GROWING OLD TOGETHER: ESTATE PLANNING CONCERNS FOR THE AGING SAME-SEX COUPLE

Aimee Bouchard

Kim Zadworny

Follow this and additional works at: http://digitalcommons.law.wne.edu/lawreview

Recommended Citation
Few people look forward to their own deaths. However, looking forward is exactly what people should do. Estate planning, stripped to its essence, is simply a practicality for nearly everyone; it is a mechanism for setting up the most efficient and economical way to provide for the inevitable. This is especially true for gay, lesbian, bisexual, or transgender (GLBT) individuals. Members of the GLBT community face particular planning issues not only with regard to the dissemination of their property, but also the recognition of their wishes. The current landscape of equal rights, though vastly more tolerant than yesteryear, sorely needs further reform. A lack of planning inevitably results in expense, complication, and delay. An intestate GLBT person’s estate would pass according to state intestacy laws, generally to a legal spouse and then to blood relatives, no matter how distant. Careful attention is necessary to protect a GLBT person’s life partner and family.

This Article attempts to address estate planning concerns of the small or moderate estate—those consisting of less than federally taxable net value,\(^1\) few assets other than cash, an automobile, or a rented or owned home. This Article focuses on the intent of individuals to designate their property for a loved one and practical solutions that are currently available to allow that to happen. This Article also suggests methods by which the process of future transfer can be more efficiently and simply addressed.

GLBT persons have long enjoyed nontraditional structuring of family and friends, sometimes with encompassing and supportive

---

\(^*\) The Law Offices of Kim E. Zadworny, LLC, is a practice focused on what Kim E. Zadworny calls “Life Law,” which is designed to provide legal guidance and counsel through major life events involving marriage, children, buying and selling a home, directive planning for the future, and estate administration.

biological families, other times through personally established and chosen units that constitute family. There are a myriad of relationship options open to same-sex couples, including marriage, civil union, domestic partnership recognition, and traditional cohabitation. Consider the following case studies.

A. **Case Study One**

J came to us with a dilemma. His partner of thirteen years, D, had passed away. They shared everything—their lives, their home, and their business. D had executed a will bequeathing the entire estate to J, but it named another person as the executor. While the will was being probated, J went into significant debt. The property that he shared with D while D was alive—the property that would be J’s once the probate was complete—was currently unavailable for J to pay his bills. Further, J could not continue the business they shared while the estate was in probate.

Although they had lived in Massachusetts, J and D never married. Without marriage, J lacked standing to make a claim for funds from the estate to pay for his necessities as the spouse of the decedent. The executor was less than sympathetic, with distinct undertones of homophobia in his spoken and written dealings with J. Without a clear estate plan, D’s intentions for J were not realized and J dealt with unnecessary difficulties.

B. **Case Study Two**

T and L, both in their forties, were weeks away from their wedding when L passed away unexpectedly. L left no will, so her estate passed by the laws of intestacy.\(^2\) Had T and L been married, T would have received all of L’s estate.\(^3\) However, because they had

---

2. Intestacy is defined as “the state or condition of a person’s having died without a valid will.” *Black’s Law Dictionary* 840 (8th ed. 2004). Each state has intestacy statutes that distribute property if the decedent leaves no will. Intestacy statutes try to mimic traditional expectations of what the decedent would have done had they created a will, and so usually distribute property to immediate family, starting with the surviving spouse, children, and parents. See *Mass. Gen. Laws* ch. 190, §§ 1-8 (2006) for Massachusetts’s intestate distribution.


   If the deceased leaves kindred and no issue, and it appears on determination by the probate court, as hereinafter provided, that the whole estate does not exceed two hundred thousand dollars in value, the surviving husband or wife shall take the whole thereof; otherwise such survivor shall take two hundred thousand dollars and one half of the remaining personal and one half of the remaining real property.

not yet been married there was no legal relationship and T had no right to L's estate. Some, but, unfortunately, not all of L's family were supportive. There were others in L's family who did not approve of L and T's same-sex relationship and believed that T should receive nothing from L's estate.

What if your partner gets in a car accident and is incapacitated, or if your partner begins showing signs of Alzheimer's? What if your partner's biological family does not approve of the relationship? How can same-sex partners protect themselves as they age, and protect the surviving spouse when they pass?

This Article will examine the different mechanisms that same-sex couples can use to protect each other as they age, covering a range of topics from property issues to decision-making power in end-of-life decisions. Part I will give a brief history of the evolution of the recognition of same-sex relationships and what rights these relationship structures may provide for estate planning purposes. Part II will take a closer look at same-sex marriage in Massachusetts and the impact marriage has on estate planning considerations for couples who choose to marry and couples who do not. Part III will examine what other mechanisms are available for same-sex couples to protect their jointly held assets and transfer property without going through probate. Part IV will discuss the monetary issues that aging same-sex couples should consider when creating their estate plan, and Part V will examine what nonmonetary concerns same-sex couples should include in a well-rounded estate plan. Finally, in the Conclusion, this Article will briefly examine what difference these considerations could have made to the couples in our case studies. The Conclusion answers the question: What steps could J or T have taken to avoid the complications they faced at the death of their partners?

