as an irreversible or incurable mental or physical condition with little or no hope of recovery. See Adam A. Milani, *Better Off Dead Than Disabled?: Should Courts Recognize A "Wrongful Living" Cause of Action When Doctors Fail to Honor Patients' Advance Directives?*, 54 WASH. & LEE L. REV. 149, 164 n.74 (1997).

³⁶ *Cruzan v. Mo. Dep't of Health*, 497 U.S. 261, 277 (1990); see *Brophy v. New England Sinai Hosp., Inc.*, 497 N.E.2d 626, 633 (Mass. 1986); see also *In re Quinlan*, 355 A.2d 647, 663-65 (N.J. 1976) (discussing a patient's right to refuse medical treatment).

³⁷ Carson Strong, *Consent to Sperm Retrieval and Insemination After Death or Persistent Vegetative State*, 14 J.L. & HEALTH 243, 248 (2000).

³⁸ *Cf. id.* (stating next of kin make medical decisions when no living will is present).

³⁹ See Fleischner, *supra* note 35.

erwise warrant the withholding of lifesaving treatment under their living will, yet a situation exists where partner B knows of a stem cell study or drug trial, for example, directly associated with partner A's end-of-life condition. Partner B may then authorize, under the terms of the medical power of attorney, the continuation of lifesaving treatment until the results of that study or trial are available.

Providing for unforeseen circumstances is the primary goal of the nontraditional estate planner. One such circumstance is a court ordered guardianship appointment. This situation is best illustrated by the case of Sharon Kowalski.⁴⁰ Kowalski had been living with her partner Karen Thompson when she suffered severe injuries in an automobile accident.⁴¹ Thompson cross-petitioned against Kowalski's father for guardianship.⁴² Thompson assumed that she would be able to visit her partner, so she consented to the father's guardianship.⁴³ Kowalski's father then, with the court's approval, terminated all visitation rights to Thompson.⁴⁴ Eight years and many court rulings later, Thompson was named as her partner's guardian.⁴⁵

The nomination of guardianship for personal needs, property management, or conservatorship grants standing to a same-sex partner to seek guardianship status in court.⁴⁶ A number of states authorize the nomination of a guardian by statute.⁴⁷ While guardianship is not automatic, a person's same-sex partner, once the partner's standing is established through nomination by documentation, may then demonstrate to the court why he or she is the appropriate guardian by presenting evidence such as: common residence, financial and emotional interdependence, and a mutually reciprocal estate plan.⁴⁸

⁴⁰ *In re Kowalski*, 478 N.W.2d 790 (Minn. Ct. App. 1991).

⁴¹ *Id.* at 791.

⁴² *Id.*

⁴³ *Id.*

⁴⁴ *Id.*

⁴⁵ *Id.* at 797.

⁴⁶ *See* N.Y. Mental Hyg. Law § 81.19 (McKinney 2010).

⁴⁷ *E.g., id.* § 81.17 ("In the petition, or in a written instrument duly executed, acknowledged, and filed in the proceeding before the appointment of a guardian, the person alleged to be incapacitated may nominate a guardian.").

⁴⁸ *See id.* § 81.19(d). Evidence proving financial interdependence may include mortgage statements in both parties' names, bills and bank account statements in both

Perhaps the most emotionally memorable case I have been involved with was that of Rosa and Vanessa.⁴⁹ Both partners in this twenty-year relationship had previously been married to men and had families of their own. They discovered their sexuality when they met and courageously bonded their relationship, despite suffering ridicule and misunderstanding from their own children. Vanessa suffered a severe stroke ten years prior to Rosa seeking my assistance and had been in a convalescent home for that entire time. As Vanessa steadily recovered and prepared to finally go home with Rosa, Vanessa's children arrived from Florida and threatened to take her back with them. Rosa believed that Vanessa's children were more interested in Vanessa providing inexpensive day care for her grandchildren than any sincere belief that Vanessa would be better off with them. Vanessa's children had only sporadically attempted to contact her in the previous twenty years. I drafted a nomination of guardian document and medical power of attorney for Vanessa, naming Rosa as her agent. These actions alone caused Vanessa's children to retreat from their threat and return to Florida, leaving her in Rosa's care, as she had been for the previous ten years.

Durable powers of attorney (DPA) for business management provide partners with the security of knowing that one partner can pay bills, make transfers, correspond with state and federal agencies, and buy and sell property, among other enumerated powers, if the other is unable to for any reason.⁵⁰ Durable refers to the fact that the designation remains in effect even if the signatory is completely incapacitated.⁵¹ Private entities, such as banks and brokerage houses, may require their own versions of a DPA; however, some private entities will accept a notarized DPA if it meets their execution requirements.

The final document of a basic estate plan is an affidavit of burial or cremation, authorizing a surviving partner to have access to the final

parties names, or joint ownership of real property. *In re Davidson*, 903 N.Y.S.2d 685, 688 (Sup. Ct. 2010).

⁴⁹ Rosa and Vanessa were not their real names.

⁵⁰ See generally FREDERICK HERTZ WITH EMILY DOSKOW, *MAKING IT LEGAL: A GUIDE TO SAME-SEX MARRIAGE, DOMESTIC PARTNERSHIPS & CIVIL UNIONS* 203-05 (2009).

⁵¹ *Id.*

remains and make the final arrangements for their deceased partner.⁵² Many traditional estate planners would include a statement regarding the final wishes of the decedent in the decedent's will. This is inadvisable for same-sex couples because some funeral homes require the entire will, if a burial or cremation authorization is contained therein, to ensure proper execution. When executing an affidavit of burial or cremation, it is imperative to comply with the execution standards that the state requires for the execution of a will, i.e., two disinterested witnesses and a notary's signature.⁵³ Allowing same-sex couples to make funeral decisions for one another has been an acceptable legislative olive branch to the LGBT community.⁵⁴ However, as with homophobic hospital staff, homophobic funeral directors may look for a reason to deny a surviving partner access to the deceased partner's remains. Affidavits of burial or cremation provide the surviving partner the legal authority to circumvent personal prejudices.⁵⁵

III. SOPHISTICATED ASSET TRANSFER MECHANISMS

The seven documents discussed above begin to address the basic needs of same-sex couples on a foundational level. Many same-sex couples desire to pass assets through a trust in place of a traditional will. Trusts established in a decedent's will, called testamentary trusts, do not bypass probate as they are established through the last will and testament of the decedent.⁵⁶ In contrast, living trusts are established during

⁵² See JOAN M. BURDA, *ESTATE PLANNING FOR SAME-SEX COUPLES* 75-77 (2004).

