

**GAY AND LESBIAN ELDERS: ESTATE PLANNING
AND END-OF-LIFE DECISION MAKING**

Nancy J. Knauer

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Nancy J. Knauer*

I. INTRODUCTION

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 "some 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 con-

* Professor of Law, Beasley School of Law, Temple University. This Article was prepared for the Symposium entitled *Family, Life, and Legacy: Planning Issues for the LGBT Community* organized by the *Florida Coastal Law Review*. Many of the issues discussed in this Article are also explored in my forthcoming book, *GAY AND LESBIAN ELDERS: HISTORY, LAW, AND IDENTITY POLITICS IN THE UNITED STATES* (forthcoming 2010). I would like to thank the editors and staff of the *Florida Coastal Law Review* for planning and hosting such a timely Symposium.

¹ Gerry Shih, *Suit Charges Elderly Gay Partners Were Forced Apart*, N.Y. TIMES, Apr. 20, 2010, <http://bayarea.blogs.nytimes.com/2010/04/20/suit-charges-elderly-gay-couple-was-forced-apart/?scp=1&sq=elderly%20gay%20partners&st=cse>.

² Kate Kendell, *Defending the Indefensible*, NAT'L CTR. FOR LESBIAN RIGHTS, Apr. 29, 2010, http://www.nclrights.org/site/PageServer?pagename=blog_katesBlog042910 (stating Harold "did not want Clay to call an ambulance"); see also Lois Pearlman, *No Reason to Separate Gay Couple, Friend Says*, BAY AREA REP., Apr. 29, 2010, <http://www.ebar.com/news/article.php?sec=news&article=4748> (reporting Harold was "upset about leaving in an ambulance").

³ Shih, *supra* note 1.

⁴ Mac McClelland, *Plot Thickens in Sonoma Discrimination Case*, MOTHER JONES, Apr. 28, 2010, <http://motherjones.com/rights-stuff/2010/04/plot-thickens-sonoma-discrimination-case>; see also First Amended Complaint at 12, *Green v. Cnty. of Sonoma* (Cal. App. Dep't Super. Ct. Mar. 22, 2010) (No. SPR-81815) [hereinafter First Amended Complaint], available at http://www.nclrights.org/site/DocServer/Greene_v_Sonoma_County.pdf?docID=7461 (describing the type of nursing unit).

⁵ First Amended Complaint, *supra* note 4, at 16. According to allegations made by Clay in court documents, he was "only informed . . . of his partner's death some days after the fact." *Id.*

trol over their finances.⁶ The officials dismantled, quickly and unceremoniously, the life Clay and Harold had built together over the course of twenty-five years.⁷

The series of events set in motion by Clay's 911 call were the subject of a lawsuit brought by Harold's estate and Clay against county officials and other related parties.⁸ The plaintiffs alleged the defendants' actions were motivated by antigay bias and a desire for financial gain.⁹ To the contrary, county representatives 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 antigay bias prompted a swift denial from the defendants,¹¹ and Sonoma County launched a public relations campaign to assure tourists the county had not countenanced homophobia.¹² Days before the trial was scheduled to begin in 2010,¹³ the county and the nursing home where Clay alleged he had been restrained against his will settled the claims against them for an amount in excess of \$600,000.¹⁴ Although the county denied any discrimination or breach of fiduciary duty had occurred, it agreed to modify some of its procedures to prevent similar events in the future.¹⁵

⁶ Paul Payne, *Lawsuit Ignites Firestorm in Gay Community Against Sonoma County*, PRESS DEMOCRAT, Apr. 20, 2010, <http://www.pressdemocrat.com/article/20100420/ARTICLES/100429976/1350>.

⁷ *Id.* (reporting the couple had spent twenty-five 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 . . . [t]hey went to museums and traveled through Europe. They entertained and had a lot of friends." Pearlman, *supra* note 2 (quoting Jannette Biggerstaff).

⁸ First Amended Complaint, *supra* note 4, at 1.

⁹ *Id.* at 14, 17.

¹⁰ *See* Payne, *supra* note 6.

¹¹ *See, e.g.*, Pearlman, *supra* note 2.

¹² Chris Smith, *Sonoma County Tourism Bureau Reacts to Anti-Gay Name Calling*, PRESS DEMOCRAT, Apr. 22, 2010, <http://www.pressdemocrat.com/article/20100422/NEWS/100429799/1350>.

¹³ Press Release, Sonoma Cnty., Sonoma County Lawsuit Resolved: Clay Greene, Harold Scull Settlement Announced (July 22, 2010), available at <http://press.sonoma-county.org/content.aspx?sid=1018&id=1367>.

¹⁴ Bob Egelko, *Suit By Elderly Gay Couple to be Settled*, S.F. CHRON., July 25, 2010, at C2, available at 2010 WLNR 14788813.

¹⁵ *See* Press Release, Sonoma Cnty., *supra* note 13.

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 and 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.¹⁶ The allegations made by Harold's estate and Clay struck a powerful chord in the gay and lesbian community because they seemed to confirm some of the deepest-seated fears of older gay men and lesbians.¹⁷

The allegations were not proven, but the fact this scenario *could* occur—that partners could be separated and confined against their will—weighs heavily on the minds of older gay men and lesbians.¹⁸ By any standard, the scenario is a nightmare. Clay later summarized his experience in an interview with *The New York Times*, “‘I was trash’ to them, he said. ‘I’m going to end up in the [d]umpster.’”¹⁹

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.²⁰ Over the past twenty years, the gay and lesbian community has placed an increasing emphasis on estate-planning documents.²¹ Beginning in

¹⁶ See Pearlman, *supra* note 2; Shih, *supra* note 1. Clay's lawyer reported that “[t]he cats are dead.” Payne, *supra* note 6.

¹⁷ Shih, *supra* note 1 (reporting “[f]or gay men and lesbians, the series of events outlined in the complaint hits very close to home”).

¹⁸ See Lisa Haefele, METLIFE MATURE MARKET INST., OUT AND AGING: THE METLIFE STUDY OF LESBIAN AND GAY BABY BOOMERS (2006), available at <http://www.metlife.com/assets/cao/mmi/publications/studies/mmi-out-aging-lesbian-gay-retirement.pdf>. According to a 2006 MetLife survey of one thousand lesbian, gay, bisexual, and transsexual (LGBT) individuals age forty to sixty-one, a high percentage reported a deep concern that they would be discriminated against as they got older because of their sexual orientation. *Id.*

¹⁹ Scott James, *An Unlikely Plaintiff. At Issue? He Dares Not Speak Its Name*, N.Y. TIMES, May 7, 2010, at A19, available at 2010 WLNR 9469110.

²⁰ Paul Payne, *Guerneville Man Settles Suit Against Sonoma County for \$600,000*, PRESS DEMOCRAT, July 22, 2010, <http://www.pressdemocrat.com/article/20100722/ARTICLES/100729795?p=3&tc=pg>.

²¹ See GEORGE CHAUNCEY, WHY MARRIAGE? THE HISTORY SHAPING TODAY'S DEBATE OVER GAY EQUALITY 111-15 (2004) (discussing the Sharon Kowalski case

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.²² 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.²³ 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. However, Clay and Harold's experience illustrates that sometimes even the most carefully executed estate plan can prove inadequate to protect gay and lesbian elders and their chosen families.

The proactive and instrumental use of estate-planning documents by same-sex couples to create families has received a good deal of attention from academics, practitioners, and advocates,²⁴ but very little consideration has been given to the distinct set of concerns faced by gay and lesbian elders.²⁵ 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.²⁶ Marginalized by ageism within the gay and lesbian community and homophobia within the senior community, the concerns of gay and lesbian elders have been over-

which prompted the gay and lesbian community to place more emphasis on preparing estate-planning documents).

²² See *id.* (discussing the Sharon Kowalski case).

²³ See *id.* at 113.

²⁴ See, e.g., JOAN M. BURDA, *ESTATE PLANNING FOR SAME-SEX COUPLES* (2004) (practitioner-oriented publication); Adam Chase, *Tax Planning for Same-Sex Couples*, 72 DENV. U. L. REV. 359 (1995) (academic treatment); NAT'L CTR. FOR LESBIAN RIGHTS, *LIFELINES: DOCUMENTS TO PROTECT YOU AND YOUR FAMILY* (undated), available at http://www.nclrights.org/site/DocServer/NCLR_LIFELINES.pdf?docID=521 (advocacy publication).

²⁵ See, e.g., Aimee Bouchard & Kim Zadworny, *Growing Old Together: Estate Planning Concerns for the Aging Same-Sex Couple*, 30 W. NEW ENG. L. REV. 713 (2008); Matthew R. DuBois, Note, *Legal Planning for Gay, Lesbian, and Non-Traditional Elders*, 63 ALB. L. REV. 263 (1999).

²⁶ See generally Nancy J. Knauer, *LGBT Elder Law: Toward Equity in Aging*, 32 HARV. J. L. & GENDER 1 (2009) (arguing for equity in aging regardless of sexual orientation).

looked and ignored.²⁷ For example, the three signature issues of the contemporary gay and lesbian movement for civil rights—marriage equality, employment nondiscrimination, and the efforts to repeal the military’s Don’t Ask, Don’t Tell policy—do not speak directly to the needs of elders.²⁸ The three issues of greater concern to gay and lesbian elders are the legal fragility of their *chosen family*, financial insecurity, and antigay bias and discrimination on the part of service providers and senior-specific venues.²⁹

Efforts to address these concerns will require significant legal and policy reform, as well as increased educational outreach efforts.³⁰ 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 antigay 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 affluent testators.³¹

This Article is organized thematically around the three areas of core concern for gay and lesbian elders—chosen family, financial insecurity, and antigay bias. Part II provides an overview of the current generation of gay and lesbian elders, including a summary of pre-Stonewall history and existing demographic information. Part III outlines the challenges associated with drafting an estate plan that favors chosen

²⁷ *Id.* at 4 (explaining gay and lesbian elders are especially vulnerable). “They are unable to speak for themselves, and others are unwilling to speak for them.” *Id.*

²⁸ *Id.* at 5-6 (describing the “three signature issues” in greater detail).

²⁹ *Id.* at 8 (characterizing these concerns as “legal fragility of chosen family, financial insecurity, and the availability of LGBT-positive housing and eldercare”).

³⁰ *See generally id.* at 39-40 (proposing cultural competency training, antibullying measures, and broad-based antidiscrimination protections).

³¹ 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 antidiscrimination protections, are equally applicable to transgender elders and gender identity. *See generally id.*

family over next of kin. Part IV engages the topic of financial insecurity, discussing various benefits and government programs, such as social security and Medicaid planning. Finally, Part V discusses why an integrated elder-care plan is an essential component of estate planning for gay and lesbian elders, and how antigay bias and homophobia can 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.

II. 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 sixty-five years of age or older.³² Until recently, gay and lesbian elders were rarely studied, but the ex-

³² There is no definitive estimate of the number of gay and lesbian elders in the United States. The figures quoted in the text represent the number of seniors in the United States multiplied by the percentage of the general population who are thought to be gay or lesbian. Department of Health and Human Services Administration on Aging (HHS), Projected Future Growth of the Older Population, http://www.aoa.gov/AoARoot/Aging_Statistics/future_growth/future_growth.aspx (last visited Jan. 4, 2011). In 2010, there were forty million seniors in the United States. *Id.* Estimates of the percentage of the general population who are gay or lesbian range between four and six percent. SERVS. & ADVOCACY FOR GAY, LESBIAN, BISEXUAL & TRANSGENDER ELDERS (SAGE) & MOVEMENT ADVANCEMENT PROJECT, IMPROVING THE LIVES OF LGBT OLDER ADULTS 2 (2010) [hereinafter LGBT OLDER ADULTS], available at <http://sageusa.org/uploads/Advancing%20Equality%20for%20LGBT%20Elders%20%5BFINAL%20COMPRESSED%5D.pdf>. The four percent figure is based on studies conducted by the Williams Institute at the University of California, Los Angeles (UCLA), and it is the percentage used by the largest LGBT senior advocacy group, SAGE. *Id.* at 2. The higher six percent ceiling represents figures from state and federal health surveys reporting same-sex behavior. JAIME M. GRANT ET AL., NAT'L GAY AND LESBIAN TASK FORCE POLICY INST., OUTING AGE 2010: PUBLIC POLICY ISSUES AFFECTING LESBIAN, GAY, BISEXUAL AND TRANSGENDER ELDERS 134 (2010), available at http://www.thetaskforce.org/downloads/reports/reports/outingage_final.pdf. The estimates provided by the U.S. Administration on Aging (AoA) differ because the AoA defines senior status as starting at age sixty and includes transgender elders. AoA, Diversity: Lesbian, Gay, Bisexual and Transgender (LGBT), http://www.aoa.gov/AoARoot/AoA_Programs/Tools_Resources/diversity.aspx (last visited Jan. 4, 2011). The AoA estimates there are between 1.75 million and 4 million LGBT elders in the United States who are sixty years of age or older. *Id.*

isting 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.³³ Fearful of encountering antigay bias, gay and lesbian elders retreat to the closet and underutilize senior services.³⁴ As long-time survivors of state-sponsored homophobia in the workplace, they lag behind their nongay peers on all financial measures, such as income, savings, and home ownership.³⁵ Many are estranged from their family of origin and rely on a single generational *chosen family* for support.³⁶ For these gay and lesbian elders, estate planning can provide a much needed level of 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 a marriage equivalent.