I. LEGAL RECOGNITION OF SAME-SEX RELATIONSHIPS

The number of visible same-sex, long-term relationships has increased dramatically over the past few decades. In fact, the incidence of same-sex couples reporting in the most recent census increased over three hundred percent from the previous census, ten years before. It is widely believed that even this number may un-

---

4. These legal relationship structures include reciprocal beneficiaries, civil unions, domestic partnerships, and marriage.

derestimate the actual number of same-sex couples involved in long-term relationships.\textsuperscript{6} Given the number of individuals unwilling to report to the federal government that they are involved in a same-sex relationship, perhaps due to the federal government's lack of protection from discrimination,\textsuperscript{7} it is likely that the actual number of same-sex relationships in the United States is much higher.\textsuperscript{8}

There is some limited opportunity for same-sex couples to enter into legally recognized relationships. In 1993, Hawaii became the first state to attempt to grant the right to marry to same-sex couples. In \textit{Baehr v. Lewin}, the petitioners challenged the constitutionality of Hawaii's denial of same-sex marriages.\textsuperscript{9} The court examined Hawaii Revised Statute, section 572-1, which defines the requisites for a valid marriage contract and restricted the marital relationship to one between a man and a woman. It found that Hawaii's statute was subject to strict scrutiny under the equal protection clause of the Hawaii Constitution because the statute employed sex-based discrimination in creating its marriage laws.\textsuperscript{10} The Hawaii Supreme Court held:

\begin{quote}
[I]n accordance with the "strict scrutiny" standard, the burden will rest on Lewin [the director of the Hawaii Board of Health] to overcome the presumption that [Hawaii's marriage statute] is unconstitutional by demonstrating that it furthers compelling state interests and is narrowly drawn to avoid unnecessary abridgments of constitutional rights.\textsuperscript{11}
\end{quote}

The case was remanded to the Hawaii Circuit Court, which held that the state had not met its burden of proof. By the time the case reached the Hawaii Supreme Court once again, however, the plain-

\textsuperscript{6} Gesing, \textit{supra} note 5, at 845.

\textsuperscript{7} See generally \textit{Boy Scouts of Am. v. Dale}, 530 U.S. 640, 644 (2000) (holding that the Boy Scouts, as a private organization, could refuse to allow homosexuals membership); \textit{Romer v. Evans}, 517 U.S. 620, 625 (1996) (denying homosexuals classification, and therefore protection, as a "suspect" class).


\textsuperscript{10} \textit{Id.} at 64.

\textsuperscript{11} \textit{Id.} at 68.
tiff's suit had become moot, because the Hawaii legislature had submitted to the voters a constitutional amendment which granted the legislature "the power to reserve marriage to opposite-sex couples." The amendment was ratified in November of 1998.

Despite the constitutional amendment banning gay marriage, the Hawaii legislature did attempt to provide some protections to same-sex relationships. The Hawaii legislature passed the Hawaii Reciprocal Beneficiaries Act, which granted some of the legal rights of marriage to couples who registered as "reciprocal beneficiaries." These protections included hospital visitation and inheritance rights.

Vermont was the first state to offer a comparable legal alternative to marriage by what it termed a civil union. The civil union was developed by the Vermont legislature after the Vermont Supreme Court held that, under the common benefits clause of the Vermont Constitution, the state was constitutionally required to extend all the benefits of a heterosexual marriage to same-sex couples. Vermont then began issuing civil unions in 2000. When Vermont extended the status of a civil union to same-sex couples, it granted them all the same legal rights as provided by marriage within the state, including the "presumption of parenthood" to any

13. Id. (quoting HAW. CONST. art. I, § 23).
14. Id.
15. HAW. REV. STAT. § 572C-1 (1997); Glidden, supra note 12, at 488.
18. VT. CONST. art. VII, ch. 1 ("[G]overnment is, or ought to be, instituted for the common benefit, protection, and security of the people, nation, or community, and not for the particular emolument or advantage of any single person, family, or set of persons, who are a part only of that community."); Baker v. State, 744 A.2d 864, 886 (Vt. 1999) ("[W]e find a constitutional obligation to extend to plaintiffs the common benefit, protection, and security that Vermont law provides opposite-sex married couples."); Grace Ganz Blumberg, Legal Recognition of Same-Sex Conjugal Relationships: The 2003 California Domestic Partner Rights and Responsibilities Act in a Comparative Civil Rights and Family Law Perspective, 51 UCLA L. Rev. 1555, 1556-59 (2004) (discussing how Vermont's civil union legislation was compelled by the courts and comparing it to California's domestic partnership legislation, which was completely legislated).
child born during the course of a marriage.\textsuperscript{20} Vermont's civil union designation also specifically provides that a party to a civil union will be recognized as "next of kin."\textsuperscript{21} The law also states that a party to a civil union will receive the benefits of marriage associated with intestate succession and waiver of wills.\textsuperscript{22} Although civil unions provide state benefits similar to those provided to married couples, those rights do not transfer if the couple moves out of state and the rights are not recognized federally.\textsuperscript{23} Civil unions for same-

\textsuperscript{20} VT. STAT. ANN. tit. 15, § 1204(f) (2008) ("The rights of parties to a civil union, with respect to a child of whom either becomes the natural parent during the term of the civil union, shall be the same as those of a married couple, with respect to a child of whom either spouse becomes the natural parent during the marriage."); see also Mark Strasser, \textit{When Is a Parent Not a Parent? On DOMA, Civil Unions, and Presumptions of Parenthood}, 23 CARDOZO L. REV. 299, 299 (2001). The presumption of parenthood means that the husband is "rebuttably presumed to be the father of a child born into the marriage." \textit{Id.} This means that in Vermont, a same-sex partner also receives the benefits of this presumption, meaning that "the couple will not have to spend time, money, and energy in establishing the partner's parental rights." \textit{Id.} A child should have the right to make medical decisions for an elderly same-sex coparent and the ability to inherit if that parent did not create a will, because the child should be recognized as kin.