⁵³ See, e.g., N.Y. EST. POWERS & TRUSTS LAW § 3-2.1 (McKinney 2010).

⁵⁴ See Katherine Gregg, *R.I. Lawmakers Override Governor's Vetoes*, PROVIDENCE J., Jan. 5, 2010, <http://newsblog.projo.com/2010/01/lawmakers-over-ride-governors.html> ("The House — and then the Senate — voted to override Republican Carcieri's veto of a bill giving domestic partners the right to claim the bodies of — and make funeral arrangements for — their loved ones."); see also N.Y. PUB. HEALTH LAW § 4201 (McKinney 2010) (stating priority of control for the disposition of a decedent's remains).

⁵⁵ See BURDA, *supra* note 52.

⁵⁶ See BURDA, *supra* note 52, at 40. Testamentary trusts are beneficial to provide for controlled asset management and transfer when minors are involved or if a beneficiary is receiving means-based government assistance, such as social security disability or social security income. See Steven P. Riley & Colleen K. O'Rourke, *Special Classes of Persons*, in 4 BASIC ESTATE PLANNING IN FLORIDA §§ 4.54-.55 (6th ed. 2009). A large influx of money through a general bequest in a will could disrupt the beneficiary's eligibility for such assistance. See BURDA, *supra* note 52, at 41-43.

the lifetime of the grantor and may be revocable, giving the grantor access to and control of the assets within the revocable trust during his or her lifetime, or irrevocable, removing any control over the assets or their distribution after their transfer into the irrevocable trust.⁵⁷

Asset transfers after death may also be accomplished by revocable trusts, with several benefits not found in a traditional transfer via a last will and testament.⁵⁸ One of the many benefits of a revocable trust is that assets held within and transferred via a revocable trust bypass probate, maintaining privacy and avoiding potentially hostile family interaction when one partner dies.⁵⁹

The grantor of a revocable trust may access assets placed in the trust, meaning he or she may buy, sell, or substitute any assets placed therein.⁶⁰ The grantor continues to report income and deductions from assets held in a revocable trust to the appropriate tax authorities, and gift tax implications will not arise as long as the grantor alone receives distributions from the trust.⁶¹ Should a beneficiary receive distributions from the trust, the grantor may be obligated to report a taxable gift if said distributions are in excess of \$13,000.00,⁶² or if the grantor has exceeded his or her \$1,000,000.00 lifetime gifting allowance or unified credit.⁶³

Therefore, a testamentary supplemental needs trust may be established to protect the beneficiary's interests and pass the assets in a controlled manner. *See, e.g.*, N.Y. EST. POWERS & TRUSTS LAW § 7-1.2 (McKinney 2010).

⁵⁷ *See* BURDA, *supra* note 52, at 37-40.

⁵⁸ *See id.*

⁵⁹ *See id.* In order for a revocable trust to benefit the grantor, assets, including title of real property, must be transferred into the revocable trust prior to the grantor's death; otherwise, those assets will be subject to a traditional probate proceeding. *Id.* at 38. With careful probate planning on the part of the nontraditional estate planner, bypassing probate may not be critical, particularly for tangible assets located within the decedent's state of residence.

⁶⁰ *See id.* at 38. One benefit of placing title to real property located in several states into a revocable trust is to bypass the need for ancillary probate processes in each separate state where real property is located. *Id.*

⁶¹ 34A AM. JUR. 2D *Federal Taxation* ¶ 143,253 (2010).

⁶² I.R.C. § 2503(b)(1) (2010) (stating that the 2010 annual gift exclusion is \$13,000.00).

⁶³ I.R.C. § 2505(a)(1) (2006).

Living irrevocable trusts provide a more complex asset transfer structure that, given the goals of the grantor, require special consideration on the part of the nontraditional estate planner. The grantor may not reclaim assets held in an irrevocable trust, nor can the trust be terminated or its terms altered, unless provisions for such alterations are contained within the original trust agreement.⁶⁴

One such trust, the grantor retained income trust (GRIT), has a distinct benefit for same-sex couples.⁶⁵ In determining whether there is a taxable gift made to a family member, the IRS specifically defines such a family member as a spouse, ancestor of the grantor or their spouse, or the spouse of such an ancestor, effectively denying same-sex married couples the protection of a GRIT.⁶⁶ With a GRIT:

[T]he grantor creates an irrevocable trust and retains the right to all trust income for: (a) the earlier of a specified term or the death of the grantor; or (b) a specified term. If the grantor survives the specified term, the trust principal passes to [the designated beneficiaries] according to the terms and provisions of the trust instrument.⁶⁷

A qualified personal residence trust (QPRT) is an irrevocable trust that contains the grantor's ownership interest in a personal residence.⁶⁸ The goal of a QPRT is to transfer the residence at the value assessed at the time of the transfer.⁶⁹ Under specified terms within the trust, the grantor would retain the right to use the residence during a term of years, which reduces the property's value for gift tax pur-

⁶⁴ See BURDA, *supra* note 52, at 37-38. With intentionally defective grantor trusts, the grantor may maintain a nonfiduciary power, such as the right to substitute assets, making the trust a Grantor Trust. See I.R.C. § 675(4)(C) (2006). But, this power will not cause the trust assets to be included in the grantor's estate. See Rev. Rul. 2008-22, 2008-16 I.R.B. 796.

⁶⁵ See generally 34A AM. JUR. 2D *Federal Taxation* ¶ 143,280.1 (2010) (listing different trusts in which the grantor retains his or her assets).

⁶⁶ I.R.C. § 2701(e)(2) (2006).

⁶⁷ *Abusive Trust Tax Evasion Schemes—Special Types of Trusts*, IRS, <http://www.irs.gov/businesses/small/article/0,,id=106553,00.html> (last visited Jan. 6, 2011).

⁶⁸ 76 AM. JUR. 2D *Trusts* § 7 (2010).