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 the notion that one should be open and proud.³⁷ Homosexual acts were criminalized in all states,³⁸

³³ See Knauer, *supra* note 26, at 8-16 (describing social isolation and financial insecurity).

³⁴ See Elizabeth Kling & Douglas Kimmel, *SAGE: New York City's Pioneer Organization for LGBT Elders*, in *LESBIAN, GAY, BISEXUAL, AND TRANSGENDER AGING: RESEARCH AND CLINICAL PERSPECTIVES* 266-67 (Douglas Kimmel, Tara Rose & Steven David eds., 2006). For example, according to a 2001 study conducted by the HHS, gay and lesbian elders are only twenty percent as likely as their nongay peers to take advantage of federally funded aging services, as well as other entitlements such as housing assistance and food stamps. *Id.* at 266.

³⁵ See *infra* text accompanying notes 73-80 (discussing financial data).

³⁶ See *infra* Part III (defining *chosen family*).

³⁷ See generally ANNAMARIE JAGOSE, *QUEER THEORY: AN INTRODUCTION* 30-43 (1996) (discussing the history of gay liberation from the 1969 Stonewall riots until the mid-1970s).

³⁸ See Jeremy Quittner, *Are You Breaking the Law? Where Does Your State Stand on Sodomy Laws?*, *ADVOC.*, Aug. 2002, at 52. Adult consensual sodomy was criminalized in all states until Illinois repealed its sodomy law in 1961 when it adopted the Model Penal Code. See *id.*; Sodomy Laws - Illinois, <http://www.glapn.org/sodomylaws/usa/illinois/illinois.htm> (last visited Jan. 4, 2011). Illinois remained an outlier for a decade. See Quittner, *supra*. When the American Psychiatric

and a host of criminal sanctions were used to police expressions of homosexuality, to suppress sympathetic discussions of homosexuality, and to inhibit the ability of homosexuals to socialize.³⁹ Homosexuality was classified as a severe form of mental illness that disqualified its sufferers from most employment, military service, and parenthood.⁴⁰ For this pre-Stonewall generation, the closet was a nonnegotiable way of life.⁴¹ There was no public progay counternarrative. Being exposed as homosexual could cost an individual his job and his family.⁴² It could also prompt medical intervention in the form of civil commitment, electroshock therapy, and even a lobotomy.⁴³

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 de-

Association declassified homosexuality as a mental illness in 1973, only five other states had repealed their sodomy laws: Connecticut (1971), Colorado (1972), Oregon (1972), Delaware (1973), and North Dakota (1973). *Id.*; Bob Roehr, *Pentagon Regulation Calls Gays Mentally Ill*, WINDY CITY TIMES, June 28, 2006, <http://www.outlineschicago.com/gay/lesbian/news/ARTICLE.php?AID=11900>. In 1986 the U.S. Supreme Court ruled in *Bowers v. Hardwick* that the criminalization of adult consensual sodomy did not violate the U.S. Constitution. *Bowers v. Hardwick*, 478 U.S. 186, 196 (1986). *Bowers* was not overruled until 2003 when the U.S. Supreme Court declared the Texas homosexual sodomy law unconstitutional. *Lawrence v. Texas*, 539 U.S. 558, 578 (2003).

³⁹ See Knauer, *supra* note 26, at 20-21 (discussing legal disabilities imposed on homosexuals prior to the Stonewall riots and the Gay Liberation movement).

⁴⁰ See generally RONALD BAYER, *HOMOSEXUALITY AND AMERICAN PSYCHIATRY: THE POLITICS OF DIAGNOSIS* (1987) (describing history of controversy relating to the 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. See generally *id.* at 15-40 (discussing homosexuality from abomination to disease).

⁴¹ See FUNDERS FOR LESBIAN & GAY ISSUES, *AGING IN EQUITY: LGBT ELDERS IN AMERICA 5* (2004) [hereinafter *AGING IN EQUITY*], available at <http://www.lgbt funders.org/files/AgingInEquity.pdf>. For example, a 2004 report on LGBT elders explained that “‘passing’ as heterosexual has been a lifelong survival strategy” for the pre-Stonewall generation. *Id.*

⁴² WILLIAM N. ESKRIDGE, JR., *GAYLAW: CHALLENGING THE APARTHEID OF THE CLOSET 67* (1999).

⁴³ See *id.* at 62 (describing “lobotomies, electrical and pharmacological shock therapy, and . . . castration”).

clare themselves.⁴⁴ In 1969, the youngest of today's gay and lesbian elders were twenty-four and the oldest of today's gay and lesbian elders were in their fifties and above.⁴⁵ It was not until four years after Stonewall that the American Psychiatric Association finally declassified homosexuality as a mental illness.⁴⁶ By that time, the youngest of today's elders were twenty-eight 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.⁴⁷ Some elders who embraced the new discourse of pride and chose to live openly now report they have become increasingly less forthcoming about their sexual orientation as they age.⁴⁸ 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.⁴⁹ As one elder explained, "as strong as I am today . . . when I'm at the

⁴⁴ JAGOSE, *supra* note 37, at 30. 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 policies and quietist tactics, a significant if mythological date for the origin of the gay liberation movement." *Id.* The Stonewall riots began on June 27, 1969, when police raided a gay bar, the Stonewall Inn, in Greenwich Village. *Id.* See generally MARTIN DUBERMAN, STONEWALL (1993) (discussing history of Stonewall through the lives of six individuals). The disturbances continued sporadically for several days. *Id.* at 203-09.

⁴⁵ In 2010, the youngest gay and lesbian elders (i.e., those individuals who turned 65) were born in 1945.

⁴⁶ See BAYER, *supra* note 40, at 67-178 (describing circumstances surrounding declassification).

⁴⁷ James, *supra* note 19. 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. *Id.*

⁴⁸ AGING IN EQUITY, *supra* note 41, at 10. A 2004 report found that seventy-five percent of LGBT elders are not *completely open* about their sexual orientation with health care providers. *Id.*

⁴⁹ See Jane Gross, *Aging and Gay, and Facing Prejudice in Twilight*, N.Y. TIMES, Oct. 9, 2007, at A1, available at 2007 WLNR 19751537. Jane Gross explains:

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.

gate of the nursing home, the closet door is going to slam shut behind me.”⁵⁰

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.⁵¹ Taken together, however, existing research data, growing anecdotal accounts, and surveys produced by advocacy and industry groups paint a disturbing picture of the condition of gay and lesbian elders. Gay and lesbian elders are more likely to be single than their nongay peers, and they are more likely to live alone.⁵² Both of these factors place gay and lesbian elders at an increased risk of social isolation.⁵³ 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.⁵⁴ They are also much less likely to have children than their nongay peers.⁵⁵ As a result, gay and lesbian elders, as well as gay men and

Id.; see also Jonathan Starkey, *Out of Isolation*, NEWSDAY, Feb. 1, 2008, at B06, available at 2008 WLNR 1983781.

⁵⁰ Gross, *supra* note 49 (quoting LGBT elder).

⁵¹ See Judith C. Barker, *Lesbian Aging: An Agenda for Social Research*, in GAY AND LESBIAN AGING: RESEARCH AND FUTURE DIRECTIONS 29, 32 (Gilbert Herdt & Brian de Vries eds., 2004).

⁵² See Brian de Vries & John A. Blando, *The Study of Gay and Lesbian Aging: Lessons for Social Gerontology*, in GAY AND LESBIAN AGING: RESEARCH AND FUTURE DIRECTIONS 3, 7 (Gilbert Herdt & Brian de Vries eds., 2004) (describing how homosexuals are more likely to be single compared to heterosexuals); see also SEAN CAHILL, KEN SOUTH & JANE SPADE, POLICY INST. OF THE NAT’L GAY AND LESBIAN TASK FORCE FOUND., OUTING AGE: PUBLIC POLICY ISSUES AFFECTING GAY, LESBIAN, BISEXUAL AND TRANSGENDER ELDERS 10 (2000), available at http://www.thetaskforce.org/reports_and_research/outing_age (stating gay and lesbian elders are more likely to live alone rather than heterosexual elders).

⁵³ GRANT, *supra* note 32, at 91-92 (explaining that isolation occurs when a person cannot access needed social and medical support services).

⁵⁴ See Barker, *supra* note 51, at 61-62.

⁵⁵ See CAHILL ET AL., *supra* note 52. In some studies on gay and lesbian elders, up to ninety percent of the respondents did not have children, compared with only twenty percent of nongay elders generally. *Id.*; see also de Vries & Blando, *supra* note 52, at 5.

lesbians generally, rely on what anthropologists have termed *chosen family* for emotional, physical, and financial support.⁵⁶

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.⁵⁷ 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.⁵⁸ This is problematic because aging policy in the United States assumes the existence of a multigenerational support network.⁵⁹ Eighty percent of all long-term care is provided by informal unpaid caregivers who are most often younger relatives or spouses.⁶⁰ In the case of a single-genera-

⁵⁶ See generally KATH WESTON, *FAMILIES WE CHOOSE: LESBIANS, GAYS, KINSHIP* (1997). See also de Vries & Blando, *supra* note 52, at 8-11 (alternate family structure based on camaraderie and caring); Douglas C. Kimmel, *Issues to Consider in Studies of Midlife and Older Sexual Minorities*, in *GAY AND LESBIAN AGING: RESEARCH AND FUTURE DIRECTIONS* 265, 268 (Gilbert Herdt & Brian de Vries eds., 2004) (using the term “family of choice” to describe the support system developed by the gay and lesbian community); Jacqueline S. Weinstock, *Lesbian Friendships at and Beyond Midlife: Patterns and Possibilities for the 21st Century*, in *GAY AND LESBIAN AGING: RESEARCH AND FUTURE DIRECTIONS* 177, 177-203 (Gilbert Herdt & Brian de Vries eds., 2004) (discussing the concept of “friends like family”).

⁵⁷ See Knauer, *supra* note 26, at 41-44.

⁵⁸ See Andrew J. Hostetler, *Old, Gay, and Alone? The Ecology of Well-Being Among Middle-Aged and Older Single Gay Men*, in *GAY AND LESBIAN AGING: RESEARCH AND FUTURE DIRECTIONS* 143, 159-61 (Gilbert Herdt & Brian de Vries eds., 2004). Intergenerational relationships are not common in the gay and lesbian community. *Id.*

⁵⁹ See Barker, *supra* note 51, at 58-59. Caring for older relatives as they age is also a strong cultural value. *Id.* 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.” *Id.* at 59.

⁶⁰ BARBARA COLEMAN & SHEEL M. PANDYA, AARP PUB. POLICY INST., *FAMILY CAREGIVING AND LONG-TERM CARE 1* (2002), available at http://assets.aarp.org/rgcenter/il/fs91_ltc.pdf. A 2009 national study showed that relatives comprise eighty-nine percent of all unpaid caregivers for individuals fifty years of age and older, and the average age of caregivers for individuals age seventy-five and older is fifty-one years of age. NAT’L ALLIANCE FOR CAREGIVING & AARP, *CAREGIVING IN THE U.S.: A FOCUSED LOOK AT THOSE CARING FOR SOMEONE AGE 50 OR OLDER 14-16* (Nov. 2009), available at <http://www.caregiving.org/data/FINALRegularExSum50plus.pdf>. Of particular relevance to gay and lesbian elders is the fact that the majority of

tional 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 a congregate living facility, such as a nursing home or assisted living facility.⁶¹ This reaction reflects their fear that they will encounter antigay bias on the part of service providers or their nongay peers, and studies show this fear is not misplaced.⁶² Older gay men and lesbians report high levels of victimization over their lifetimes, and it is understandable that their fear of antigay bias would be amplified by the vulnerabilities associated with aging.⁶³ This fear causes gay and lesbian elders to be closeted and to underutilize senior services, including the very services that are designed to help seniors “age in place.”⁶⁴ As a result, gay and lesbian elders are at a high

individuals who are “aging in place” rely solely on informal (i.e., unpaid) caregiving. *See id.* at 24.

⁶¹ *See* Gross, *supra* note 49.

⁶² *See* GRANT, *supra* note 32, at 47. The data regarding antigay bias is limited, but it is increasingly confirmed by anecdotal evidence. *See id.* It is clear that seniors are the age cohort with the strongest antigay attitudes. KAISER FAMILY FOUND., 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 15 (2001), 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>. A national survey by the Kaiser Family Foundation highlighted the differences in attitude between young people and individuals age sixty-five and older. *Id.* A much higher percentage of the sixty-five and older age cohort considered homosexuality to be morally wrong. *Id.* at 6. 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.*

⁶³ *See, e.g.,* Anthony R. D’Augelli & Arnold H. Grossman, *Disclosure of Sexual Orientation, Victimization, and Mental Health Among Lesbian, Gay, and Bisexual Older Adults*, 16 J. INTERPERSONAL VIOLENCE 1015 (2001).