\textsuperscript{21} VT. STAT. ANN. tit. 15, § 1204(b) ("A party to a civil union shall be included in any definition or use of the terms 'spouse,' 'family,' 'immediate family,' 'dependent,' 'next of kin,' and other terms that denote the spousal relationship, as those terms are used throughout the law.").

\textsuperscript{22} \textit{Id.} § 1204(e)(1) ("[L]aws relating to title, tenure, descent and distribution, intestate succession, waiver of will, survivorship, or other incidents of the acquisition, ownership, or transfer, inter vivos or at death, of real or personal property, including eligibility to hold real and personal property as tenants by the entirety (parties to a civil union meet the common law unity of person qualification for purposes of a tenancy by the entirety) [also apply to parties in a civil union."]").

\textsuperscript{23} Barbara J. Cox, \textit{But Why Not Marriage: An Essay on Vermont's Civil Unions Law, Same-Sex Marriage, and Separate but (Un)Equal}, 25 VT. L. REV. 113, 140 (2000). However states that also have civil union laws may recognize a civil union performed in a different state or a different country. For example, Connecticut's law states:

All civil unions in which one or both parties are citizens of this state, celebrated in a foreign country, shall be valid, provided: (1) Each party would have legal capacity to contract such civil union in this state and the civil union is celebrated in conformity with the law of that country; or (2) the civil union is celebrated in the presence of the ambassador or minister to that country from the United States or in the presence of a consular officer of the United States accredited to such country, at a place within his or her consular jurisdiction, by any ordained or licensed member of the clergy engaged in the work of the ministry in any state of the United States or in any foreign country.

sex couples are now recognized in Connecticut,\textsuperscript{24} New Jersey,\textsuperscript{25} and, starting in 2008, New Hampshire.\textsuperscript{26}

California has also made strides in granting same-sex couples some of the benefits of marriage.\textsuperscript{27} In 1999, the California legislature began working on the California Domestic Partner Rights and Responsibilities Act of 2003.\textsuperscript{28} Unlike the legislation in Hawaii and Vermont, "[t]he Act is exceptional in the United States in that it is the first enactment of its type that is entirely legislative in origin."\textsuperscript{29} This Act was apparently borne out of the good nature of the legislature.\textsuperscript{30} It provides many of the same legal benefits of marriage and was inspired by an increasing trend of employers offering same-sex domestic partners the same benefits packages offered to heterosexual spouses.\textsuperscript{31} Unlike the statutes of other states, where legal protections were extended to same-sex couples only after the courts compelled the states to do so, the California Domestic Partner Rights and Responsibilities Act reflects a changing society as well.

\textsuperscript{24} See generally Conn. Gen. Stat. § 46b-38nn ("Parties to a civil union shall have all the same benefits, protections and responsibilities under law, whether derived from the general statutes, administrative regulations or court rules, policy, common law or any other source of civil law, as are granted to spouses in a marriage, which is defined as the union of one man and one woman."); Gay & Lesbian Advocates & Defenders, Connecticut Civil Unions (2007), available at http://www.glad.org/marriage/CivilUnionCT.pdf.

\textsuperscript{25} N.J. Stat. Ann. § 37:1-28(f) (West 2007) ("The Legislature has chosen to establish civil unions by amending the current marriage statute to include same-sex couples. In doing so, the Legislature is continuing its longstanding history of insuring equality under the laws for all New Jersey citizens by providing same-sex couples with the same rights and benefits as heterosexual couples who choose to marry."); see also Lewis v. Harris, 908 A.2d 196, 224 (N.J. 2006) (holding that the benefits of marriage could not be denied to same-sex couples and sparking the civil union statute).


\textsuperscript{27} See Cal. Fam. Code § 297.5(a) (West 2004 & Supp. 2008) ("Registered domestic partners shall have the same rights, protections, and benefits, and shall be subject to the same responsibilities, obligations, and duties under law, whether they derive from statutes, administrative regulations, court rules, government policies, common law, or any other provisions or sources of law, as are granted to and imposed upon spouses.").

\textsuperscript{28} Blumberg, supra note 18, at 1561.

\textsuperscript{29} Id. at 1556.

\textsuperscript{30} Id. at 1565.

\textsuperscript{31} Id. at 1564.
as a legislative attempt to respond to those changes.32 The community was ready for this change: "The sustained effort to achieve a functional equivalent of marriage focused community attention on that goal for a period of years in a way that litigation would not have done."33

The California Domestic Partner Rights and Responsibilities Act states that same-sex domestic partners will be treated like heterosexual married partners in the event of the death of one spouse.34 The Act states:

A surviving registered domestic partner, following the death of the other partner, shall have the same rights, protections, and benefits, and shall be subject to the same responsibilities, obligations, and duties under law, whether they derive from statutes, administrative regulations, court rules, government policies, common law, or any other provisions or sources of law, as are granted to and imposed upon a widow or a widower.35

Maine also provides for domestic partnership recognition. The Maine Probate Code recognizes and provides for "domestic partners."36 In addition, the Maine Probate Code provides that surviving registered domestic partners are "heirs."37 Starting in 2008, Oregon will also have a comprehensive domestic partnership registration.38