⁶⁹ 34 AM. JUR. 2D *Federal Taxation* ¶ 40203 (2010).

poses.⁷⁰ If the grantor survives the term of years, the property passes to the beneficiary, and the grantor enjoys the considerable benefit of having the property excluded from his estate for estate tax purposes.⁷¹ The grantor maintains the responsibility for all upkeep during the term of years and is entitled to all real estate tax deductions or other income tax advantages associated with home ownership.⁷² Any improvements to the residence during the term of years are considered additional gifts to the QPRT.⁷³

The transfer of the residence into the trust is viewed as a gift to the beneficiary by the grantor.⁷⁴ The deferral of the beneficiary's ownership interest reduces the value of the gift, as does a longer term of years, sometimes up to fifty percent of the residence's value at transfer.⁷⁵ The gift tax consequences of this manner of asset transfer, in most circumstances, are far less severe than the estate tax consequences to the grantor's estate if the residence were to be included.⁷⁶ Should the grantor fail to survive the term of years, as with a GRIT, the property would revert to the grantor's estate.⁷⁷

If a client's individual goals include transferring monetary interests to a partner during the lifetime of both parties, the grantor retained annuity trust (GRAT) provides such a vehicle.⁷⁸ Balancing the assets of a wealth discordant couple has many benefits, including potentially increasing the poorer partner's chances of qualifying for the purchase of life insurance or meeting individual financial requirements to stay in the home of a deceased partner. As with a GRIT, the grantor funds the GRAT with a single contribution of assets, which then pays a percent-

⁷⁰ *Id.*

⁷¹ *Id.*

⁷² *Id.*

⁷³ *Id.* Additional gifts to the QPRT must be reported if they cost more than \$13,000.00 per beneficiary, or if the grantor has exceeded his lifetime gifting allowance. I.R.C. § 2503(b) (2006).

⁷⁴ 34 AM. JUR. 2D *Federal Taxation* ¶ 40203 (2010).

⁷⁵ Samuel Weiner, *Estate Planning: How to Use Present Value Techniques to Your Clients' Advantage*, N.J. LAW., July 1994, at 16, 17.

⁷⁶ *See* 34 AM. JUR. 2D *Federal Taxation* ¶ 40203 (2010).

⁷⁷ *See id.*

⁷⁸ GEORGE GLEASON BOGERT ET AL., *BOGERT'S TRUSTS AND TRUSTEES* § 264.10 (2010).

age of the original contribution, or with a predetermined percentage increase, back to the grantor for a fixed term of years.⁷⁹ Assets remaining in the trust at the end of the term of years pass to the beneficiary.⁸⁰ The difference between the actual rate of return and the IRS assumed rate of return passes free of gift taxes.⁸¹ Should the grantor fail to survive the term of years, assets remaining in the GRAT are included in the grantor's gross estate for estate tax purposes.⁸²

GRATs are not immune to federal gift tax; however, the exposure is often negligible. The taxable gift resulting from the transfer of property to a GRAT is the present value of the remainder interest, determined by using the IRS assumed rate of interest calculated monthly, and the rate in effect on the date of the gift controls.⁸³ Minimization of gift tax exposure can be achieved because, given the high annuity payout level, the grantor will receive back almost all of the trust assets if the assets earn at the assumed investment return rate.⁸⁴

The Williams Institute conducted a study to analyze federal estate tax disadvantages experienced by same-sex couples.⁸⁵ Data revealed that of the small percentage of estates large enough to be subject to estate taxation, “[s]ame-sex couples face federal marginal tax rates of up to 45% on the bequest of assets to their surviving partner at death that exceed an excluded amount per estate (\$3.5 million in 2009).”⁸⁶

⁷⁹ *Id.*

⁸⁰ *Id.*

⁸¹ 3 ROY M. ADAMS & THOMAS W. ABENDROTH, ESTATE, TAX AND PERSONAL FINANCIAL PLANNING § 28:14 (2010).

⁸² BOGERT ET AL., *supra* note 78.

⁸³ ADAMS, *supra* note 81.

⁸⁴ *See generally id.* (explaining how the taxable gift is calculated when property is transferred into a GRAT).

⁸⁵ MICHAEL D. STEINBERGER, FEDERAL ESTATE TAX DISADVANTAGES FOR SAME-SEX COUPLES (Williams Inst. 2009), available at <http://escholarship.org/uc/item/9nt0170b?query=steinberger>. “The Williams Institute advances sexual orientation law and public policy through rigorous, independent research and scholarship, and disseminates it to judges, legislators, policymakers, media and the public. A national think tank at UCLA Law, the Williams Institute produces high quality research with real-world relevance.” *About Us*, WILLIAMS INST., <http://www.law.ucla.edu/williamsinstitute/about/index.html> (last visited Jan. 6, 2011).

⁸⁶ STEINBERGER, *supra* note 85.

The goal of the irrevocable life insurance trust (ILIT) is to provide a surviving partner or family members with the ability to fund the payment of estate taxes without increasing both the estate tax bill and exposure to gift taxation.⁸⁷ A typical ILIT owns one or more life insurance policies on the life of the donor.⁸⁸ If drafted properly, the proceeds of the policies owned by the ILIT will not be included in the taxable estate of the donor upon his or her death.⁸⁹ The key element in determining whether the proceeds of a life insurance policy will be vulnerable to estate taxation is ownership.⁹⁰ Therefore, the donor may not own the policy, and the donor may not serve as trustee for the ILIT.⁹¹

The final irrevocable trust vehicle I will discuss in this Part is the charitable remainder unitrust (CRUT). A CRUT is an irrevocable trust into which the grantor transfers assets, usually investment property, that will pay to the designated beneficiary a percentage of the income of the trust based upon an annual review of the market value.⁹² Upon the death of the beneficiary, the trust principal passes to a predetermined charitable entity.⁹³ There are several tax benefits to CRUTs, including an immediate charitable deduction upon funding the trust.⁹⁴

⁸⁷ See BOGERT ET AL., *supra* note 78, § 1111. Yearly premiums are considered taxable gifts to the life insurance beneficiaries. *Id.* In order to eliminate gift tax exposure, the trust must contain a Crummey Power, or right of withdrawal. *Id.* Each premium payment must be accompanied by an offer to the beneficiaries to remove their share of the premium payment. *Id.* Once they have refused the right, the trustee pays the premium. *Id.* If the premiums are less than the annual gift exclusion times the number of beneficiaries, gift taxation will not occur. *Id.* The Crummey Power was created by the landmark case of *Crummey v. Commissioner*. *Id.*; see *Crummey v. Comm'r*, 397 F.2d 82 (9th Cir. 1968).