⁶⁴ *See* Knauer, *supra* note 26, at 37. Federal aging policy is coordinated by the AoA. Administration on Aging, About AoA, <http://www.aoa.gov/AoARoot/About/index.aspx> (last visited Jan. 4, 2011). It oversees a nationwide aging network that includes 629 Area Agencies for Aging (AAAs). Administration on Aging, National Aging Network, http://www.aoa.gov/AoARoot/AoA_Programs/OAA/Aging_Network/Index.aspx (last visited Jan. 4, 2011). AAAs provide a range of services that are designed to make it possible for elders to remain in their homes and communities and “age in

risk for social isolation, especially after the death of a partner and as their chosen family members become increasingly infirm.⁶⁵

Since 1990, the Census Bureau has gathered information on same-sex partnered households.⁶⁶ This data represents the largest national data set for gay and lesbian elders, but it is necessarily partial because it only covers *partnered* households willing to self-report on a government form.⁶⁷ Census data does not include single gay men and lesbians or partnered gay men and lesbians who do not feel comfortable outing themselves to the federal government.⁶⁸ 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.⁶⁹ 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.⁷⁰

Based on the 2000 census data, elder same-sex partnered households exist in ninety-seven percent of the counties in the United States,⁷¹ and fifteen percent of all same-sex partnered households are in

place," including meals and nutritional support, in-home care, transportation, daycare, and even emergency home repair. Knauer, *supra* note 26, at n.246.

⁶⁵ GRANT, *supra* note 32, at 91 (explaining that isolation occurs when a person cannot access needed social and medical support services).

⁶⁶ M.V. BADGETT & MARC A. ROGERS, LEFT OUT OF THE COUNT: MISSING SAME-SEX COUPLES IN CENSUS 2000 1 (2003), available at http://www2.law.ucla.edu/williamsinstitute/pdf/WhoGetsCounted_FORMATTED1.pdf. 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*. *Id.* It is then possible to calculate the number of same-sex partnered households by comparing the sex of the occupants with their status. *Id.* Researchers believe that the number of same-sex partnered households reflected on the 2000 census reflects a significant undercount. *Id.*

⁶⁷ *Id.* at 3.

⁶⁸ *Id.*

⁶⁹ *Id.* at 8. Researchers believe that any survey inquiring as to sexual orientation will result in an undercount due to the continuing stigma attached to homosexuality. *Id.*; see also GRANT, *supra* note 32, at 136.

⁷⁰ See BADGETT & ROGERS, *supra* note 66.

⁷¹ Gary Gates, *Gay and Lesbian Families in the Census: Gay and Lesbian Seniors*, THE URBAN INST., (May 30, 2003), <http://www.urban.org/url.cfm?ID=900627>. Partnered same-sex couples live in 99.3% of the counties in the United States. DAVID M. SMITH & GARY J. GATES, HUMAN RIGHTS CAMPAIGN, GAY AND LESBIAN FAMILIES

locations classified as rural.⁷² 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.⁷³ Elders in same-sex partnered households are more likely than their nongay peers to report a disability in each of the categories queried on the census, including hearing, vision, mobility, and memory.⁷⁴ Additionally, elder same-sex partnered households earn less income than their different-sex married peers.⁷⁵ Specifically, they have 34.7% less income from retirement savings than elder different-sex married couples.⁷⁶ Compared to their nongay peers, only four out of five same-sex senior couples own their home, and, when they do, the home's median value is lower and they are more likely to be still paying a mortgage.⁷⁷

The census data also shows that same-sex partnered households are significantly more likely to live at or near the poverty line than those in different-sex marriages.⁷⁸ According to the census data, when compared to their nongay peers, elder female same-sex partnered households are seventy-two percent more likely to be receiving supplemental security income and eighty-four percent more likely to be receiving public assistance.⁷⁹ Elder female same-sex partnered households are nearly twice as likely to live below the poverty line as their nongay

IN THE UNITED STATES: SAME-SEX UNMARRIED PARTNER HOUSEHOLDS 3 (2001), available at http://www.urban.org/uploadedPDF/1000491_gl_partner_households.pdf.

⁷² GRANT, *supra* note 32, at 33-34.

⁷³ *Id.* at 33.

⁷⁴ Amanda K. Baumle & Anthony P. Romero, Elder Gays, Lesbians, and Bisexuals: New Demographic and Policy Analyses (2009) (unpublished manuscript) (on file with author).

⁷⁵ LISA BENNETT & GARY J. GATES, HUMAN RIGHTS CAMPAIGN FOUND., THE COST OF MARRIAGE INEQUALITY TO GAY, LESBIAN AND BISEXUAL SENIORS 4 (2004), available at http://www.hrc.org/documents/cost_of_marriage.pdf.

⁷⁶ *Id.* at 5.

⁷⁷ *Id.* at 6.

⁷⁸ RANDY ALBELDA, M.V. LEE BADGETT, ALYSSA SCHNEEBAUM & GARY J. GATES, WILLIAMS INST., POVERTY IN THE LESBIAN, GAY, AND BISEXUAL COMMUNITY, at ii (2009), <http://www.law.ucla.edu/williamsinstitute/pdf/LGBPovertyReport.pdf>.

⁷⁹ NAOMI G. GOLDBERG, WILLIAMS INST., THE IMPACT OF INEQUALITY FOR SAME-SEX PARTNERS IN EMPLOYER-SPONSORED RETIREMENT PLANS, at i, 7-8 (2009) http://www.law.ucla.edu/williamsinstitute/pdf/RetirementAnalysis_Final.pdf.

peers.⁸⁰ Elder female same-sex partnered households have close to twenty percent less income than different-sex married couples, have considerably less income from retirement plans, and are twenty-one percent less likely to have income from interest, rentals, and dividends.⁸¹ The findings with respect to financial status are especially disturbing because partnered gay and lesbian elders captured by the census data are more likely to be financially secure.⁸²

C. *The View from the Closet*

In terms of family support, disability, and financial security, gay and lesbian elders are a vulnerable population, but the closet exacerbates their risk of isolation.⁸³ A brief thumbnail of pre-Stonewall history and quick summary of demographic data illustrates that gay and lesbian elders differ from younger gay men and lesbians, as well as nongay seniors.⁸⁴ For example, many gay and lesbian elders hold distinct views on homosexuality and identity that do not correspond to those held by members of later generations.⁸⁵ 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.⁸⁶ Clay provides a

⁸⁰ See ALBELDA ET AL., *supra* note 78.

⁸¹ See GOLDBERG, *supra* note 79, at 7.

⁸² See BADGETT & ROGERS, *supra* note 66, at 12 (stating that gay and lesbian elders with higher incomes had a higher participation rate than gay and lesbian elders with lower incomes). Historically, the census has underrepresented same-sex couples compared to different-sex couples. *Id.*

⁸³ GAY & LESBIAN MED. ASSOC., HEALTHY PEOPLE 2010: COMPANION DOCUMENT FOR LESBIAN, GAY, BISEXUAL, AND TRANSGENDER (LGBT) HEALTH 51 (2001), http://www.glma.org/_data/n_0001/resources/live/HealthyCompanionDoc3.pdf (diminishing familial support follows from lack of legal acknowledgement of same-sex couples). The same study notes financial barriers relate to inadequate disability coverage in LGBT communities. *Id.* at 342; see GOLDBERG, *supra* note 79, at 5 (noting high poverty rates among lesbians). See generally GAY & LESBIAN MED. ASSOC., *supra*, at 261.

⁸⁴ GLENDA M. RUSSELL & JANIS S. BOHAN, INST. FOR GAY & LESBIAN STRATEGIC STUDIES, THE GAY GENERATION GAP: COMMUNICATING ACROSS THE LGBT GENERATIONAL DIVIDE 3 (2005), available at http://www.bouldersafeschools.org/PDFs/article_angles.pdf.

⁸⁵ *Id.*

⁸⁶ See, e.g., Todd W. Rawls, *Disclosure and Depression Among Older Gay and Homosexual Men: Findings from the Urban Men's Health Study*, in GAY AND

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 8.⁸⁷ It is unclear whether Clay's reticence is due to an individual worldview where he and Harold were special *friends*, or if he is simply using a euphemism to maintain the open secret of the closet.⁸⁸ In either event, the resulting silence on the part of gay and lesbian elders increases the difficulty of developing a needs assessment strategy or engaging them in outreach efforts.⁸⁹ As explained in Part III, the closet may 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.⁹⁰

In addition, research suggests that pre-Stonewall history continues to inform the way gay and lesbian elders approach their relationships with medical professionals.⁹¹ Long classified as mentally ill, gay and lesbian elders express trepidation over interactions with medical service providers.⁹² Gay and lesbian elders often avoid disclosure of their sexual orientation and will avoid encounters with medical profes-

LESBIAN AGING: RESEARCH AND FUTURE DIRECTIONS 117, 129 (Gilbert Herdt & Brian de Vries, eds., 2004). For example, one study found, "21.0% of the older men . . . think of themselves as homosexual, rather than as gay, queer, or something else." *Id.* The same study showed a strong correlation between age and self-identification as gay, reporting "19.8% of the men in their 60s self-identify as homosexual, and 51.3% of the men 70 years of age and older think of themselves as homosexual, rather than as gay" *Id.*

⁸⁷ James, *supra* note 19.

⁸⁸ See generally EVE KOSOFKY SEDGWICK, *EPISTEMOLOGY OF THE CLOSET* 67 (1990).

⁸⁹ 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*, *GERIATRIC TIMES*, Nov./Dec. 2003, at 6, available at <http://www.cmellc.com/geriatrictimes/g031203.html> (quoting Shari Brotman, Bill Ryan & Robert Cormier, *The Health and Social Service Needs of Gay and Lesbian Elders and Their Families in Canada*, 43 *GERONTOLOGIST* 192, 199 (2003)).

⁹⁰ See *infra* Part III.

⁹¹ See Barker, *supra* note 51, at 54. 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." *Id.*

⁹² Rawls, *supra* note 86, at 133-34; Barker, *supra* note 51, at 54.

sionals to the extent possible.⁹³ 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.⁹⁴ Finally, the fear of encountering antigay bias can cause gay and lesbian elders to underutilize social services, thereby increasing their risk of social isolation.⁹⁵

III. 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.⁹⁶ Their homosexuality distanced them from their family of origin, and they would not likely have children of their own,⁹⁷ unless they were from a prior heterosexual relationship.⁹⁸ Both of these observations

⁹³ See GAY & LESBIAN MED. ASSOC., *supra* note 83, at 49. The Gay and Lesbian Medical Association (GLMA) found “in an effort to avoid . . . bias or because of internalized homophobia, LGBT patients frequently withhold personal information about their sexual orientation, gender identity, practices, and behavioral risks from their health care providers.” *Id.*

⁹⁴ See Knauer, *supra* note 26, at n.227 (discussing the psychoanalytic model of homosexuality and the sexual predator). Russell and Bohan note, “the homophobic assumption that adults are a risk to youth, . . . (however mistaken) has often impeded worthwhile interactions across generations.” RUSSELL & BOHAN, *supra* note 84, at 1. For a discussion of the development of the sexual predator model, see generally JENNIFER TERRY, AN AMERICAN OBSESSION: SCIENCE, MEDICINE, AND HOMOSEXUALITY IN MODERN SOCIETY 272 (1999) (discussing sexual psychopath laws enacted in the 1930s).

⁹⁵ See Kling & Kimmel, *supra* note 34, at 266 (citing a 2001 HHS study indicating gay and lesbian elders are only twenty percent as likely as their nongay peers to take advantage of federally funded aging-senior services and other entitlements such as housing assistance and food stamps).

⁹⁶ WESTON, *supra* note 56, at 38-39.

⁹⁷ *Id.* at 25.

⁹⁸ *Id.* In a chapter titled *Exiles from Kinship*, Weston explains:

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.

Id.

were especially true of the pre-Stonewall generation, who came of age during a fearful period for homosexuals.⁹⁹ 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 coworkers.¹⁰⁰ 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.¹⁰¹ 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 lesbians continue to struggle with to this day.¹⁰²

In place of a traditional multigenerational family formed through marriage, biology, or adoption, gay men and lesbians created alternative family or fictive kinship networks with other gay men and lesbians based on affinity, rather than biology or marriage.¹⁰³ 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; however, for the current cohort of gay and lesbian elders, chosen family remains their primary source of support.¹⁰⁴ 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,

⁹⁹ *Id.* at 44.

¹⁰⁰ *Id.*

¹⁰¹ See Barker, *supra* note 51, at 61 (describing shame experienced by family members); see also WESTON, *supra* note 56, at 45 (noting possibility of medical intervention).

¹⁰² See Barker, *supra* note 51, at 61-62 (discussing estrangement from family of origin).

¹⁰³ See Kimmel, *supra* note 56, at 268. 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."