For estate planning purposes, these different relationship substitutes do provide same-sex couples some protections. For example, a partner in a civil union will be considered next-of-kin.39 Depending on the laws of the state, this means that a surviving partner may be entitled to support from an executor while an estate is in probate, that he or she may be entitled to an elective spousal share should the partner decide to elect against a will, and, if his or

32. Id. at 1565.
33. Id. at 1566.
35. Id.
36. Me. Rev. Stat. Ann. tit. 18-A, § 1-201(10-A) (Supp. 2007) ("'Domestic partner' means one of 2 unmarried adults who are domiciled together under long-term arrangements that evidence a commitment to remain responsible indefinitely for each other's welfare.").
37. Id. § 1-201(17) ("'Heirs' means those persons, including the surviving spouse or surviving registered domestic partner, who are entitled under the statutes of intestate succession to the property of a decedent.").
38. See New Hampshire Civil Unions, supra note 26, at 1 n.2.
her partner dies intestate, that the surviving partner will be granted the deceased partner's estate before children or parents.

II. Effect of Marriage

One circumstance that automatically triggers legal recognition of certain death benefits is marriage. A huge number of legal presumptions—from tax deductions and exclusions to automatic inheritance rights—are raised when one is married. These presumptions, however, are not so simple for same-sex couples whose marriages, or equivalent arrangements, do not have federal recognition. This leaves an inability to fully protect oneself prospectively.

In November of 2003, the Massachusetts Supreme Judicial Court announced its landmark decision in *Goodridge v. Department of Public Health*, where it held that the denial of same-sex marriage violated the Massachusetts Constitution. Chief Justice Marshall began her opinion by stating:

> Marriage is a vital social institution. The exclusive commitment of two individuals to each other nurtures love and mutual support; it brings stability to our society. For those who choose to marry, and for their children, marriage provides an abundance of legal, financial, and social benefits... The Massachusetts Constitution affirms the dignity and equality of all individuals. It forbids the creation of second-class citizens. In reaching our conclusion, we have given full deference to the arguments made by the Commonwealth. But it has failed to identify any constitutionally adequate reason for denying civil marriage to same-sex couples.

The court then gave the legislature 180 days to remedy the constitutional defect. In the interim, the legislature went back to the court for an opinion on whether granting civil unions, the solution extended in Vermont, would be a sufficient compromise. The court declared that civil unions were inadequate, with a broad and powerful statement that "[t]he history of our nation has demonstrated that separate is seldom, if ever, equal."
A. Protections for Married Couples

Partners who are married have a range of laws that help protect them and their assets in the event of the death of one partner. One such statute, which would have helped our client J, is an allowance to the surviving partner for necessaries to the surviving spouse. In Massachusetts, a surviving spouse and children can be granted access to enough personal property and real estate to support them while the estate is in probate.\(^46\)

Another inheritance benefit of marriage is the spousal elective share.\(^47\) Should one person in the couple fail to adequately provide for the other—for example, if a partner neglects to make a new will that recognizes the relationship—the surviving spouse can choose to take a share of the estate as defined by statute, rather than following the will.\(^48\) In Massachusetts, for example, a surviving spouse may waive the will and take one-third of the decedent’s personal property and one-third of the real property if the decedent had children.\(^49\) If the decedent did not have children, but had other kin-

---


Such parts of the personal property of a deceased person as the probate court, having regard to all the circumstances of the case, may allow as necessaries to the surviving spouse and for the family under the care of such spouse or if there is no surviving spouse, to the minor children of the deceased, not exceeding one hundred dollars to any child, and also such provisions and other articles as are necessary for the reasonable sustenance of the family, and the use of the house of the deceased and of the furniture therein for six months next succeeding the death, shall not be taken as assets for the payment of debts, legacies or charges of administration. After exhausting the personal property, real property may be sold or mortgaged to provide the amount of allowance decreed, in the same manner as it is sold or mortgaged for the payment of debts, if a decree authorizing such sale or mortgage is made, upon the petition of any party in interest, within one year after the approval of the bond of the executor or administrator.


\(^{48}\) See Ronald J. Scalise, Jr., Honor Thy Father and Mother?: How Intestacy Law Goes Too Far in Protecting Parents, 37 Seton Hall L. Rev. 171, 196 (2006) (“[A]ll non-community property states provide that spouses have duties toward each other, even after death. For instance, even if all the assets of the marriage are titled in the name of one spouse, that spouse cannot effectively disinherit his surviving spouse by leaving his entire estate to his secret lover, a needy parent, a sibling, or a charity. In such cases, the surviving spouse can ‘elect’ against the will and receive a designated share or fraction of the deceased spouse’s estate, the provisions of the will notwithstanding to the contrary. The deceased spouse cannot unilaterally avoid his ‘duty’ of support owed to his surviving spouse.” (citation omitted)).

\(^{49}\) The elective share in Massachusetts depends on the value of the estate and the status of the surviving spouse, decedents, or other kin. Mass. Gen. Laws ch. 191, § 15. If a deceased leaves no other family, a spouse is entitled to $25,000 plus half of all
dred, then the surviving spouse may take twenty-five thousand dollars and one-half of the remaining personal and real property.\textsuperscript{50}

Another benefit of marriage is that the same-sex partner will be recognized by the intestacy statutes. Intestacy statutes attempt to distribute a decedent's estate in the manner that the state believes would have been the decedent's intent had they written a will.\textsuperscript{51} In Massachusetts, if the decedent leaves children, the surviving spouse receives half of the personal property and half of the real property.\textsuperscript{52} The remainder goes to the children in equal shares.\textsuperscript{53} If the decedent did not have children, but does have other kindred, then the surviving spouse receives two hundred thousand dollars and then half of the remaining personal and real property.\textsuperscript{54} The remainder is then granted to the decedent's parents.\textsuperscript{55} If the decedent's parents are not alive, then the remainder goes to the decedent's brothers and sisters.\textsuperscript{56} Without a legally recognized relationship or a will, a surviving same-sex partner may not have any rights to the property that he or she may have shared with the decedent.