⁸⁸ BOGERT ET AL., *supra* note 78, § 1111.

⁸⁹ *See id.*

⁹⁰ *Id.*

⁹¹ *Id.*

⁹² *Id.* § 1208.

⁹³ *Id.* A Charitable Lead Trust reverses the order of payout, making the interest payments from the trust, in annuity or unitrust interest form, payable to the charitable interest during the established term of years or life of the grantor, and the remaining principal payable to noncharitable beneficiaries. *Id.* The grantor receives a charitable deduction for each of the years the interest is paid to the charitable beneficiary, but the remainder is considered a taxable gift to the noncharitable beneficiaries. *Id.*

⁹⁴ *Id.* This deduction is based on the actuarial value of the charity's right to receive principal from the trust upon the death of the grantor. *Id.* Also, because the charity

Moreover, if significantly appreciated assets are sold, there are no capital gains taxes to be paid because the CRUT is a tax-exempt entity.⁹⁵ As the assets pass to charity upon the death of the beneficiary, the estate will receive a charitable deduction.⁹⁶ The trust itself is not subject to income taxation, making the CRUT a desirable way to provide income to a beneficiary during their life and achieve significant tax benefits upon the trust's creation.⁹⁷

Gay and lesbian couples can pay as much as \$10,000.00 to protect themselves through the drafting of a comprehensive estate plan.⁹⁸ Perhaps the greatest benefit of marriage lies in the laws governing divorce. In states that forbid recognition of same-sex relationships, and in other states that do not recognize nonsolemnized relationships, dissolution is unstructured, and the outcome is often dependent upon the wealthier partner's ability to hire more experienced counsel. Some of the most heartbreaking cases I have taken involved a wealthy partner leaving a less-wealthy partner. In circumstances where there were no written agreements, the wealthy partner, often the partner who owns property titled solely in their name, can leave the less-wealthy partner with no money, no property, and no safety net. For that reason, no estate plan for a long-term same-sex couple is complete without a DPA, a privately drafted contract between the parties that attempts to approximate the protections of legal marriage in the event the relationship ends in dissolution.⁹⁹ These agreements are the only way to ensure that both

may not fully realize the donation, it may be carried forward for a period of five years.
Id.

⁹⁵ *See id.*

⁹⁶ *See id.*

⁹⁷ *Id.* The beneficiary will be subject to income tax for income received from a CRUT. I.R.C. § 664(b) (2006).

⁹⁸ *See, e.g.,* Rex W. Huppke, *Marriage Benefits Costly for Gay Couples*, CHI. TRIB., Jan. 18, 2010, available at 2010 WLNR 1059717.

⁹⁹ ERICA BELL, FORMATION, PROTECTION AND RECOGNITION OF DOMESTIC PARTNERSHIPS AND NON-TRADITIONAL FAMILIES 1259 (2007). In my experience, those clients who have been through a break up, where property was jointly owned and there was no DPA in place, have been far more willing to draft a DPA in a subsequent relationship.

parties' interests will be protected in an equitable manner if a relationship fails.¹⁰⁰

While most partnership agreements address jointly held property, a partner may also choose to create a support obligation toward the other in consideration of a contribution of labor or sacrifice.¹⁰¹ Some common elements of DPAs are a description of individual contributions to jointly held property,¹⁰² as well as anticipated future contributions of the parties,¹⁰³ and provisions for the future sale of such jointly held property. Couples may also create alternative dispute resolution criteria to address future disputes based on elements contained within the agreement.¹⁰⁴

No amount of considered planning will prevent a tragedy from striking. However, the devastation of a tragedy's aftermath can be minimized substantially if couples have prepared by consulting an attorney with experience in nontraditional estate planning. The education provided by such a consultation alone is invaluable.

¹⁰⁰ The legal status of DPAs is specific to the state in which the contract is to be enforced. Most states honor explicit, written relationship contracts, as opposed to oral contracts. HAYDEN CURRY ET AL., *A LEGAL GUIDE FOR LESBIAN AND GAY COUPLES* 7/3 (12th ed. 2004).

¹⁰¹ *See generally id.* A hypothetical example of this type of sacrifice might include one partner moving away from lucrative employment to support another or giving up a job to raise children. However, it is important to understand that traditional post-divorce tax benefits of maintenance or support payments do not exist for same-sex couples; therefore, careful tax review is required, and gift tax returns are often necessary if the support amount is greater than the annual exclusion. *See generally* 28 U.S.C. § 1738C (2006) (providing that states are not required to recognize a same-sex relationship as a marriage under its laws); *see also* I.R.C. § 2503(b)(1) (1998).

¹⁰² DPAs may state whether property ownership shall be evenly divided, or in respect to each party's contribution to address I.R.C. § 2040(a) which states that the full value of the property held as JTWROS will pass to the surviving partner when the other partner passes. *See* I.R.C. § 2040(a) (2006).

¹⁰³ It is critical to identify individual contributions to future acquired property or future enhancements to existing joint property by allowing each partner to agree upon these contributions and acknowledge them, with notarized signatures, on a separate schedule attached to the DPA.

¹⁰⁴ *See generally* CURRY ET AL., *supra* note 100.

IV. JOINT OWNERSHIP OF REAL PROPERTY

Purchasing property is one of the most financially bonding experiences for a couple. Some of the most common struggles same-sex couples experience involve the potential tax consequences of joint ownership of real property. Committed gay and lesbian couples' choices are limited in the ways in which they can purchase real property together.¹⁰⁵ Most gay couples may choose between two of the three available ownership mechanisms; the third, TBE, is reserved for legally married couples.¹⁰⁶ The greatest advantage of this form of ownership is its ability to shield the property from the creditors of either spouse.¹⁰⁷

The desire to secure a surviving partner's ownership rights after death often conflicts with a significant ownership assumption made by the IRS. This assumption pertains to property owned by unmarried couples as JTWRROS.¹⁰⁸ This method of real property ownership effectively transforms jointly held real property into a nonprobate asset, ensuring the surviving partner's ownership and saving him or her the necessity of depending on a probate court's ruling in order to transfer the property upon a joint tenant's death.¹⁰⁹ For couples of modest means, this is the logical way to ensure their partner will not have their ownership rights questioned by homophobic family members.