Id.; see also de Vries & Blando, *supra* note 52, at 8-11 (family of caring); Weinstock, *supra* note 56, at 177-210 ("friends like family").

¹⁰⁴ See Weinstock, *supra* note 56, at 194-200 (discussing the increasing trend among gay men and lesbians to form recognized families). 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 F1, available at 2001 WLNR 3325341.

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 is also likely to be older, because chosen family networks tend to be comprised of individuals in the same age cohort. This factor eliminates the benefits associated with intergenerational lifetime giving and further complicates fiduciary designations.

A. *Marriage Equality*

Much of the scholarship on estate planning for gay men and lesbians focuses on how to pass property to a surviving same-sex partner or make sure the partner has the authority to direct health care decisions.¹⁰⁵ 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 essential ways 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 or own property in a nonmarriage jurisdiction. In addition, same-sex marriage laws may be repealed or otherwise invalidated, meaning their state could become a nonmarriage jurisdiction.

Despite the gains 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 fall of 2010, five states and the District of Columbia had legalized same-sex marriage,¹⁰⁶ two states recognized

¹⁰⁵ See Nancy J. Knauer, *The September 11 Attacks and Surviving Same-Sex Partners: Defining Family Through Tragedy*, 75 TEMP. L. REV. 31, 46-49 (2002) (describing decision-making authority and same-sex couples).

¹⁰⁶ The states are: Connecticut, Iowa, Massachusetts, New Hampshire, and Vermont. In 2008, the Connecticut Supreme Court ruled in favor of same-sex marriage. *Kerrigan v. Comm'r of Pub. Health*, 957 A.2d 407, 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. D.C. CODE § 46-401 (2010). In 2009, the Iowa Supreme Court unanimously

same-sex marriages performed in other states,¹⁰⁷ another five states offered a parallel status that grants same-sex partners all the rights and responsibilities of spouses,¹⁰⁸ and six states provided a lesser quantum

ruled in favor of same-sex marriage. *Varnum v. Brien*, 763 N.W.2d 862, 906 (Iowa 2009). Applying intermediate scrutiny, the court held that the state antimarriage law violated the Equal Protection Clause of the Iowa Constitution, because the law did not promote any substantial state interests. *Id.* at 904-06. 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't 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. VT. STAT. ANN. tit. 15, § 8 (2009). The law took effect on September 1, 2009. *Id.* Nine years earlier, Vermont had been the first state to grant marriage equivalence through the creation of the parallel status of *civil union*. VT. STAT. ANN. tit. 15, § 1201 (2009). In 1999, the Vermont Supreme Court ruled in *Baker v. Vermont* that same-sex couples are entitled under the Vermont Constitution to all of the protections and benefits provided by marriage. *Baker v. Vermont*, 744 A.2d 864, 886 (Vt. 1999).

¹⁰⁷ In February 2010, the Attorney General of Maryland issued an advisory opinion stating that Maryland would recognize out-of-state same-sex marriages. Aaron C. Davis & John Wagner, *Maryland to Recognize Gay Marriages from Other Places*, WASH. POST, Feb. 25, 2010, <http://www.washingtonpost.com/wp-dyn/content/article/2010/02/24/AR2010022405686.html>. The state of New York recognizes both out-of-state same-sex marriages and same-sex marriages performed in foreign jurisdictions. *Martinez v. Cnty. of Monroe*, 850 N.Y.S.2d 740, 742-43 (App. Div. 2008).

¹⁰⁸ These states are: California, Nevada, New Jersey, Oregon, and Washington. The California Supreme Court mandated same-sex marriage in 2008. *In re Marriage Cases*, 183 P.3d 384, 452 (Cal. 2008) (holding an individual's homosexual orientation is not a sufficient basis for withholding or restricting the fundamental right to marry guaranteed under the California Constitution). Marriages began taking place in June of 2008. Jesse McKinley, *A Landmark Day in California as Same-Sex Marriages Begin to Take Hold*, N.Y. TIMES, June 17, 2008, at A19, available at 2008 WLNR 11392097. In November 2008, voters approved Proposition 8, a ballot proposition that amended the California Constitution to restrict marriage to a union between a man and a woman. Jesse McKinley & Laurie Goodstein, *Bans in 3 States on Gay Marriage*, N.Y. TIMES, Nov. 6, 2008, at A1, available at 2008 WLNR 21173920. In 2009, the Supreme Court of California ruled that the approximately 18,000 marriages that took place before Proposition 8 remained valid. *Strauss v. Horton*, 207 P.3d 48, 121-22 (Cal. 2009). California currently has the marriage equivalent status of "registered domestic partners." CAL. FAM. CODE § 297 (West 2005). In 2006, the Supreme Court of New Jersey held that limiting access to the protections and benefits of civil marriage to different-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, 223-24 (N.J. 2006). In response, the New Jersey legislature enacted the Civil Union Act. N.J. STAT. ANN. § 37:1-29 (West 2007). Prior to that, in 2004, New Jersey had

of rights.¹⁰⁹ The vast majority of states still had laws prohibiting same-sex marriage,¹¹⁰ and the federal Defense of Marriage Act (DOMA) en-

extended limited rights to same-sex partners and different-sex partners over sixty-two years of age who registered as *domestic partners*. N.J. STAT. ANN. §§ 26:8A-1, 26:8A-4 (2004). Nevada enacted a comprehensive domestic partnership law in 2009. NEV. REV. STAT. ANN. § 122 (2009). In 2007, Oregon enacted its domestic partnership law, the Oregon Family Fairness Act. 2007 Or. Laws 99. The law took effect on January 1, 2008. OR. REV. STAT. § 106.300 (2008). Washington first enacted relationship recognition in 2007. WASH. REV. CODE § 26.60.010 (2008). On April 15, 2009, the Washington legislature passed a bill extending full marriage rights to domestic partners. 2009 Wash. Sess. Laws 4. In 2009, the law withstood an attempt to repeal it through a citizen's referendum. Janet I. Tu, *Voters Expand Same-Sex Rights*, SEATTLE TIMES, NOV. 6, 2009, http://seattletimes.nwsourc.com/html/politics/2010213134_referendum06m.html.

¹⁰⁹ 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. REV. STAT. §§ 15-22-101 to 15-22-102 (2009). In 1993, the Hawaii Supreme Court ruled in *Baehr v. Lewin* that prohibiting same-sex couples from marrying constituted gender discrimination and violated the Equal Rights Amendment to the state constitution. *Baehr v. Lewin*, 852 P.2d 44, 67 (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 sixty rights and responsibilities commonly associated with marriage to reciprocal beneficiaries. HAW. REV. STAT. § 572C-5 (1997). In 2009, the Maine legislature passed marriage equality legislation. Associated Press, *Maine Voters Repeal Gay-Marriage Law*, MSNBC, Nov. 24, 2009, http://www.msnbc.msn.com/id/33609492/ns/politics-more_politics/. The legislation was repealed before it took effect by a voter referendum in November 2009. *Id.*; see also ME. REV. STAT. ANN. tit. 22, § 2710 (2009). Five years earlier, Maine had enacted legislation establishing a statewide domestic partner registry that extended to same-sex couples certain healthcare decision-making authority and inheritance rights equivalent to spouses. ME. REV. STAT. ANN. tit. 22, § 2710 (2009). This law remains in effect. *Id.* In 2009, Rhode Island enacted legislation that grants a *domestic partner* the right to make burial decisions. R.I. GEN. LAWS § 23-4-10 (2010). The House voted to override the Governor's veto by an overwhelming majority (67-3). 2009 R.I. Pub. Laws 385. In 2009, the Wisconsin legislature passed domestic partner legislation that grants same-sex couples forty-three rights and protections. WIS. STAT. § 770.001 (2010).

¹¹⁰ Forty-four states prohibit same-sex marriage. HUMAN RIGHTS CAMPAIGN, STATEWIDE MARRIAGE PROHIBITIONS (2008), http://www.hrc.org/documents/marriage_prohibitions.pdf. Eighteen states have laws that could prohibit civil unions and domestic partnerships as well. *Id.* These states are: Alabama, Arkansas, Florida,

sured that same-sex couples were legal strangers for all federal purposes.¹¹¹

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 together over fifty years and were both in their eighties.¹¹² Del and Phyllis, however, are not necessarily representative of all gay and lesbian elders. They were an extraordinary couple who had shared a life of activism beginning in the 1950s when they founded the Daughters of Bilitis, the first lesbian organization in the United States.¹¹³ Despite Del and Phyllis's 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 twenty, thirty, or forty years together; or one of the partners might suffer from

Georgia, Kentucky, Idaho, Louisiana, Michigan, Nebraska, North Dakota, Ohio, Oklahoma, South Carolina, South Dakota, Texas, Utah, Virginia, and Wisconsin. *Id.*

¹¹¹ See 1 U.S.C. § 7 (2006). The Defense of Marriage Act (DOMA), enacted in 1996 in response to the Hawaii Supreme Court decision in *Baehr v. Lewin*, 852 P.2d 44 (Haw. 1993), adds a definition of *marriage* and *spouse* to Title 1 of the United States Code. *Id.*; see, e.g., Defense of Marriage Act, Pub. L. No. 104-199, 110 Stat. 2419 (1996). DOMA provides:

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

1 U.S.C. § 7 (2010).

¹¹² McKinley & Goodstein, *supra* note 108; see also William Grimes, *Del Martin, Lesbian Activist, Dies at 87*, N.Y. TIMES, Aug. 28, 2008, at C10, available at 2008 WLNR 16221719.

¹¹³ Grimes, *supra* note 112.

diminished capacity, such that marriage or registration is no longer an option.¹¹⁴

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.”¹¹⁵ Clay and Harold had not registered as domestic partners,¹¹⁶ and, in an interview with *The New York Times*, Clay seemed disinterested in the prospect of legalized same-sex marriage.¹¹⁷ Far from a poster boy for gay rights, Clay referred to Harold as his *friend*, and told the interviewer, “[w]e weren’t a married couple[.]’ . . . ‘Why are you making a big deal out of this? We were just roommates.’”¹¹⁸ 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.¹¹⁹

As same-sex marriage and marriage equivalence become more common, it remains to be seen what meaning will attach when couples

¹¹⁴ The level of capacity required in order to marry is relatively low. *See, e.g.*, *DeMedio v. DeMedio*, 257 A.2d 290, 293 (Pa. Super. Ct. 1969) (examining wife’s mental capacity and ability to understand contract of marriage at time of ceremony). *But see* 23 PA. CONS. STAT. 1304(c) (2010) (mandating that individuals who are “weak minded, insane, [or] of unsound mind” are ineligible for marriage license without court approval).

¹¹⁵ *See* CAL. CIV. PROC. CODE § 377.60 (West 2005). The history of relationship recognition in California is confusing. Prior to *In re Marriage Cases*, 183 P.3d 384, 452 (Cal. 2008), 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 decision-making authority, and standing to sue for wrongful death. CAL. CIV. PROC. CODE § 377.60 (West 2005). 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, 298.5 (West 2005) (establishing procedure for “registered domestic partners”).

¹¹⁶ Payne, *supra* note 20.

¹¹⁷ James, *supra* note 19.

¹¹⁸ *Id.*

¹¹⁹ *See id.*

fail to marry or register.¹²⁰ It is possible that the 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 Washington state case 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.¹²¹ Robert Schwerzler and Frank Vasquez were together for nearly thirty years when Robert died at age seventy-eight without a will.¹²² They owned a burlap bag recycling business in Puyallup, Washington, but the bulk of the property was in Robert's name.¹²³ As his next of kin, Robert's siblings asserted their property rights and defended their actions by claiming Frank was just a roommate.¹²⁴ Robert had not been out to his family about his

¹²⁰ It also bears mentioning that no one should enter into marriage lightly, even at an advanced age. Recent reports indicate an increase in the rate of divorce among older individuals. See Deirdre Bair, *The 40-Year Itch*, N.Y. TIMES, June 4, 2010, at A27, available at 2010 WLNR 11437237. This trend should not be surprising given the gains in life expectancy and the diminished stigma associated with divorce. See *id.* In the absence of uniform marriage equality, divorce or dissolution can pose unique challenges for same-sex couples. Cf. Marcelle S. Fischler, *The Right to Divorce*, N.Y. TIMES, June 7, 2009, at ST13, available at 2009 WLNR 10905435 (stating that out-of-state married couples must satisfy the residency requirement in New York before qualifying for a divorce). Today, it is easier for same-sex couples to get married than it is for them to get divorced, because states do not impose residency requirements on marriage (or marriage equivalence), but they do impose such restrictions on divorce. Colleen McNichols Ramais, *Til Death Do You Part . . . And This Time We Mean It: Denial of Access to Divorce for Same-Sex Couples*, 2010 U. ILL. L. REV. 1013, 1025 (2010). See Fischler, *supra* (stating New York's residency requirement for divorce). Many same-sex couples who live in nonmarriage jurisdictions have traveled out-of-state to get married. See, e.g., *id.* When they return home, they are not legally married, but nor can they get divorced. See, e.g., *id.* 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. See *id.* The same is true for married same-sex couples who find they have to move to a nonmarriage jurisdiction. See *id.* The fact that they cannot divorce in their home state may have little practical effect provided they do not venture to a marriage jurisdiction. However, the separated couple will suddenly find themselves married if their state of residence recognizes same-sex marriage or they travel to a state that does.