However, the ability to get married in Massachusetts is not a substitute for proper estate planning. If a couple moves out of Massachusetts there is no guarantee that their relationship or their rights will be recognized out of state. In 1996, President Bill Clinton signed the Defense of Marriage Act (DOMA) into law.\textsuperscript{57} This

\begin{footnotesize}
\textsuperscript{50} See, e.g., MASS. GEN. LAWS ch. 191, § 15.
\textsuperscript{51} See supra note 2.
\textsuperscript{52} MASS. GEN. LAWS ch. 190, § 1 (2006).
\textsuperscript{53} Id. § 3.
\textsuperscript{54} Id. § 1.
\textsuperscript{55} Id. § 3.
\textsuperscript{56} Id.
\end{footnotesize}
Act consists of two parts. First, it provides a federal definition of marriage, a task normally left to the states, which excludes same-sex unions. It states:

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 a wife.

The second part of DOMA states:

No State, territory, or possession of the United States, or Indian tribe, shall be required to give effect to any public act, record, or judicial proceeding of any other State, territory, possession, or tribe respecting a relationship between persons of the same sex that is treated as a marriage under the laws of such other State, territory, possession, or tribe, or a right or claim arising from such relationship.

This Act was propelled by a homophobic backlash in response to Hawaii’s attempt to grant same-sex marriages. Since DOMA was passed, forty states have passed their own versions of the Act. Due to the enactment of DOMA, it is uncertain whether marriages in Massachusetts will have any effect if the couple moves out of Massachusetts. It also means that married same-sex couples will be denied the federal rights and obligations granted to heterosexual married couples.

When DOMA was written, no state had yet granted marriage licenses to same-sex couples. Now that same-sex marriages are le-

60. 28 U.S.C. § 1738C.
61. Litigating the Defense of Marriage Act, supra note 57, at 2684-85.
62. Gomes, supra note 8, at 14.
64. Although, there is an argument to be made that DOMA violates the Full Faith and Credit Clause of the Constitution. Litigating the Defense of Marriage Act, supra note 57, at 2688.
gal in Massachusetts, DOMA will likely be challenged as unconstitutional.66

B. Considerations for Unmarried Couples

Not only is marriage an ineffective substitute for proper estate planning; but, in addition, not every couple decides to get married.67 There are many reasons why people may choose to remain unmarried.68 A website dedicated to the alternatives to marriage states: “According to the 2000 census, there are currently about eleven million people living with an unmarried partner in the United States. This includes both same-sex and different-sex couples.”69 In these situations it is even more imperative that the individual create an estate plan that ensures that his or her intent will be followed.

When a couple remains unmarried and a partner dies without leaving a will, the intestacy provisions of state probate law come into play.70 Intestacy provisions attempt to substitute an estate plan that the testator would have wanted, yet the statutory provisions often fall short of what the decedent would have wished.71 In the case of same-sex couples, who often face intolerance by their families, this is especially a concern because intestacy laws primarily direct inheritance to biological family members by a matter of relationship hierarchy, effectively cutting a partner out of any share of the decedent’s estate. Rather than going to the partner, “[i]n the absence of descendants and a surviving spouse, most states list par-

66. Litigating the Defense of Marriage Act, supra note 57. DOMA will likely be challenged as both violating the Equal Protection Clause, because it singles out homosexuals as a class and this classification was motivated by “animus” towards the group, and the Due Process Clause, because marriage is a “fundamental” right. See generally id.


70. Jennifer Tulin McGrath, The Ethical Responsibilities of Estate Planning Attorneys in the Representation of Non-Traditional Couples, 27 SEATTLE U. L. REV. 75, 83-84 (2003) (“If a non-traditional couple does not engage in any estate planning, the survivor of them will generally have no claim on any of the decedent’s probate assets. Therefore, non-traditional couples especially must engage in appropriate estate planning in order to ensure that their wishes are respected and carried out.”).

ents as next in line to receive an intestate child's estate.'72 Despite the inadequacies of intestacy, a "number of studies suggest that the majority of the population dies intestate."73 There are, however, various means available to unmarried couples to protect one another.

III. OTHER LEGAL STRUCTURES TO PROTECT ASSETS AND RELATIONSHIPS

Same-sex partners face greater challenges than many heterosexual couples in ensuring that their partners and families are protected after their deaths. Specific considerations must be addressed that will benefit couples whether married or unmarried, heterosexual or homosexual. Some of these considerations are addressed in this Part. The most important planning documents that one can give oneself—and often one's survivors—are a will, a health care proxy or durable power of attorney, and a declaration of homestead.

A. The Will

The first estate planning mechanism that typically comes to mind is a will. A will is "[a] document by which a person directs his or her estate to be distributed upon death."74 In a will, a partner can distribute assets to the other partner. However, wills are subject to challenges.75 If the family of the decedent does not respect the same-sex relationship, there may be an attempt to invalidate a will that distributes property to the surviving partner. Wills can be challenged in several ways, including lack of capacity, undue influence, fraud, or duress.76 In order to help prevent a successful challenge to a will, there are some precautionary steps that a couple can take when drafting their wills.