The disadvantages to owning property as JTWRROS may be mitigated to an extent by careful record keeping, but it is critical that any couple looking to purchase property understand the specifics of this type of ownership. The most common issue confronting joint owners

¹⁰⁵ The limitations discussed apply to couples that live in states that do not respect full marriage rights for same-sex couples. However, even in states that do recognize same-sex marriage, the federal protections of marriage associated with the transfer of real property ownership after death would not apply because of the Defense of Marriage Act. 28 U.S.C. § 1738C (2006).

¹⁰⁶ See, e.g., N.Y. EST. POWERS & TRUSTS LAW § 6-2.2 (McKinney 2010).

¹⁰⁷ See N.Y. TAX LAW § 2040 (McKinney 2010); N.Y. EST. POWERS & TRUSTS LAW § 6-2.2 (McKinney 2010).

¹⁰⁸ See I.R.C. § 2040 (2006).

¹⁰⁹ See 34A AM. JUR. 2D *Federal Taxation* ¶ 143,452 (2010). In order for the surviving partner to subsequently convey the property previously held as JTWRROS, he or she simply must provide the title obtained at the purchase of the property and the death certificate of the predeceased partner. See *id.*

appears to be how best to document uneven contributions by individual partners. Because many joint tenancies are defined by the common law notion of the four unities of property ownership (time, title, possession, and interest),¹¹⁰ equal ownership, and therefore equal contribution to expenses associated with jointly held property, is assumed for the purposes of equitable distribution of property upon the dissolution of the relationship.¹¹¹ DPAs are strongly advised for couples owning property with unequal contribution to expenses.¹¹²

Real estate attorneys unfamiliar with same-sex couples and the tax issues associated with the purchase of joint property, often fail to advise their gay and lesbian clients about a significant section of the United States Tax Code that allows the IRS to attribute the entire value of the property to the first deceased partner.¹¹³ This provision necessitates specific and ongoing record keeping of individual partner contributions to jointly held property.¹¹⁴ Not only must these records indicate

¹¹⁰ See *Taylor v. Canterbury*, 92 P.3d 961, 962 (Colo. 2004); *Harms v. Sprague*, 473 N.E.2d 930, 932 (Ill. 1984). Some states follow the common law with reference to the four unities, however, other states require equal shares in interest. See CAL. CIV. CODE § 683 (West 2010); N.M. STAT. ANN. § 47-1-36 (West 2010); UTAH CODE ANN. § 57-1-5 (West 2010).

¹¹¹ See 20 AM. JUR. 2D *Cotenancy and Joint Ownership* § 4 (2010). These contribution issues arise upon the severance of joint tenancies. See R.H. Helmholz, *Realism and Formalism in the Severance of Joint Tenancies*, 77 NEB. L. REV. 1, 2 (1998). The emerging understanding of the unity of interest focuses on the intention of the parties; however, states treat this understanding differently. See *id.*

¹¹² It is important to note that in community property states, such as Washington and California, where same-sex registered domestic partners own joint property specifically classified as community property, the IRS will consider it so. See Rev. Rul. 87-98, 1987-2 C.B. 206.

¹¹³ See I.R.C. § 2040(a) (2006). The law states in pertinent part, “[t]he value of the gross estate shall include the value of all property to the extent of the interest therein held as joint tenants with right of survivorship by the decedent and any other person” *Id.* Section 2040 creates a rebuttable presumption, and once evidence of individual contribution is submitted by the surviving partner, the burden of proof shifts to the IRS. *Estate of Fratini v. Comm’r*, 76 T.C.M. (CCH) 342 (1998).

¹¹⁴ See *Estate of Fratini*, 76 T.C.M. (CCH) 342. One method of proving individual contribution to jointly held property is called the “three bank account rule.” See *id.* Each individual has a separate individual bank account into which his or her salary, personal gifts, settlement awards, assets from a deceased source through probate or nonprobate designation, and any other individually acquired asset will flow. See *id.* A third bank account exists solely to pay bills associated with the jointly held

individual contributions, they must also prove the source of the individual income.¹¹⁵

If the initial ownership interest does not accurately reflect individual contributions, one major tax issue that may occur in the formation of the joint tenancy is that of the taxable gift. Because each party has a unilateral right to sever the joint tenancy,¹¹⁶ equal ownership from the onset is presumed.¹¹⁷ If one party contributes more to the property's purchase than the annual gift exclusion, a taxable gift may occur.¹¹⁸

Financial advisors, even those with extensive experience working with same-sex couples, often advise new property owners to purchase as tenants in common (TIC) to facilitate the partners' ability to easily determine each partner's individual ownership share. Each partner owns an undivided interest in the whole property.¹¹⁹ This method also allows each partner to own an unequal share established at the inception of the tenancy.¹²⁰ The most important aspect of ownership as TIC from an estate planner's perspective is the fact that each individual partner's interest is a probate asset, requiring a will or trust to pass that interest to a surviving partner.¹²¹ The benefit of ownership as TIC is

property. *See id.* Each partner's cancelled checks from their individual bank account into the *house* account will serve as evidence of individual contribution, thus the "three bank account rule." *See id.* Exact records may not be necessary if each partner can show that they had sufficient funds to make separate payments. *See id.*

¹¹⁵ *See* Estate of Goldsborough v. Comm'r, 70 T.C. 1077, 1082-83 (1978) (addressing the issue of partner gifting in order to circumvent individual contribution requirements).

¹¹⁶ *See, e.g.*, N.Y. REAL PROP. LAW § 240-c (McKinney 2010). Unilateral severance of property owned as JTWROS is not possible with property owned as TBE, an important and rarely touted advantage of marriage. *See, e.g.*, EVE PREMINGER ET AL., TRUSTS & ESTATES PRACTICE IN NEW YORK: SURVIVORSHIP ESTATES § 2:36 (2010).

¹¹⁷ *See* 20 AM. JUR. 2D *Cotenancy and Joint Ownership* § 4 (2010).

¹¹⁸ *See* I.R.C. § 2503 (2006).

¹¹⁹ *See* 20 AM. JUR. 2D *Cotenancy and Joint Ownership* § 32 (2010).