¹²¹ See Marsha King, *Should Companion get Deceased's Estate?*, SEATTLE TIMES, Jan. 23, 2001, at A1, available at 2001 WLNR 1340047.

¹²² *Id.*

¹²³ *Id.*

¹²⁴ *Id.*

sexual orientation or the nature of his longstanding relationship with Frank.¹²⁵ After several years of litigation and publicity, the Washington Supreme Court remanded the case to the trial court to allow Frank to present his equitable claim.¹²⁶

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 equivalent status may not be respected in states that do not have an analogous status.¹²⁷ For example, an elder same-sex couple who are legally married in Massachusetts may prefer to spend their retirement years 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.¹²⁸ 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.¹²⁹ Southern California might be an alternative, but California law regarding same-sex marriage is confusing at best.¹³⁰

¹²⁵ See *id.* The siblings justified their claim to Robert's estate, including the home he had shared with Frank, by asserting that the two men were not partners. *Id.* With respect to whether the two men were gay, Robert's brother testified that "[c]ertainly, there was nothing being done out in public." *Id.*

¹²⁶ *Vasquez v. Hawthorne*, 33 P.3d 735, 737 (Wash. 2001) (upholding a same-sex partner's ability to make an equitable claim against the estate of his deceased partner); see also Sam Skolnik, *Same-Sex Estate Rights Backed - State High Court Says Gays May be Entitled to Partners' Property in Absence of a Will*, SEATTLE POST-INTELLIGENCER, Nov. 2, 2001, at B1, available at 2001 WLNR 1760451.

¹²⁷ See AMERICAN PSYCHOLOGICAL ASSOCIATION, RESOLUTION ON SEXUAL ORIENTATION AND MARRIAGE (2004), available at <http://www.apa.org/pi/families/resources/task-force/military-deployment.pdf> (citing Nancy J. Knauer, *The September 11 Attacks and Surviving Same-Sex Partners: Defining Family Through Tragedy*, 75 TEMP. L. REV. 31, 93 (2002)). The American Psychological Association identified the lack of portability as a significant source of minority stress. *Id.*

¹²⁸ See generally Renwick McLean, *Spain Legalizes Gay Marriage; Law is Among the Most Liberal*, N.Y. TIMES, July 1, 2005, at A9, available at 2005 WLNR 10351324 (discussing Spain's legalization of same-sex marriages in 2005).

¹²⁹ See *supra* note 110 (both states have laws prohibiting same-sex marriage).

¹³⁰ In 2009, the California State Supreme Court ruled that the approximately 18,000 marriages that took place in California before Proposition 8 remained valid, as are same-sex marriages performed elsewhere during that period. *Strauss v. Horton*, 207 P.3d 28, 121-23 (Cal. 2009).

The current patchwork of marriage laws in the United States 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.¹³¹ In the District of Columbia, same-sex marriage has been the subject of constant court challenges since the city council legalized it in 2009.¹³²

B. Property and Probate

Providing 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.¹³³ The remainder of this Part discusses how to provide for chosen family who are not related by marriage, marriage equivalence, blood, or adoption. Given the current uncertainty regarding marriage equality in the United States, 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 state's laws of intestate succession.¹³⁴ It is possible to title property to avoid probate through

¹³¹ McKinley & Goodstein, *supra* note 108; Abby Goodnough, *A Setback in Maine for Gay Marriage, but Medical Marijuana Law Expands*, N.Y. TIMES, Nov. 5, 2009, <http://www.nytimes.com/2009/11/05/us/politics/05maine.html>.

¹³² Keith L. Alexander, *Same-Sex Marriage in D.C. is Upheld: Court of Appeals Rules 5 to 4 Against Foes' Referendum Initiative*, WASH. POST, July 16, 2010, at B6.

¹³³ See Kimmel, *supra* note 56, at 275 (discussing the importance of having a partner). On the importance of a partner, Kimmel explains, "[a] partner may also serve as a *buffer* against losses and someone who can aid with challenges of aging." *Id.* More specifically, Kimmel notes, "[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.*

¹³⁴ Individuals who are qualified to take by intestate succession are also restricted by marriage, biology, or adoption. See UNIF. PROBATE CODE § 2-102A (1969) (amended 2008) (spouses share in separate property states); *id.* § 2-103 (sharing among heirs

trusts, joint ownership, and transfer on death designations.¹³⁵ There are also various other death benefits that pass outside of probate directly to the beneficiaries, such as insurance proceeds. These benefits are discussed in Part IV below.

In the United States, approximately two-thirds of all decedents die intestate.¹³⁶ 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,¹³⁷ and then to the surviving children.¹³⁸ If the decedent left no surviving spouse or children, the estate passes to parents and then to progressively more distant relatives, along lines clearly defined by blood or adoption.¹³⁹ The intestacy rules attempt to approximate what most individuals would have wanted had they executed a will.¹⁴⁰ Although the rules of interstate succession are considered a default setting, in actuality, they control the distribution of the majority of estates. As discussed in Part IV and Part V, 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 to identify individuals who are authorized to make certain health care decisions.

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.¹⁴¹ There are only two ways under

other than spouse); *id.* § 2-114 (status of children by adoption and effect of the marital status of the parents with respect to the child).

¹³⁵ *See generally id.* § 1-102 (1969). The purpose of probate is to transfer title to the property owned by the decedent to the beneficiaries named under the will and settle all debts against the estate. *Id.*

¹³⁶ Bina Brown, *Estate Planning: Make a Will*, CNN, June 26, 2006, <http://edition.cnn.com/2006/BUSINESS/06/12/btn.will/> (reporting sixty-six percent of the United States population dies without a will).

¹³⁷ *See UNIF. PROBATE CODE* § 2-102A (1969) (amended 2008).

¹³⁸ *Id.* § 2-103.

¹³⁹ *Id.*

¹⁴⁰ *See id.* art. II, pt. 1 (describing the distribution scheme as "designed to provide suitable rules for the person of modest means who relies on the estate plan provided by law").

¹⁴¹ *See id.* §§ 2-103, 2-114. In the vast majority of states where the decedent is not survived by a spouse, the rules of intestate succession distribute the decedent's

the rules of intestate succession to make chosen family count as legal family: marriage and adoption.¹⁴² 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.¹⁴³ 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.¹⁴⁴ Unlike marriage, adoption is forever, and an adoptive parent can never divorce his or her adopted child.¹⁴⁵

Used instrumentally, adult adoption allows an individual to add a chosen family member, including a partner, to his legally recognized family tree for intestacy purposes and other reasons—such as standing to sue for wrongful death or appointment as administrator of the es-

property to the closest relatives in the following priority: children, parents, siblings, nieces and nephews, grandparents, aunts and uncles, first cousins, and so on. *See id.* § 2-103. The Uniform Probate Code does not include intestate heirs beyond descendants of grandparents. *Id.* § 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.* § 2-102. If a decedent is not survived by any relatives within the prescribed degrees of relationship, all property will escheat to the state. *See id.* § 2-105.

¹⁴² *See id.* §§ 2-102 to -103.

¹⁴³ *See supra* notes 106-08 (listing states that recognize same-sex marriage).

¹⁴⁴ In the 1898 case of *Collamore v. Learned*, the Massachusetts Supreme Court declared that it was *perfectly proper* to use adult adoption to secure inheritance rights. *Collamore v. Learned*, 50 N.E. 518, 519 (Mass. 1898). At least one court, however, has disallowed adult adoption in the context of a same-sex relationship on public policy grounds. *See In re Robert Paul P.*, 63 N.Y.2d 233, 236 (1984). In 1984, New York's highest court disallowed the application of a fifty-seven-year-old gay man to adopt his fifty-year-old male partner. *Id.* at 235. 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.* at 236. In addition, parties considering this step should also investigate the applicability of state criminal incest laws.

¹⁴⁵ Even a same-sex spouse living in a nonmarriage state with an out-of-state marriage license can theoretically move, establish residency, and then sue for divorce. *Cf.* Fischler, *supra* note 120 (discussing the New York State Supreme Court's decision granting the first dissolution of a same-sex marriage in New York when the marriage occurred outside New York's jurisdiction). This option is not available to adoptive parents.

tate—thereby qualifying the chosen family member as a child who stands in priority above all other next of kin.¹⁴⁶ Adult adoption can also forestall will challenges from collateral kin, which are discussed in greater detail in Part V below.¹⁴⁷

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.¹⁴⁸ There can also be considerable fees and delay associated with probate.¹⁴⁹ In order to avoid or minimize probate, an individual must divest himself of his property prior to death, something that can be impracticable in the case of younger individuals. One way to accomplish the necessary divestment is with an *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.¹⁵⁰ 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.¹⁵¹ 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.¹⁵² 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.¹⁵³ With real estate, this result can be accomplished through the use of a joint tenancy

¹⁴⁶ See John G. Culhane, *A "Clanging Silence": Same-Sex Couples and Tort Law*, 89 KY. L.J. 911, 953-54 (2001) (outlining the 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 (1969).

¹⁴⁷ See *infra* Part V.A.

¹⁴⁸ See *infra* Part V.A.

¹⁴⁹ See generally John H. Langbein, *The Nonprobate Revolution and the Future of the Law of Succession*, 97 HARV. L. REV. 1108 (1984) (discussing the urge to avoid probate).

¹⁵⁰ See *id.* at 1113.

¹⁵¹ See generally *id.* (discussing the use of *inter vivos* trusts in the context of privacy concerns).

¹⁵² See UNIF. PROBATE CODE § 2-511 (1969). In this situation, the settlor of the trust would also execute a will that would transfer any property held by the settlor at the time of death into the trust. *Id.* § 2-511(a).

¹⁵³ See Langbein, *supra* note 149, at 1114.

with right of survivorship.¹⁵⁴ Securities can be registered with “transfer on death” instructions,¹⁵⁵ and bank accounts can similarly be titled with “payable on death” designations.¹⁵⁶

The benefits of 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 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 adds a friend to the deed of his house as a joint tenant with right of survivorship, and the grantor 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 IV 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.¹⁵⁷

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.¹⁵⁸ When an individual is incapable of expressing his or her desires regarding medical care, these documents help ensure the individual’s wishes are respected by service providers. In addition, an individual can appoint a surrogate to act on

¹⁵⁴ *Id.* (discussing joint tenancy as a will substitute).

¹⁵⁵ UNIF. PROBATE CODE §§ 6-301, 6-302, 6-309 (1969) (§ 6-309 amended 1998) (describing rules governing transfer on death designations).

¹⁵⁶ *Id.* §§ 6-201, 6-203, 6-212, 6-214 (1969) (§ 6-212 amended 1991) (describing rules governing multiparty bank accounts).

¹⁵⁷ *See infra* Part IV.B.

¹⁵⁸ *See, e.g.,* Joseph T. Monahan & Elizabeth A. Lawhorn, *Life-Sustaining Treatment and the Law: The Evolution of Informed Consent, Advance Directives and Surrogate Decision Making*, 19 ANNALS HEALTH L. 107 (2010); *see also* UNIF. PROBATE CODE §§ 5-501, 5-502 to -505 (1969) (governing durable powers of attorney).

his or her behalf in the event of incapacity, designate a guardian, or direct the terms of end-of-life care.¹⁵⁹ 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.¹⁶⁰

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, then a child, or perhaps even a grandchild to serve as the alternate. Gay and lesbian elders may not have this level of multigenerational 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 alternative 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.¹⁶¹ The guardian is appointed in accordance with a prescribed order of priority that favors relatives.¹⁶² 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 of whether the named surrogate decision maker is available or able to serve.¹⁶³

The major shortcoming of estate-planning documents is 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.¹⁶⁴ In 2008, Mark Goldberg

¹⁵⁹ Monahan & Lawhorn, *supra* note 158.

¹⁶⁰ Knauer, *supra* note 105, at 43, 46-49.

¹⁶¹ See UNIF. PROBATE CODE § 5-301 (1969).

¹⁶² See *id.* § 5-310(4)-(6). But see UNIF. PROBATE CODE § 5-310(7) (1969) (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).

¹⁶³ See Monahan & Lawhorn, *supra* note 158, at 110.

¹⁶⁴ 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, 428-29 (1999) (discussing the difficulty encountered by surviving same-sex partners).

struggled through bureaucratic red tape for over four weeks before he was able to claim the remains of his partner of seventeen years, Ron Hanby.¹⁶⁵ Rhode Island law at the time prescribed a list of relatives, in descending order of priority, authorized to claim remains.¹⁶⁶ The list did not include executors or other fiduciaries, nor did it include same-sex partners.¹⁶⁷ Under this law, Mark could not claim Ron's remains despite the fact they had been legally married in Connecticut, and they had a full complement of reciprocal estate-planning documents.¹⁶⁸ Ron was not survived by any next of kin and, as a result, his remains were unclaimed for thirty-two days.¹⁶⁹ After Mark's ordeal, the Rhode Island legislature amended its law to allow domestic partners to claim remains.¹⁷⁰

¹⁶⁵ Randal Edgar, *Lack of Funeral Rights Turns Mourner into Gay Activist*, PROVIDENCE J., Nov. 15, 2009, http://www.projo.com/news/content/GOLDBERG_FUNERAL_RIGHTS_11-15-09_S4GE9HC_v189.3988db7.html.