First, a will is the seminal documentation of a decedent's wishes and intent.77 All possible respect is granted to the provisions of a will and every effort will be made by a court to interpret

72. Scalise, supra note 48, at 186.
73. Id. at 201.
74. BLACK'S LAW DICTIONARY, supra note 2, at 1628.
75. See McGrath, supra note 70, at 93 ("Given the threat of post-mortem challenges to the validity of the document together with privacy concerns, wills alone are often not the most appropriate estate planning vehicle for non-traditional couples.").
77. BLACK'S LAW DICTIONARY, supra note 2, at 1628.
the will according to the intent of the testator. Partners should be careful to clearly spell out the reasons for their desired distribution of their estate. If there is a clear explanation and desire expressed by the decedent it may be easier for the decedent’s family to accept the will as it is written.

Second, if anticipating an objection or challenge to the will, a testator should include a specific provision that directs the court to negate any bequest to the challenger. For this provision to be effective, the gift to the suspected challenger must be valuable enough that the challenger would not risk losing it.

Another way to protect one’s intended beneficiaries is to keep old wills when updating an estate plan. Rather than destroying an old will, specifically designate it as superseded by the current will. If the current will is invalidated, an argument may be made that the previous one should take its place. This practice also shows a pattern of a longstanding relationship, which could make it more difficult for someone to challenge the will’s validity on the basis of undue influence.

B. Cohabitation Agreements

Another option that may protect same-sex partners is a cohabitation agreement. A cohabitation agreement is a contract entered into by parties who are living together that expresses their rights and obligations to each other and to their property. These agreements are generally enforceable so long as they are not based on the sexual relationship and conform to case law more familiarly addressing palimony. In these agreements, “unmarried couples gen-

---

79. This provision is called an “in terorem” clause. Cukier & Kolz, supra note 76, at 210.
80. Id.
81. Id. at 204.
82. Id.
84. Palimony is defined as “[a] court-ordered allowance paid by one member to the other of a couple that, though unmarried, formerly cohabitated.” Black’s Law Dictionary 1134 (7th ed. 1999) [hereinafter Black’s Law Dictionary (7th ed.)]; see Marvin v. Marvin, 557 P.2d 106, 116 (Cal. 1976) (“[A]dults who voluntarily live together and engage in sexual relations are nonetheless as competent as any other persons to contract respecting their earnings and property rights. Of course, they cannot lawfully contract to pay for the performance of sexual services, for such a contract is, in essence, an agreement for prostitution and unlawful for that reason. But they may agree to pool their earnings and to hold all property acquired during the relationship in accord with
erally have the right to create whatever kind of living together contracts they want relating to financial and property concerns."85 The couple can agree to live together and share their finances, and to continue to support each other should the relationship dissolve.86 Specific care should be taken to frame the relationship itself as a contract, similar in nature to a business arrangement, to comply with the prohibition against contracting for sexual reciprocity. Indeed, a business arrangement may be appealing to same-sex couples.

C. LLC or LLP

Another option that is available to same-sex couples to protect their joint assets is the creation of a limited liability partnership (LLP) or a limited liability company (LLC).87 By setting up an LLC, the same-sex couple can share property as joint owners of a business. The LLC can also be a very effective method of transferring property from one party to the other.

85. IHARA, WARNER & HERZT, supra note 84, at 2/5.
87. As Elizabeth A. Pope stated:

An LLC can be a great arrangement for an unmarried couple with many assets and various investments. The liability that each party has to the other can be formally structured. If unmarried couples are unable to secure asset protection under Illinois family law statutes, and wish to form something other than a contract, is it appropriate that a relationship between an unmarried couple or same sex relationship be recognized by creating limited liability companies? Does an LLC created by people who are not married create a legal “entity” that could buy property, provide health insurance to its members, obtain credit cards, serve as the couple’s consulting company, or lease a car? The answer is yes!

Another advantage to the LLC is that it can be used to protect more than two parties. In this case, the LLC can be used to transfer assets from same-sex partners to their children, regardless of biological ties, providing protection and stability to the entire family.88

D. Joint Owners

Same-sex couples may also manage their property by holding it as joint tenants with right of survivorship. Joint tenancy has significant advantages, including the ability to transfer property to the survivor immediately after the death of the decedent without the need for probate.89

It is important that partners spell out in their wills the intention that joint property shall pass automatically to the surviving partner. By taking this precaution the partners can avoid the argument from surviving family members that the account or property was only intended to be joint property for the convenience of the decedent.90

It is also important to be aware of future consequences of the joint tenancy. If both parties contributed to the property, but did not maintain careful records documenting the contributions, the entire value of the property will be included in the estate of the first to die91 or considered for certain benefit qualifications.92 This will result in tax assessment on the full amount of the property or consideration of its full valuation in asset counting. To protect against

88. Larobina, supra note 87 ("The generation transferring the wealth (the parents) forms an LLC, making themselves both managers and members. The generation receiving the wealth (the children) are made members of the company. Initially, the parents hold all of the membership interest in the company along with the assets it represents. Over time, the membership interest is gifted to the children, within allowable gift tax amounts, and the parents retain the control of the company and its assets as the managers. LLCs can be structured to allow flexibility to accommodate income distribution issues and restrictions on transfers of interests.").