¹²⁰ *See id.*

¹²¹ *See id.* ("While tenancy in common does not of itself give the tenants the right of survivorship, such a right generally may be annexed to an estate in common if the intention to do so is clearly expressed." (citations omitted)). Without a will, the deceased partner's ownership interest will be distributed to their closest living legal relative through the laws of intestacy of the state where the decedent lived. *See, e.g.*, N.Y. EST. POWERS & TRUSTS LAW § 4-1.1 (McKinney 2010).

that comprehensive record keeping of individual contributions is not necessary to prove ownership interest.¹²² Whether this benefit outweighs the automatic and probate-free transfer of ownership to a surviving spouse depends on the particular requirements of the individual owners.

V. PROBATE PREPARATION AS ESTATE PLANNING

Understanding clients' goals, both financial and emotional, will help the estate planner process the myriad of considerations necessary to draft and execute a successful estate plan. However, I believe that the firm test of an estate planner is his or her ability to prepare for and prosecute that estate plan in a probate court.¹²³ Avoiding common drafting and execution mistakes will save time and money on the other end.

My first case as an apprentice attorney working at a firm that catered to LGBT clients was on a probate matter. It became clear to me, a novice, that the unfortunate and painful legal journey that followed for my client was completely preventable. When he came to my office, all he brought with him was the will of his deceased partner, which they had created themselves from an estate-planning computer program purchased at a local office supply store. While valid, it was not compliant with New York law because it lacked an attached attestation affidavit,¹²⁴ necessitating an exhaustive and expensive search for witnesses who were simply hospital employees that happened to be working on the day the will was executed. This mistake could have been rectified if there were explicit instructions in the will-making program regarding state law attestation requirements or, of course, if the client had sought the assistance of an experienced attorney. The common practice for attorneys should be to include a self-proving affidavit that witnesses sign at the execution of the will, attesting that the testator

¹²² See 20 AM. JUR. 2D *Cotenancy and Joint Ownership* § 32 (2010).

¹²³ See, e.g., N.Y. CT. RULES § 207.16 (McKinney 2010) (depending on the jurisdiction, the administration of estates most often occurs in surrogate's or probate court).

¹²⁴ See N.Y. Surr. Ct. Proc. Act Law § 1406 (McKinney 2010) (requiring a will be accompanied by a statement from the witnesses verifying the testator's competency and intention to execute his or her will).

was competent in all respects to sign the will, that he or she in fact signed the will in their presence, and that the witnesses also signed the will.

Also troubling was the lack of any information regarding the family of the decedent. While this was a long-term relationship, the decedent was estranged from his family and never talked about them with his partner. Under section 1403 of New York's Surrogate's Court Procedure Act, an executor must serve notice on necessary parties to the probate action.¹²⁵ The surviving partner and the decedent were not married, therefore the decedent's closest living relatives, his first cousins, were the necessary parties requiring service of a consent to probate form and a copy of the decedent's will. Many unnecessary billable hours were spent locating the decedent's closest blood relatives in order to comply with these filing requirements.¹²⁶

State law governs the regulation of the probate process, as well as the procedural details surrounding the submission of a probate petition.¹²⁷ In my experience, executors may face differing filing and form requirements depending on the county in which the probate action is heard. Not all jurisdictions have notification requirements, and some allow for the prevalidation of a will by the testator while he or she is alive.¹²⁸ If the probate process is fully explained and all information gathered up front from the testator, the person most likely to have the information, the probate process may prove to be quick and efficient. The first will that I drafted and also prosecuted in probate was cleared

¹²⁵ See *id.* § 1403. Necessary parties under section 1403 include the distributees of the decedent, or those who would have received from his estate had he died without a will, any person whose rights would be negatively affected by a subsequent testamentary instrument, such as a codicil, and anyone whose rights would be negatively affected by a will which had been previously offered for probate in surrogate's court. *Id.*

¹²⁶ See N.Y. CT. RULES § 207.16 (McKinney 2010) (describing in detail the due diligence protocols to be used by an executor to discover necessary parties for the purpose of notification).

¹²⁷ See, e.g., *id.*; FLA. STAT. § 731.155 (2002).

¹²⁸ See, e.g., OHIO REV. CODE ANN. § 2107.081 (West 2010). Declaration of the validity of a will allows a testator, by motion to the court and notification of all heirs identified in intestate succession, to prove the validity of their own will. *Id.* Once proven, the will cannot be challenged upon the death of the testator. See *id.*

by the surrogate's court in eighteen days from the testator's death. Both partners had provided all of the information required for probating their wills by the time of execution.¹²⁹

Probate courts are now prosecuting the wills of married same-sex testators.¹³⁰ This creates a jurisdictional tension for couples that process their estates in states that do not recognize same-sex marriage. While the civil rights movement and the gay rights movement are strikingly different, the opposition to the same-sex marriage movement and the interracial marriage movement followed almost identical scripts.¹³¹ State antimiscegenation laws and, in some cases, state constitutional amendments were passed to outlaw interracial marriage.¹³²

During their struggle for marriage recognition, surviving spouses of interracial marriages presented probate issues to courts across the land, and the courts' analysis, either allowing or denying recognition, illuminates the judicial reasoning underlying the current decisions addressing the needs of surviving spouses of same-sex marriages.

When confronted with the probate issue of a surviving spouse from an interracial marriage, courts appeared to draw the distinction between, as Linda Silberman described, an *evasion* marriage and a *mobile* marriage.¹³³ According to Silberman, in an evasion marriage, a

¹²⁹ An interesting footnote to this case was my use of the following simultaneous death provision:

If the death of my partner and my own death are caused by a simultaneous death event, defined as a single event or series of related events causing the death of both parties within a 30 day period, then our jointly held property shall be sold and divided equally, going to the secondary beneficiaries listed in our individual Wills.

Because I had all the information required by the court by the eighteenth day, the court refused to issue letters testamentary until thirty days had passed.

¹³⁰ See *In re* Estate of H. Kenneth Ranftle, No. 4585-2008 (N.Y. Sur. Ct. Jan. 26, 2009), available at <http://www.bonasera.org/wp-content/uploads/in-the-matter-of-the-estate-of-h-kenneth-ranftle.pdf>.

¹³¹ See *infra* notes 132-37 and accompanying text.

¹³² See BRIEF HISTORY OF MARRIAGE MEDDLING IN THE UNITED STATES, <http://www.filibustercartoons.com/marriage.htm> (last visited Jan. 6, 2011) (providing a visual timeline of antimiscegenation laws and constitutional amendments).