¹⁶⁶ R.I. GEN. LAWS § 5-33.2-24 (2009).

¹⁶⁷ *See id.* At the time, Rhode Island law authorized the designation of a *funeral agent*, but it required the use of a specific form prescribed by statute. R.I. GEN. LAWS § 5-33.3-4 (2009). *See generally* FUNERAL CONSUMERS ALLIANCE, WHO HAS THE RIGHT TO MAKE DECISIONS ABOUT YOUR FUNERAL?, <http://www.funerals.org/your-legal-rights/funeral-decision-rights> (last visited Jan. 4, 2011) [hereinafter DECISIONS ABOUT YOUR FUNERAL].

¹⁶⁸ Edgar, *supra* note 166; Letter from Marc S. Goldberg to Sheldon Whitehouse, U.S. Senator for R.I. (Feb. 3, 2009), *available at* <http://marriageequalityri.wordpress.com/2009/02/13/goldberg-letter-to-sen-whitehouse-partner-burial-rights/>.

¹⁶⁹ Edgar, *supra* note 166.

¹⁷⁰ *See* R.I. GEN. LAWS § 23-4-10 (2009). 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). *Id.* 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. *Id.* 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. *Id.* 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." Letter from Donald L. Carcieri, Governor of R.I., to M. Teresa Paiva Weed, President of the R.I. Senate (Nov. 10, 2009), *available at* http://www.projo.com/news/2009/pdf/veto_s0195_funeral_directors.pdf. The legislature overrode the Governor's veto by an overwhelming margin. 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>.

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.¹⁷¹ States have begun to enact legislation granting individuals the power to control their funeral and burial arrangements, but the approaches have been far from uniform.¹⁷² Some states provide that a decedent's written instructions concerning burial must be honored.¹⁷³ Other states allow the appointment of a funeral-planning agent with decision-making authority,¹⁷⁴ and other states have adopted some combination of the two.¹⁷⁵ In some instances, state law requires individuals to execute a separate document,¹⁷⁶ but other states, such as Vermont, have incorporated the power in their advance directive forms.¹⁷⁷ 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.¹⁷⁸ The form this document should take is state-specific.¹⁷⁹ However, even testators who reside in states that have not yet adopted legislation should consider executing a generic form expressing their wishes. The form will serve as indicia of intent should

¹⁷¹ See R.I. GEN. LAWS § 5-33.2-24 (2009). When Ron died on October 2, 2008, his marriage would have been recognized in California, Connecticut, and Massachusetts. See *In re Marriage Cases*, 183 P.3d 384, 452 (Cal. 2008); *Kerrigan v. Comm'r of Pub. Health*, 957 A.2d 407, 411-12 (Conn. 2008); *Goodridge v. Dep't of Pub. Health*, 798 N.E.2d 941, 948 (Mass. 2003).

¹⁷² For example, Alabama generally restricts authority to next of kin with the exception of individuals designated in a *preneed* funeral contract or the executor of the decedent's will. ALA. CODE § 34-13-11 (2010). See generally DECISIONS ABOUT YOUR FUNERAL, *supra* note 168.

¹⁷³ See, e.g., WASH. REV. CODE § 68.50.160 (2010) (personal preference law).

¹⁷⁴ See, e.g., N.H. REV. STAT. ANN. § 290:17 (2010) (authorizing designated agent).

¹⁷⁵ See, e.g., OKLA. STAT. tit. 21, § 1151 (2010) (combined personal preference and agent law).

¹⁷⁶ See, e.g., R.I. GEN. LAWS § 5-33.3-4 (2009) (form prescribed by statute).

¹⁷⁷ See, e.g., VT. STAT. ANN. tit. 18, § 9700 (2010) (advance directives for health care and disposition of remains).

¹⁷⁸ See, e.g., ALLAN J. GIBBER, GIBBER ON ESTATE ADMINISTRATION: CHAPTER ONE (2008), available at AE MD-CLE 1-1 (indicating the preferred approach is to have a separate document with specific funeral and burial instructions).

¹⁷⁹ See, e.g., CAL. HEALTH & SAFETY CODE § 7100.1 (West 2010) (requiring only that the instructions be unambiguous, in writing, and the arrangements be paid for); CONN. GEN. STAT. § 45a-318 (2010) (providing a suggested form in the statute).

next of kin challenge that intent later, or in case the jurisdiction subsequently enacts enabling legislation.¹⁸⁰

Hospital visitation authorizations are another type of document that have become a common feature of gay and lesbian estate planning.¹⁸¹ Necessitated by hospital policies that restrict visitors to “family members,” it is unclear whether these documents carry any legal force.¹⁸² In *Langbehn v. Public Health Trust of Miami-Dade County*, a federal district court dismissed a claim brought by a surviving partner who was denied access to her dying partner, despite the fact she was her partner’s attorney in fact and authorized to make all medical decisions.¹⁸³

In 2010, President Obama issued a Presidential Memorandum to the Secretary of the Department of Health and Human Services (HHS) affirming the rights of patients at hospitals that receive Medicare and Medicaid to receive visitors of their choosing.¹⁸⁴ The Presidential Memorandum directs the Secretary to initiate rulemaking “to ensure that hospitals that participate in Medicare or Medicaid respect the rights of patients to designate visitors.”¹⁸⁵ The Memorandum further provides that “participating hospitals may not deny visitation privileges on the basis of race, color, national origin, religion, sex, sexual orientation, gender identity, or disability.”¹⁸⁶ Although this proposed regulatory reform is very encouraging, much remains to be seen regarding implementation and the extent to which hospitals may impose restrictions based on medical necessity.

¹⁸⁰ See, e.g., CAL. HEALTH & SAFETY CODE § 7100.1 (West 2010) (requiring the directions to be carried out without any material change).

¹⁸¹ See generally *Langbehn v. Pub. Health Trust of Miami-Dade Cnty.*, 661 F. Supp. 2d 1326 (S.D. Fla. 2009).

¹⁸² See *id.* at 1347.

¹⁸³ *Id.*

¹⁸⁴ Memorandum from Barack Obama, President of the United States, to Kathleen Sebelius, Sec’y of Health & Human Servs. (Apr. 15, 2010), available at <http://www.whitehouse.gov/the-press-office/presidential-memorandum-hospital-visitation>.

¹⁸⁵ *Id.*

¹⁸⁶ *Id.*

IV. FINANCIAL SECURITY AND BENEFITS

According to census data, elder same-sex partnered households lag behind their nongay peers in terms of all the important financial indicators, including income, retirement savings, and home ownership.¹⁸⁷ 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 nongay peers, and elder female same-sex partnered households are almost twice as likely to live in poverty than their nongay peers.¹⁸⁸ To some extent, this financial insecurity represents the inevitable effect of a lifetime of discrimination,¹⁸⁹ but it is 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 antigay bias.¹⁹⁰

This Part 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.

¹⁸⁷ GOLDBERG, *supra* note 79, at 6; *see also* DIDI HERMAN, *THE ANTIGAY AGENDA: ORTHODOX VISION AND THE CHRISTIAN RIGHT* 116-19 (1997). The financial insecurity experienced by many gay and lesbian elders contradicts the stereotype of gay affluence that antigay groups popularized during the culture wars of the 1990s. *See* HERMAN, *supra*.

¹⁸⁸ *See* ALBELDA ET AL., *supra* note 78, at 11.

¹⁸⁹ As explained in Part II, homosexuality was classified as a serious mental illness, sodomy was criminalized, and there were no antidiscrimination protections. *See supra* Part II.A. To the contrary, in many instances there were affirmative policies against homosexual employees. *See supra* Part II.A. Congress began hearings in 1950 to investigate the risk posed by homosexual federal employees. ALLAN BÉRUBÉ, *COMING OUT UNDER FIRE: THE HISTORY OF GAY MEN AND WOMEN IN WORLD WAR TWO* 265-68 (1990). The hearings led to the recommendations that the government, through the Federal Bureau of Investigation, 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 employers. *Id.* at 269-70. It was not until 1982 that the first state amended its antidiscrimination laws to include sexual orientation. *See* WIS. STAT. ANN. § 111.36(1)(d) (2010).

¹⁹⁰ *See supra* note 34 (citing HHS study).

Advocates for marriage equality have just begun to quantify the *costs* of the legal barriers erected by DOMA.¹⁹¹ 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.

A. *Social Security*

Social security benefits represent a significant source of retirement income in the United States.¹⁹² As of 2005, seventy-one percent of seniors rely on social security payments for at least half of their income, whereas forty percent of seniors rely on social security for ninety percent or more of their income.¹⁹³ For twenty-six percent of seniors, social security is their *only* source of income.¹⁹⁴ The amount of social security payments an individual receives is a function of how long he works and how much he is paid.¹⁹⁵ As a result, individuals who experienced long periods of unemployment or underemployment will receive smaller benefit payments. According to the census data, elder female-partnered households rely more heavily on social security income as a percentage of their overall income than different-sex married couples.¹⁹⁶ They also receive, on average, fifteen percent less in social security benefits than their nongay peers.¹⁹⁷

¹⁹¹ BENNETT & GATES, *supra* note 75, at 4. There are estimated to be 1049 federal statutory provisions under which marital status is a factor in determining or receiving benefits, rights, and privileges. Letter from Dayna K. Shah, Assoc. Gen. Counsel, U.S. Gen. Accounting Office, to Bill Frist, Majority Leader, U.S. Senate 1 (Jan. 23, 2004), available at <http://www.gao.gov/new.items/d04353r.pdf>.

¹⁹² See GARY SIDOR, CONG. RESEARCH SERV., SOCIAL SECURITY: BRIEF FACTS AND STATISTICS 22 (2005), available at http://usa.usembassy.de/etexts/soc/crs_socsecurity2005.pdf.

¹⁹³ *Id.* at 24.

¹⁹⁴ *Id.*

¹⁹⁵ See 42 U.S.C. §§ 403, 414 (2006). In order to be considered *fully insured* for social security purposes, an individual must have worked a specified number of quarters. *Id.* § 414(a). The amounts of an individual's social security payments are then determined by the individual's reported wages and self-employment income. *Id.* § 403(a).

¹⁹⁶ GOLDBERG, *supra* note 79, at 7-8.

¹⁹⁷ *Id.* at 7.

DOMA mandates that same-sex partners are not entitled to social security spousal benefits, even if the partners are legally married under state law.¹⁹⁸ The spousal survivor benefits provide additional financial security by allowing the surviving spouse to receive the benefits paid to the deceased spouse if that amount is greater than what the survivor would be entitled to in his or her own right.¹⁹⁹ In 2000, it was estimated that the exclusion of surviving same-sex partners costs gay and lesbian elders \$124 million annually in foregone benefits.²⁰⁰ A more recent Congressional Budget Office Report (CBO Report) estimated that thirty 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.²⁰¹ The CBO Report estimated by 2014 this change would amount to an increase in benefits of \$350 million annually.²⁰²

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 the amount the worker paid into the program.²⁰³ A worker in a same-sex marriage who pays the same amount as a similarly situated worker in a different-sex

¹⁹⁸ See *supra* note 111 (discussing DOMA).

¹⁹⁹ 42 U.S.C. § 402(e)-(f) (2006). A surviving spouse qualifies for Social Security death benefits. *Id.* § 402(i). The surviving spouse of a fully-insured, deceased, retired worker receives 100% of the deceased spouse's benefits. See *id.* § 402(e)-(f). Also, divorced former spouses qualify for social security death benefits. *Id.* § 402.

²⁰⁰ See CAHILL ET AL., *supra* note 52, at 43.

²⁰¹ See CONG. BUDGET OFFICE, THE POTENTIAL BUDGETARY IMPACT OF RECOGNIZING SAME-SEX MARRIAGES 7 (June 21, 2004), available at <http://www.cbo.gov/ftpdocs/55xx/doc5559/06-21-SameSexMarriage.pdf>.