89. As stated by Jennifer Tulin McGrath:
Bank and investment accounts and real property may be owned jointly with rights of survivorship. Some non-traditional couples embrace joint tenancy as a symbol of their commitment to one another. However, joint tenancy with rights of survivorship has other more practical advantages. Joint tenancy provides an asset transfer function because the surviving member of a non-traditional couple enjoys immediate ownership of the account or real property upon the decedent's death. This transfer occurs outside of the decedent's will (if any) and outside of the probate court. In addition, a joint ownership arrangement is often free from attack by heirs-at-law or other estranged family members claiming a right to the decedent's assets.

McGrath, supra note 70, at 87-88 (citations omitted).

90. Cukier & Koltz, supra note 76, at 209.

91. Id.; see also McGrath, supra note 70, at 97.

92. These benefits include MassHealth, disability, etc.
this, couples must maintain detailed records of the separate contributions.

E. Adult Adoption

An adult may adopt another adult.93 If one partner in a same-sex relationship adopts the other, the adopted partner will gain all the rights a child has to their parent, including being considered the next-of-kin.

However, if a couple chooses adult adoption, they will not be able to get legally married should this option become available.94 Therefore, a couple should think seriously about the potential impact of an adoption, and how it might affect later choices.95

F. Trusts

Trusts can help a same-sex couple transfer assets and protect the surviving spouse and children. Trusts have some advantages over a will. As one scholar points out,

[A] trust is less contestable than a will. Unlike a will, which must be filed with the probate court, there is no public filing requirement for a trust. There is no corresponding notification of heirs-at-law nor filing of any sort of public inventory of the trust's assets. As a result, the nature and extent of the assets as well as the dispositive terms of the instrument remain private.96

With a trust, the settlor can transfer assets to multiple beneficiaries and direct how they should receive those assets. The settlor can also establish a trust so that its assets do not go through probate, but instead pass instantly to the surviving partner or family.

93. See, e.g., MASS. GEN. LAWS ch. 210, § 1 (2006) ("A person of full age may petition the probate court in the county where he resides for leave to adopt as his child another person younger than himself, unless such other person is his or her wife or husband, or brother, sister, uncle or aunt, of the whole or half blood.").


95. Further, adult adoptions may not always work as intended and have the potential to cause significant complications. See, e.g., Associated Press, Adult Adoption Case Goes to Court, BOSTON GLOBE, Jan. 15, 2007 (discussing a case where an ex-partner may have a right to a family trust, even after separating from her partner and receiving funds intended to release the family from any obligations, where her ex-partner legally adopted her as an adult child), available at http://www.boston.com/news/local/articles/2007/01/15/adult_adoption_case_goes_to_court.

96. McGrath, supra note 70, at 93 (citations omitted).
IV. Monetary Issues to Consider in Estate Planning

A. Taxes

Marriage, or one of its substitutes, can help a couple avoid estate taxes at the state level. However, if an estate is large enough, federal estate taxes are an important estate planning consideration. Since no same-sex legal relationship will be recognized on the federal level, same-sex couples may not use the unlimited marital deduction, a marital tax benefit that many substantial estate plans heavily rely upon.

If an estate is large enough, tax planning will be an important factor when crafting the estate plan. An estate worth more than two million dollars will be subject to a federal estate tax, and may also be subject to state estate tax. Traditional married couples have an advantage over same-sex couples when structuring their estate plans to avoid taxes because, “[t]raditional couples may utilize the unified credit and unlimited marital deduction to postpone any estate tax until the death of the surviving spouse.” Any transfer from one same-sex partner to the other at death will be subject to tax. If the couple is married in Massachusetts, the partners can use the marital deduction for state estate tax purposes but will not get any federal benefit.

Same-sex couples also need to be cautious of the gift tax, since same-sex relationships are not recognized on the federal level. The annual exclusion for the gift tax is twelve thousand dollars. Any transfer of wealth between partners that exceeds this amount

97. This section will only give a brief examination of tax implications, as the focus of this Article is on the protections necessary for small to moderate estates. There are many other detailed articles on the importance of planning for the estate tax.


99. See supra notes 57-66 and accompanying text.

100. McGrath, supra note 70, at 90.

101. The threshold value will go up to $3.5 million in 2009 and the estate tax is scheduled to be repealed in 2010 and brought back again in 2011. However, scholars believe that Congress will change this repeal before it goes into effect. See DEP’T OF THE TREASURY, INTERNAL REVENUE SERV., INTRODUCTION TO ESTATE AND GIFT TAXES (2007) [hereinafter INTRODUCTION TO ESTATE AND GIFT TAXES], available at http://www.irs.gov/pub/irs-pdf/p950.pdf.


103. McGrath, supra note 70, at 90.

104. Cukier & Kolz, supra note 76, at 199.


106. See INTRODUCTION TO ESTATE AND GIFT TAXES, supra note 101, at 6 (stating that the annual exclusion is twelve thousand dollars per person, per year).
will have gift tax implications.\textsuperscript{107} For example, if one partner transfers ownership in the couple’s home to the other partner, the transaction will have federal gift tax implications; whereas, if the couple was a heterosexual married couple, this transaction would be without any gift tax consequences.\textsuperscript{108}

One option for same-sex couples is to take advantage of the annual gift exclusion of twelve thousand dollars. A gift of twelve thousand dollars can be leveraged by purchasing life insurance for the other party, or by adding it to a trust.\textsuperscript{109} Taking out cross life insurance policies can be a good option for same-sex partners. However, in order to take out a life insurance policy on an individual, the purchaser must have an insurable interest in that person.\textsuperscript{110} Same-sex partners who do not have a legally recognized relationship may face difficulties when attempting to purchase life insurance. If the partners share property or a business, the argument that they have an insurable interest is clear, because they would suffer a financial loss should their partner pass away.