¹³³ Linda Silberman, *Same-Sex Marriage: Refining the Conflict of Laws Analysis*, 153 U. PA. L. REV. 2195, 2198-2208 (2005).

couple purposefully flees their own state to take advantage of more favorable marriage laws in other states or countries, and then returns to their home state.¹³⁴ Several cases in states that maintained a criminal proscription¹³⁵ against interracial marriage refused to honor evasion marriages for probate purposes.¹³⁶ However, courts were more willing to allow for a surviving spouse's rights through probate if a party was simply domiciled in the state at the time judicial redress in probate was sought.¹³⁷

The key word in this analysis is *marriage*. Probate courts that were asked to recognize the rights of a surviving partner without the frame of a valid marriage refused to extend to same-sex partners the automatic spousal rights attendant to marriage.¹³⁸ In 1993, *In re Cooper* addressed the issue of a surviving nonmarried partner's claim for a right of election.¹³⁹ The decedent had a will and left everything except a substantial piece of real estate to his surviving partner.¹⁴⁰ In true New York fashion, the partner wanted the apartment.¹⁴¹ The appellate division refused his claims, stating:

This court holds that persons of the same sex have no constitutional rights to enter into a marriage with each other. Neither due process nor equal protection of law provisions are violated by prohibiting such marriages.

¹³⁴ *Id.* at 2198.

¹³⁵ For the purposes of this Article, I will not analyze probate court treatment of other marriages that carried a criminal proscription, such as bigamous or consanguineous marriages. However, the judicial outcomes in those cases generally adhere to the *evasion* versus *mobile* marriage theory.

¹³⁶ *See, e.g., In re Estate of Mortenson*, 316 P.2d 1106 (Ariz. 1957); *Eggers v. Olson*, 231 P. 483 (Okla. 1924); *Greenhow v. James*, 80 Va. 636 (1885).

¹³⁷ *See Succession of Caballero v. Ex'r*, 24 La. Ann. 573 (1872) (narrowing the focus of the criminal proscription to marriages performed in Louisiana); *Miller v. Lucks*, 36 So. 2d 140 (Miss. 1948).

¹³⁸ *See, e.g., In re Estate of Hall*, 707 N.E.2d 201 (Ill. App. Ct. 1998); *In re Cooper*, 592 N.Y.S.2d 797 (App. Div. 1993).

¹³⁹ *In re Cooper*, 592 N.Y.S.2d at 798-800; *see also* N.Y. EST. POWERS & TRUSTS LAW § 5-1.1 (McKinney 2010) (addressing New York's law regarding right of election by a surviving spouse).

¹⁴⁰ *In re Cooper*, 592 N.Y.S.2d at 797-98.

¹⁴¹ *See id.*

Nor does Mr. Chin have any right or standing to elect against decedent's will.¹⁴²

The Illinois case of *In re Estate of Hall* also demonstrates the court's reticence to create a marriage where, according to the court, it did not exist.¹⁴³ Andrea Hall died intestate and her partner sought a spousal share in the estate, arguing that Illinois's prohibition of same-sex marriage was unconstitutional.¹⁴⁴ The court denied her claim with remarkably circular reasoning, stating that even if the court were to declare the prohibition of same-sex marriage unconstitutional, the petitioner still was never married to the decedent, and therefore, the claim was moot.¹⁴⁵

While the few courts today that have addressed probate issues for surviving partners of same-sex marriages have relied less on the *evasion* versus *mobile* analysis, it is likely that we will see this type of reasoning in the future.¹⁴⁶ For example, the interjurisdictional confusion surrounding section 1403 of the New York Surrogate's Court Procedure Act, the New York necessary party notification requirement, demonstrates the need for a single voice regarding recognition of same-sex marriages by states that do not perform them.¹⁴⁷

In *In re Estate of Kenneth Ranftle*, the court recognized a Canadian marriage,¹⁴⁸ stating:

¹⁴² *Id.* at 798 (quoting *In re Estate of Cooper*, 564 N.Y.S.2d 684, 685 (Sur. Ct. 1990)). It is difficult to determine how the court viewed the petitioner, Mr. Chin. Whether he was overreaching or not in attempting to obtain his partner's apartment, considering that he was the sole beneficiary of everything else in the estate, may have played a role in the court's decision. *See id.* The decedent left the apartment to a previous partner, and the fact that he did so in a will that was clearly drafted after he entered into his new relationship may have solidified the court's desire to honor the will of the testator. *See id.*

¹⁴³ *In re Hall*, 707 N.E.2d 201.

¹⁴⁴ *Id.* at 202-03.

¹⁴⁵ *Id.* at 207-08.

¹⁴⁶ I have only found the two cases in New York discussed herein. The reason may be that these cases were processed without a published opinion.

¹⁴⁷ *See generally* N.Y. Surr. Ct. Proc. Act Law § 1403 (McKinney 2010) (providing New York's necessary party notification law).

¹⁴⁸ *In re Estate of H. Kenneth Ranftle*, No. 4585-2008 (N.Y. Sur. Ct. Jan. 26, 2009), available at <http://www.bonasera.org/wp-content/uploads/in-the-matter-of-the-estate->

Marriages valid where solemnized have long been recognized in New York; exceptions exist only for marriages affirmatively prohibited by New York law, or proscribed by “natural law”. As the decedent’s marriage was valid under the laws of Canada, where performed, and falls into neither exception to the general rule, the marriage is entitled to recognition in New York.¹⁴⁹

In September 2008, Judge Nahman of Queens County Surrogate’s Court, in *Will of Alan Zwerling*, refused to honor a same-sex marriage for the same notification issue in section 1403 of the New York Surrogate’s Court Procedure Act, explaining the validity of same-sex marriage had not been *definitely determined*.¹⁵⁰ These conflicting interpretations, even within the five boroughs of New York City, demonstrate the necessity for considered and comprehensive information gathering while preparing an estate plan for a married same-sex couple.¹⁵¹

Getting to know the families of the client is an essential part of the nontraditional estate planner’s job.¹⁵² Asking the client questions

of-h-kenneth-ranftle.pdf. The *Ranftle* case is on appeal to the First Department Appellate Division in New York on the limited question of whether the recognition of a same-sex marriage by the State of New York requires legislative, rather than judicial action. Brief for Respondent at 4, *In re Estate of H. Kenneth Ranftle*, No. 4585-2008 (N.Y. App. Div. filed Oct. 6, 2010). The appeal was brought by the decedent’s brother. *Id.* at 1.