²⁰² *Id.*

²⁰³ In order to be considered *fully insured*, an individual must have worked a specified number of quarters. 42 U.S.C. § 414(a) (2006). The amounts of an individual's social security payments are then determined by the individual's reported wages and self-employment income. *Id.* § 403(a) (2006). 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.

marriage²⁰⁴ is entitled to fewer benefits because his or her partner is not eligible for survivor benefits.²⁰⁵ This application of DOMA has been challenged by federal lawsuits brought by legally married same-sex couples in Massachusetts who are being denied federal spousal benefits.²⁰⁶

B. Medicare/Medicaid

Currently, Medicare does not cover the cost of long-term care in a skilled nursing facility or nursing home.²⁰⁷ 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.²⁰⁸ 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*,²⁰⁹ where individuals have to spend or transfer their assets in order to qualify under the asset and income limitations imposed by the regulations.²¹⁰ The spousal impoverishment provisions are an important exception to the Medicaid asset limit and spend down rules that are designed to ensure a healthy spouse is not left destitute after qualifying the other spouse for Medicaid.²¹¹ These provisions include exempting the marital home, prohibiting a Medicaid lien from attaching to the marital home until after the death of the noninstitutionalized spouse, and allowing the noninstitutionalized spouse to keep one-half (or more) of the couple's joint assets.²¹²

²⁰⁴ See Gill v. Office Pers. Mgmt., 699 F. Supp. 2d 374, 376-77 (D. Mass. 2010) (federal district court held that DOMA violated the Equal Protection Clause and the Due Process Clause of the U.S. Constitution).

²⁰⁵ See *id.*

²⁰⁶ *Id.*

²⁰⁷ See John A. Miller, *Voluntary Impoverishment to Obtain Government Benefits*, 13 CORNELL J.L. & PUB. POL'Y 81, 82-92 (2003) (discussing skilled nursing home options).

²⁰⁸ *Id.* at 82-83.

²⁰⁹ *Id.* at 83-92.

²¹⁰ *Id.* at 92.

²¹¹ See 42 U.S.C. § 1382b(a) (2006) (exempting certain resources including residence, car, qualifying irrevocable trusts, limited burial expenses, and life insurance policies).

²¹² See 42 U.S.C. § 1396p(a) (2006); CTRS. FOR MEDICARE & MEDICAID SERVS., 2010 SSI AND SPOUSAL IMPOVERISHMENT Standards (2010), available at <http://www.cms.gov/MedicaidEligibility/Downloads/1998-2010SSIFBR122909.pdf>. States are

These spousal protections do not apply to same-sex couples under DOMA.²¹³ For same-sex couples, the result of the disallowance will depend on how their assets are titled and which partner requires long-term care.²¹⁴ Unlike married different-sex couples, same-sex couples may not be able to exempt their home, and, if they are able to exempt their home, a Medicaid lien will attach at the death of the institutionalized spouse.²¹⁵ Also, the noninstitutionalized same-sex partner will not be entitled to one-half of their joint assets.²¹⁶

C. Pension and Other Death Benefits

For survivors, pension and retirement fund benefits can provide a significant source of financial support.²¹⁷ Benefits payable under retirement plans are considered nonprobate assets, which means they do not pass under the employee's will, nor are they subject to the rules of intestate succession if the employee dies intestate.²¹⁸ As a result, non-

required to attempt to recover expenses paid for Medicaid benefits. 42 U.S.C. § 1396p(a) (2006). 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. *Id.* § 1396p(a)(2)(A). Most importantly, a Medicaid lien cannot be recovered during the lifetime of the recipient or surviving spouse. *Id.* § 1396p(b)(2) (“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, attaching a lien is not a possibility when a qualified sibling, son, or daughter of the decedent resides in the home. *Id.* § 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, 553-55 (discussing liens in the context of nontraditional families).

²¹³ See 1 U.S.C. § 7 (2006); Defense of Marriage Act, Pub. L. No. 104-199, 110 Stat. 2419 (1996).

²¹⁴ See LGBT OLDER ADULTS, *supra* note 32, at 17 (discussing different scenarios for same-sex and different-sex couples).

²¹⁵ See generally *id.* (stating same-sex elder couples are treated the same as single elders and therefore lack the benefit options allowed for heterosexual couples under Medicaid).

²¹⁶ Each state establishes a minimum income level that can be retained by the noninstitutionalized spouse. See CTRS. FOR MEDICARE & MEDICAID SERVS., 2010 SSI AND SPOUSAL IMPOVERISHMENT Standards (2010), available at <http://www.cms.gov/MedicaidEligibility/Downloads/1998-2010SSIFBR122909.pdf>.

²¹⁷ See *infra* notes 226-27 (discussing significance of the surviving domestic partner being able to keep their partner’s pension).

²¹⁸ See Langbein, *supra* note 149, at 1111.

probate assets enjoy immunity from claims by family members.²¹⁹ One major drawback, however, is that an employee does not always have the power to designate a beneficiary of his or her own choosing.²²⁰ 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.²²¹

This problem occurs when the pension plan provides that a surviving spouse is the only permissible beneficiary.²²² In 2005, William (Bill) Swensor died unexpectedly at the age of sixty-six and left behind his partner of fifty-one years, Marvin Burrows.²²³ Bill and Marvin started dating when they were just fifteen and seventeen, respectively.²²⁴ Bill and Marvin were registered domestic partners and were married in San Francisco in 2004 during a brief period of civil disobedience when the city issued marriage licenses to same-sex couples.²²⁵ 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.²²⁶ Without Bill's income, Marvin struggled financially and lost the house he had shared with Bill for thirty-five years.²²⁷ Although Marvin made repeated requests and received the support of the National Center for Lesbian Rights, the only

²¹⁹ See *supra* Part III.B.

²²⁰ See, e.g., Damien Cave, *Dying Officer Again Turned Down on Benefits for Companion*, N.Y. TIMES, Jan. 19, 2006, <http://www.nytimes.com/2006/01/19/nyregion/19benefits.html>.

²²¹ See *id.*

²²² See *id.*

²²³ GRANT, *supra* note 32, at 56.

²²⁴ *Id.*

²²⁵ Press Release, Nat'l Ctr. for Lesbian Rights, Union Changes Policy To Provide Equal Pension Benefits To Domestic Partner (Aug. 22, 2007), available at http://www.nclrights.org/site/PageServer?pagename=press_unionbenefits_082207. When Bill was a teenager, his father kicked him out of his home when he found out about his relationship with Marvin, and Bill moved in with Marvin and his mother. Kelly Griffith, *40+ Years of Valentine's Days*, ADVOC., Jan. 30, 2006, http://www.columbia.org/pdf_files/freedomtomarry3.pdf.

²²⁶ Press Release, Nat'l Ctr. for Lesbian Rights, Union Changes Policy To Provide Equal Pension Benefits To Domestic Partner (Aug. 22, 2007), available at http://www.nclrights.org/site/PageServer?pagename=press_unionbenefits_082207.

²²⁷ *Id.*

alternative was to change the terms of the pension plan.²²⁸ Two years after Bill's death, the ILWU was able to renegotiate the terms of the contract to provide pension benefits for domestic partners and made the coverage retroactive to Bill's date of death.²²⁹

A somewhat more high-profile case is currently the subject of a federal lawsuit, *Gill v. Office of Personnel Management*.²³⁰ Representative Gerry Studds (D-MA) died in 2006 and was survived by his husband, Dean Hara, whom he had legally married in Massachusetts.²³¹ Dean did not qualify for any federal spousal benefits because, according to DOMA, he did not qualify as a spouse.²³² He is currently the plaintiff in *Gill* challenging the constitutionality of DOMA.²³³

V. DRAFTING IN THE FACE OF BIAS

Ageism in the gay and lesbian community and homophobia within the senior community marginalize gay and lesbian elders.²³⁴ To the larger society, the very notion of a gay or lesbian elder may seem like an *oxymoron* because seniors are widely held to be asexual,²³⁵

²²⁸ *Id.*

²²⁹ *Id.*

²³⁰ *Gill v. Office Pers. Mgmt.*, 699 F. Supp. 2d 374, 376-77 (D. Mass. 2010).

²³¹ Damien Cave, *Gerry Studds, Gay Congressman Who Served 12 Terms, Is Dead at 69*, N.Y. TIMES, Oct. 15, 2006, at 141, available at 2006 WLNR 17866937. Representative Studds served twelve terms in Congress. *Id.* He was the first openly gay member of Congress. *Id.*

²³² Abby Goodnough & Katie Zezima, *Suit Seeks to Force Government to Extend Benefits to Same-Sex Couples*, N.Y. TIMES, Mar. 3, 2009, at A12, available at 2009 WLNR 4058822.

²³³ *Gill*, 699 F. Supp. 2d at 376.

²³⁴ See Hostetler, *supra* note 58, at 169 ("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."); see also Knauer, *supra* note 26, at 36-40 (discussing homophobia within the senior community).

²³⁵ See Barker, *supra* note 51, at 53-54. With respect to the de-sexualized view of seniors, Barker explains:

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 androgenous [sic], dependent, and ineffectual. This reticence about

whereas homosexuals are often portrayed as hyper-sexual.²³⁶ 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 for 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, disappointed and incredulous heirs can challenge wills and burial instructions, leaving a surviving partner and chosen family out in the cold.²³⁷ 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.²³⁸ 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 the elder has made.²³⁹

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,²⁴⁰ undue influence,²⁴¹ fraud, and duress.²⁴² The testator's next of kin have standing to challenge a will provided they have a pecuniary interest in it—

sex occurs with respect to all older people, not just sexual minorities, and has been a long-standing issue besetting studies of sexuality.

Id. at 53 (citation omitted).

²³⁶ See *id.* at 54 (discussing “assumed hypersexuality of the young and male sexual minority person”).

²³⁷ See Starkey, *supra* note 49. A fifty-nine-year-old lesbian discussing her concern that she could be mistreated by her partner's family after her partner's death stated, “You can't know how people are.” *Id.*

²³⁸ See *supra* Part I.

²³⁹ See *supra* Part I.

²⁴⁰ See *infra* note 246.

²⁴¹ See *infra* note 256.

²⁴² See RESTATEMENT (THIRD) OF PROP.: WILLS & DONATIVE TRANSFERS § 8.3 (2003).

that is, provided they would gain financially if the will were set aside.²⁴³ As a result, disappointed heirs will have legal standing to challenge any nonnormative testamentary disposition. When that nonnormative disposition is to a same-sex partner or chosen family member, the closet, homophobia, and stereotypes about seniors can all help to facilitate claims of undue influence and lack of capacity. Shocked family members can also claim that the will must be a forgery or the result of fraud or duress.

In order to execute a valid will, an individual must be “of sound mind”—that is, he must possess testamentary capacity.²⁴⁴ This legal standard requires a three-fold finding that at the time of the execution of the will the testator understood the nature of his action, the extent of his property, and the disposition he intended.²⁴⁵ Given the widespread incidence of dementia among the senior population,²⁴⁶ 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

²⁴³ See *In re Estate of Getty*, 149 Cal. Rptr. 656, 658 (Ct. App. 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). 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. See UNIF. PROBATE CODE § 2-103 (1969) (amended 2008) (sharing among heirs other than spouse).

²⁴⁴ UNIF. PROBATE CODE § 2-501 (1969). “An individual 18 or more years of age who is of sound mind may make a will.” *Id.*

²⁴⁵ *Estate of Reichel*, 400 A.2d 1268, 1270 (Pa. 1979) (“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.”). For obvious reasons, courts measure testamentary capacity at the time the testator executes the will, as opposed to when the will speaks at the death of the testator. *In re Estate of Ziel*, 359 A.2d 728, 732 (Pa. 1976).

²⁴⁶ See B.L. Plassman et al., *Prevalence of Dementia in the United States: The Aging, Demographics, and Memory Study*, 29 NEUROEPIDEMIOLOGY 125, 125 (2007), available at <http://content.karger.com/ProdukteDB/Produkte.asp?doi=10.1159/000109998&typ=pdf> (finding the prevalence among individuals age seventy-one and older was 13.9% and increased to 37.4% for individuals aged ninety and older).

clients' capacity,²⁴⁷ including monitoring medication to make sure a client is functioning at peak when he signs the documents,²⁴⁸ securing the equivalent of a doctor's note,²⁴⁹ and videotaping the execution of the documents.²⁵⁰

Gay and lesbian elders are especially susceptible to claims that they lack the necessary mental capacity, because a nonnormative 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,²⁵¹ in some instances, the mere fact of a nontraditional disposition may be sufficient to question the capacity of the testator.²⁵² In other words, a court may perceive a nontraditional disposition as so implausible that the nature of the disposition itself may suggest that the testator was not "of sound mind."²⁵³

The doctrine of undue influence is 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,

²⁴⁷ See generally ABA COMM'N ON LAW AND AGING & AM. PSYCHOLOGICAL ASS'N., ASSESSMENT OF OLDER ADULTS WITH DIMINISHED CAPACITY: A HANDBOOK FOR LAWYERS (2005).

²⁴⁸ See *id.* at 17 ("Signs of disorientation and confusion could be due to a host of medical conditions and medication factors that are reversible.").

²⁴⁹ See *id.* at 20 ("[T]he 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. . . .").

²⁵⁰ *Id.* at 20 (discussing "videotaping as documentation").

²⁵¹ *In re Wright's Estate*, 60 P.2d 434, 438 (Cal. 1936) ("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."). In *In re Wright's Estate*, the court upheld the testamentary disposition of an individual known for objectively bizarre behavior. *Id.*

²⁵² See *supra* note 245 and accompanying text.