¹⁴⁹ *In re Estate of H. Kenneth Ranftle*, No. 4585-2008 (N.Y. Sur. Ct. Jan. 26, 2009), available at <http://www.bonasera.org/wp-content/uploads/in-the-matter-of-the-estate-of-h-kenneth-ranftle.pdf> (citations omitted). In a footnote to the *Ranftle* case, Judge Glen also mentioned Governor David Paterson’s executive order of May 14, 2008, to all New York State agencies advising them to recognize same-sex marriages that were valid where performed. *Id.* at 1 n.1.

¹⁵⁰ *Will of Alan Zwerling*, 240 N.Y. L.J. 38 (N.Y. Sur. Ct. 2008); N.Y. Surr. Ct. Proc. Act Law § 1403 (McKinney 2010).

¹⁵¹ Collecting information about the family tree of married same-sex couples is critical for estate planners not only because the law of notification of necessary parties may be in fluctuation but also because these may be the very people to create delay in the probate process. Because you never know who will be alive at the time of a testator’s death, you may be dealing with unsupportive family members during the probate process.

¹⁵² Interestingly enough, two of Kenneth Ranftles’s three siblings, the very parties that Judge Glen’s ruling denied standing to challenge their brother’s will, are gay

regarding the personal dynamics of family members may be uncomfortable, but it often provides necessary information that will not only assist in the probate process but in the drafting of the will itself. If potential necessary parties are not supportive of their gay or lesbian family members, planners may choose to grant them a token bequest, which they would forfeit should they challenge the will under an incorporated *in terrorem* clause.¹⁵³ Nontraditional estate planners can also determine who among a testator's family members are supportive and would be a potential advocate for the testator's intentions as drafted in their will.

It is critical to document client conversations carefully. The New York Civil Practice Law and Rules grants a will contestant the ability to ask the drafting attorney and the attesting witnesses questions.¹⁵⁴ Moreover, the contestant has the ability to examine the testator's estate-planning file and question the drafting attorney about its contents.¹⁵⁵ I personally require two separate intake sheets from each client asking redundant questions regarding the specific goals of the clients to complement my personal notes. A nontraditional estate planner needs back up, particularly if there are unfriendly family members in the mix.

The issue of privileged information arises in two distinct areas, both potentially related to record keeping and client interaction. First, when representing couples, it is my practice to have each sign a consent and waiver acknowledging that there is no confidentiality exclusive of the other partner. In other words, no partner can offer the attorney information to be kept from the other partner. Likewise, if the relation-

themselves. Both gay brothers have attempted to challenge the ruling while the nongay sibling has supported it, as well as Mr. Ranftle's surviving spouse.

¹⁵³ See generally N.Y. EST. POWERS & TRUSTS LAW § 3-3.5(b) (McKinney 2010) (stating the law regarding *in terrorem* clauses). *In terrorem* clauses are useful tools that serve to put potential challengers of a will on notice that they will forfeit any bequest made to them within the will if they challenge, or assist in challenging, the will's validity for any reason. *Id.*

¹⁵⁴ N.Y. C.P.L.R. 3101 (McKinney 2010). This latitude is applied to questions in deposition and only if those questions are pursuant to section 1404 of the NEW YORK SURROGATE'S COURT PROCEDURE ACT, which sets forth protocols for witnesses to be examined and the proof required from the questioning depending on the type of will being contested. N.Y. SURR. CT. PROC. ACT LAW § 1404 (McKinney 2010).

¹⁵⁵ N.Y. SURR. CT. PROC. ACT LAW § 2104(6) (McKinney 2010).

ship were to fail at some point in the future before the estate plan was completed, I would not be able to represent either party in completing the estate plan individually or in subsequent estate-related matters.

Second, when prosecuting a will through probate, there are often many differing interests, all converging at once, seeking information and assistance. If I drafted the decedent's will and am representing the estate, it is my obligation to enforce the will as drafted and prioritize the interests of the executor above all others. It is at this point that careful considerations are made to what is said to family members or other beneficiaries. The contents of certain conversations between the attorney and the testator are privileged, and the divulgence of privileged information could put the attorney at odds with the best interests of his or her client—the estate as represented by the executor.¹⁵⁶

VI. CONCLUSION

Many of the coupled same-sex clients I have represented were not married, which intensifies the need for thorough record keeping and maintenance.¹⁵⁷ While probate courts around the country are gaining familiarity with the estates of gay and lesbian individuals, their inclination to assist in the process of probating a decedent's will may be colored by their own personal feelings toward gay people.¹⁵⁸ In those situations, a prepared and organized estate planner makes all the difference.¹⁵⁹

¹⁵⁶ See generally *McCaffrey v. Estate of Brennan*, 533 S.W.2d 264, 267 (Mo. Ct. App. 1976) (providing examples of privileged information involved in probate proceedings). Conversations or information relating to the decedent's probate proceeding or planning related to probate, the decedent's assets, liabilities, claims for or against the estate, or any information regarding the decedent's mental or physical state at the time of the execution of their will is privileged. *Id.*

¹⁵⁷ It is a good idea to check with unmarried clients regularly, usually every three to five years, to update the probate file in terms of financial and family information.

¹⁵⁸ The best friend and worst enemy a probate attorney may have is the probate court clerk. They are the first, and often the most critical, person to review the probate petition. I have seen this as an advantage as it has been my experience that most clerks want the petition to be accepted; therefore, they scrutinize it with an eye toward perfection, not rejection.

¹⁵⁹ Probate petitions are detailed and confusing for attorneys unfamiliar with them. Probate clerks have little patience for attorneys who need to be schooled in the basics.

A comprehensive nontraditional estate plan must create a basic foundational safety for the client and their partner and should include a will, living will, medical power of attorney, priority visitation directive, durable power of attorney, designation of guardian for property management and personal needs, and an affidavit of burial or cremation. Depending on the specific goals and needs of the client, estate tax planning or asset transfer counseling must be a part of the client conversation.

Whether it is a simple will or a sophisticated GRAT, specific file preparation and pain staking file maintenance will serve not only your clients in the present, but will minimize the emotional and financial burden of a surviving partner in a future probate action. As the law regarding the recognition of same-sex marriage develops, nontraditional estate planners may, one day in the near future, find themselves performing the tasks of the traditional estate planner. I look forward to that day.