²⁵³ See Thomas J. Maier, *AIDS Victims' Bitter Legacy; Lovers And Relatives Battle For Estates In Disputes Over Wills*, NEWSDAY, Oct. 2, 1988, at 4, available at 1988 WLNR 148619 (discussing how 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); UNIF. PROBATE CODE § 2-501 (1969) (stating who may make a will).

the doctrine of undue influence seems tailor-made to invalidate wills that favor nonmarital 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 natural objects of the testator's bounty.²⁵⁴ 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—rather, the beneficiary is said to have substituted his intent for that of the testator.²⁵⁵ 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.²⁵⁶ Upon a showing of a confidential relationship, the burden can shift to the proponent of the will to prove the absence of undue influence.²⁵⁷ 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.²⁵⁸ Currently, a surviving same-sex partner only qualifies as an intestate heir in a handful of states,²⁵⁹ 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 the very fact of the testator designating his same-sex partner, as opposed to his next of kin, may signal a lack of capacity or the existence of undue influence.²⁶⁰ As discussed above in Part III, this is one of the reasons that

²⁵⁴ See generally Ray D. Madoff, *Unmasking Undue Influence*, 81 MINN. L. REV. 571, 578 (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.*

²⁵⁵ See *id.*

²⁵⁶ See generally Estate of Reichel, 400 A.2d 1268, 1270 (Pa. 1979). A confidential relationship can include an attorney-client or other fiduciary relationship, as well as any nonmarital sexual or romantic relationship. See *id.* at 1270-72 (Manderino, J., dissenting).

²⁵⁷ See, e.g., *id.* (finding after a clear and convincing showing of a confidential relationship, the burden shifts to the proponent of the will to disprove undue influence, provided certain other requirements are satisfied).

²⁵⁸ Nancy J. Knauer, *Defining Capacity: Balancing the Competing Interests of Autonomy and Need*, 12 TEMP. POL. & CIV. RTS. L. REV. 321, 343 (2003).

²⁵⁹ See *supra* notes 106-09 (listing states with marriage or marriage equivalence).

²⁶⁰ Knauer, *supra* note 260, at 343-44.

gay and lesbian elders may wish to minimize the amount of their property that is subject to probate.

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.²⁶¹ This was the case with Clay and Harold, where a broader finding of incapacity effectively silenced their identities and erased their past.²⁶² Under the protective and authoritative care of the court-appointed guardian, Clay and Harold really were just *friends*—former roommates.²⁶³

Contemporary guardianship law is an exercise of *parens patriae* authority that is typically within the jurisdiction of county probate judges.²⁶⁴ 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.²⁶⁵ As fiduciaries, guardians are accountable for their actions, and in many jurisdictions, they are required to file annual reports with the court detailing their administra-

²⁶¹ *Id.* at 341-47.

²⁶² See James, *supra* note 19.

²⁶³ See *id.*

²⁶⁴ See UNIF. PROBATE CODE § 5-301 (1969) (discussing appointment of guardianship to an incapacitated person); UNIF. PROBATE CODE § 5-401 (1969) (discussing a court's ability to issue a protective order for the property of a protected person). 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 1324, under which the sovereign recognized a fiduciary responsibility to safeguard the assets of an individual who had "happen[ed] to fail of his wit." See Joan L. O'Sullivan & Diane E. Hoffmann, *The Guardianship Puzzle: Whatever Happened to Due Process?*, 7 MD. J. CONTEMP. LEGAL ISSUES 11, 13 (1996) (describing nature of *parens patriae* authority).

²⁶⁵ 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 (1969). 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 (1969).

tion.²⁶⁶ Guardianship used to be an all or 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.²⁶⁷

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.²⁶⁸ 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.²⁶⁹ 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.²⁷⁰ The myth of the asexual senior presumes a heterosexual past. 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.²⁷¹ Seniors may currently be asexual, but they are assumed to have been previously heterosexual.²⁷² This blanket assumption can operate to invalidate the choice of a same-sex partner. If senior sexuality is

²⁶⁶ See UNIF. PROBATE CODE § 5-317 (1969) (revised 1998) (reports regarding incapacitated person); UNIF. PROBATE CODE § 5-420 (1969) (revised 1998) (reports regarding property of protected person).

²⁶⁷ See Knauer, *supra* note 260, at 331-41.

²⁶⁸ *Id.* at 342.

²⁶⁹ *Id.* at 342-43.

²⁷⁰ See Andrew Casta-Kaufteil, *The Old & the Restless: Mediating Rights to Intimacy for Nursing Home Residents with Cognitive Impairments*, 8 J. MED. & L. 69, 71-75 (2004) (discussing capacity questions with respect to senior sexuality); see also Michael L. Perlin, *Hospitalized Patients and the Right to Sexual Interaction: Beyond the Last Frontier?*, 20 N.Y.U. REV. L. & SOC. CHANGE 517, 524-34 (1994) (discussing sexuality of institutionalized patients with mental disabilities).

²⁷¹ Knauer, *supra* note 260, at 341-47 (discussing outsider critique of the capacity doctrine).

²⁷² See Knauer, *supra* note 26, at 26.

viewed as unusual,²⁷³ then senior *homosexuality* could be seen as downright deviant or abnormal. 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 intergenerational support network. In his complaint, Clay averred that prior to the accident, "Plaintiff Greene and Decedent enjoyed a quiet, retired life, which they planned to continue until their deaths."²⁷⁴ Although that may have been their goal, the harsh reality of aging in the United States is that many elders require intensive long-term care for an extended period before death.²⁷⁵ The cost of such care is considerable and is not covered by Medicare.²⁷⁶ 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.²⁷⁷ 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 maximize the elder's autonomy and ability to live independently for as long as possible.

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

²⁷³ See Casta-Kaufteil, *supra* note 272.

²⁷⁴ First Amended Complaint, *supra* note 4, at 2.

²⁷⁵ See Ezra Klein, *The Economics of Dying in One Graph*, WASH. POST, July 19, 2010, http://voices.washingtonpost.com/ezra-klein/2010/07/the_economics_of_dying_in_one.html (illustrating out-of-pocket health care spending in last year of life).

²⁷⁶ See Haefele, *supra* note 18, at 12 ("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.").

²⁷⁷ See *supra* notes 209-17 and accompanying text (discussing Medicaid).

their children and other relatives.²⁷⁸ 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.²⁷⁹ As a result, gay and lesbian elders may be more likely than their nongay peers to require home health care assistance or residential care in a senior living facility.²⁸⁰ That being said, gay and lesbian elders are extremely fearful of encountering antigay bias and tend to underutilize the very services that can help enable them to remain independent.²⁸¹

Gay and lesbian seniors who do enter into senior-specific housing have reported strong pressure to remain closeted.²⁸² As noted previously, 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.²⁸³ In a recent *New York Times* article, Dr. Melinda Lantz, chief of geriatric psychiatry at Beth Israel Medical Center in New York, explained, “[t]here is something special about having to hide this part of your identity at a time when your entire identity is threatened.”²⁸⁴ She notes that closeted seniors face “a faster pathway to depression, failure to thrive and even premature death.”²⁸⁵

²⁷⁸ See *supra* notes 54-59 and accompanying text.

²⁷⁹ See *id.*

²⁸⁰ See Haya El Nasser, *Fewer Seniors Live in Nursing Homes*, USA TODAY, Sept. 27, 2007, http://www.usatoday.com/news/nation/census/2007-09-27-nursing-homes_N.htm (finding only 7.4% of all seniors aged seventy-five and older live in nursing homes).

²⁸¹ See *supra* note 34 (discussing HHS study).

²⁸² 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 orientation or gender variance 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 ET AL., *supra* note 52, at 53.

²⁸³ See *supra* Part II.

²⁸⁴ Gross, *supra* note 49.

²⁸⁵ *Id.*

In terms of housing, gay and lesbian elders overwhelmingly report a preference for options that cater to their needs as gay and lesbian individuals. In one study, sixty-seven percent of the participants stated they would prefer to live in a “LGBT-only retirement communit[y].”²⁸⁶ The market has recently begun to respond to this demand by offering gay-friendly senior housing developments.²⁸⁷ Although these proposed projects have garnered considerable press coverage,²⁸⁸ relatively few of them are actually open and serving clients,²⁸⁹ and demand far outstrips supply.²⁹⁰

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 antidiscrimination policy that includes sexual orientation, if one is available. Although close to one-half of the states now provide antidiscrimination protections in employment,²⁹¹ not all of the

²⁸⁶ 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 & Steven David eds., 2006). Orel explains that for elders “[t]he 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.*

²⁸⁷ See Rona Marech, *Retirement Homes, Without the Closets: Market Widens for Gay Baby Boomers Seeking a Comfortable Place to Grow Old*, S.F. CHRON., Jan. 14, 2005, at A1, available at <http://www.sfgate.com/cgi-bin/article.cgi?f=/c/a/2005/01/14/MNGE6AQEQN1.DTL> (describing how “gay elder communities have . . . begun to spring up . . . around the country, in states from Florida to Arizona, North Carolina and California”).

²⁸⁸ See, e.g., *id.*; A.J. Burton, *Gay Senior Housing on the Rise, While Straights Cry Foul*, GFN, Dec. 19, 2006, www.thetaskforce.org/TF_in_news/06_1221/stories/13_gfn_gayseniorhousing.pdf (discussing complaints of reverse discrimination); Judy Richter, *Bay Area Gay Senior Housing Closer to Reality*, S.F. CHRON., Mar. 30, 2008, at K8, available at <http://www.sfgate.com/cgi-bin/article.cgi?f=/c/a/2008/03/30/REM9VR0FE.DTL>.

²⁸⁹ See GRANT, *supra* note 32, at 96-99; see also Catherine Trevison, *Gay Retirement Homes Still Difficult to Market*, SAINT PAUL PIONEER PRESS, Mar. 20, 2008, at 7E (noting some developments have *difficulty filling*).

²⁹⁰ GRANT, *supra* note 32, at 97.

²⁹¹ Twelve states and the District of Columbia have laws prohibiting discrimination on account of sexual orientation and gender identity. HUMAN RIGHTS CAMPAIGN, STATEWIDE EMPLOYMENT LAWS & POLICIES (2010), http://www.hrc.org/documents/Employment_Laws_and_Policies.pdf. These states are: California, Colorado, Illinois, Iowa, Maine, Minnesota, New Jersey, New Mexico, Oregon, Rhode Island, Vermont,

laws extend to housing or public accommodations.²⁹² Ideally, a facility should have a nondiscrimination policy, cultural competency training for staff, and antibullying policies to control the homophobic behavior of other residents.²⁹³

Although gay and lesbian elders fear encountering antigay bias on the part of the staff, other residents can also be a source of antigay harassment, and gay and lesbian elders have reported being shunned by their nongay peers on account of their homosexuality.²⁹⁴ Senior housing facilities have also been charged with mistreating gay and lesbian elders in order to placate the prejudice of other residents.²⁹⁵ For example, nursing homes will apparently move residents who are gay or perceived to be gay to so-called *memory* wards, because the disabled residents of those wards will not be able to complain.²⁹⁶ In 2007, *The New York Times* reported that employees at a nursing home moved an elderly gay man to a dementia ward after other residents and their families complained.²⁹⁷ The gay elder was not suffering from dementia, and he eventually hanged himself.²⁹⁸ This story brings to mind Clay's allegation that he was confined to a secure dementia ward against his will.²⁹⁹ Although Clay was fortunate to be released, he remains fearful

and Washington. *Id.* Nine additional states prohibit discrimination on account of sexual orientation. *Id.* These states are: Connecticut, Delaware, Hawaii, Maryland, Massachusetts, Nevada, New Hampshire, New York, and Wisconsin. *Id.* Antidiscrimination protections should be expanded to include senior-specific venues and housing.

²⁹² Some of the antidiscrimination laws only apply to employment, whereas other laws, such as the New Jersey Law Against Discrimination, are very broad. *See, e.g.*, N.J. REV. STAT. §§ 10:5-1 to 10:5-49 (2010) (codification of New Jersey's laws against discrimination).

²⁹³ *See* Knauer, *supra* note 26, at 55-56 (discussing antibullying principles).

²⁹⁴ Gross, *supra* note 49 ("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.").

²⁹⁵ *Id.*

²⁹⁶ *See id.* (reporting that facilities move gay residents to placate homophobic residents); First Amended Complaint, *supra* note 4, at 13-14 (alleging that Clay was confined to a dementia ward against his will).

²⁹⁷ Gross, *supra* note 49.

²⁹⁸ *Id.*

²⁹⁹ First Amended Complaint, *supra* note 4, at 13-14.

that county workers will come to his home and harm him.³⁰⁰ As a result of his experience, his lawyer explains that Clay is now “a scared little rabbit.”³⁰¹

VI. 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 steps that gay and lesbian elders can take to protect their chosen families and themselves. These include a will, an *inter vivos* trust, a durable power of attorney, an advance medical directive, burial instructions, and an integrated 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.

³⁰⁰ James, *supra* note 19.

³⁰¹ *Id.*