Another way same-sex couples may transfer assets is to take advantage of the exclusion from the gift tax for medical or educational bills. If one partner pays the school or medical bills of the other, these payments are not subject to the gift tax.\textsuperscript{111} This is one way that the partner with greater assets can protect, support, and transfer value to the other partner.

\textsuperscript{107} McGrath, \textit{supra} note 70, at 97-98. Jennifer Tulin McGrath notes that: Non-traditional couples must also be mindful of the gift tax implications of transfers made between them during lifetime. Unlike spouses, they are unable to freely transfer assets between themselves without generating tax consequences. Nevertheless, in the event one member of the non-traditional couple enjoys significantly more resources than the other, a program of annual exclusion gifting (gifts of smaller amounts which do not trigger a gift tax) may be appropriate. \textit{Id.} at 97 (citations omitted).


\textsuperscript{109} Cukier & Koltz, \textit{supra} note 76, at 199.

\textsuperscript{110} See Insurance.com, Frequently Asked Questions, Insurable Interest, http://www.insurance.com/FAQs/lifeFAQDetail.aspx/index/9 (last visited Feb. 4, 2008). An insurable interest means that the beneficiary would suffer a loss if the event insured against occurs. \textit{Id.} Without a legal relationship, it may be harder to prove to an insurance company that a same-sex partner would suffer a loss upon the death of his or her partner.

\textsuperscript{111} See Frequently Asked Questions on Gift Tax, \textit{supra} note 108.
B. *Real Property*

Naturally, the same-sex couple that owns real estate together can simply ensure that both partners hold an equal interest in the property. Tenancy options can further ensure that each partner passes his or her interest directly to the survivor or to a named beneficiary in a will.112 Married couples in Massachusetts are entitled to hold real estate as tenants by the entirety, in which both parties enjoy the entire estate and title passes to one by operation of law upon the death of the other.113 Tenancy by the entirety is based on the outdated notion that a husband and wife were one as recognized by the law.114 Neither partner can sell, mortgage, or lien the property without the authority of the other.115 However, this option is only available while married, and the property reverts to a tenancy in common upon divorce. Tenants in common each hold a separable interest in the property and each is able to sell, mortgage, or lien their own portion of the property.116 There is no automatic right of survivorship—each owner may leave his or her interest by will.117

Joint tenancy is a third way of holding property. It is somewhat of a hybrid in that the owners each hold a share in the property, each may encumber it, and ownership includes the right of survivorship.118 However, joint tenancy has additional requirements: all owners must have equal shares and must take the prop-

---

115. Id.
116. Black's Law Dictionary, *supra* note 2, at 1507 (defining a "tenant in common" as "one of two or more tenants who hold the same land by unity of possession but by separate and distinct titles, which each person having an equal right to possess the whole property but no right to survivorship").
118. The joint tenancy is described in Black's Law Dictionary as differing from a tenancy in common "because each joint tenant has a right of survivorship to the other's share. (In some states, this right must be clearly expressed in the conveyance—otherwise, the tenancy will be presumed to be a tenancy in common.)." Black's Law Dictionary, *supra* note 2, at 1505. Black's further describes tenancy by the entirety as "a joint tenancy that arises between husband and wife when a single instrument conveys realty to both of them but nothing is said in the deed or will about the character of their ownership. This type of tenancy exists in only a few states." Black's Law Dictionary (7th ed.), *supra* note 84, at 1477. A tenancy in common is described as tenancy by "two or more persons, in equal or unequal undivided shares, each person having an equal right to possess the whole property but no right of survivorship." Black's Law Dictionary, *supra* note 2, at 1506.
roperty at the same time.\textsuperscript{119} In other words, if one partner owns the property prior to beginning their relationship, the interest is not created at the same time and thus is not considered joint.\textsuperscript{120} There are other ways as well to ensure that the property not only becomes titled as desired but also remains protected for the surviving partner.

The general rule of thumb in Massachusetts is that mortgage loans are not assumable.\textsuperscript{121} Thus, it is important when financing a home, if it is practical, to be sure that both partners are obligors to the mortgage and not simply named on the deed. Insurance is the most straightforward avenue to paying off a mortgage loan in the event that the obligor partner passes. Another method is to hold the property in a trust, with the trust as the obligor under the mortgage and the nontitled partner as a named beneficiary of the trust, and additionally executing a will naming the trust as beneficiary. Thus, if the obligor partner dies, the title to the real estate passes to the trust, the trust is still able to maintain the mortgage loan without the surviving partner having to remortgage, and the surviving partner is able to remain in the home.

Partners should also take care to obtain a homeowner’s insurance policy that allows a specific rider granting coverage to a partner. If such insurance is not available, the nontitled partner should obtain renter’s insurance. Furthermore, a welcome trend in some states that makes the entire process of leaving real estate to a chosen recipient without undertaking the complexities of a trust or the hurdles of the probate process is transfer on death deeds.\textsuperscript{122}

\textsuperscript{119} Dukeminier & Krier, supra note 114, at 340.

\textsuperscript{120} See id. If a joint tenancy is initially created, by meeting these requirements, but is severed at a later time, the interest becomes a tenancy in common. Id.

\textsuperscript{121} McRae v. Pope, 42 N.E.2d 261, 265 (Mass. 1942) (“[I]n this Commonwealth, where land is conveyed subject to a mortgage, the grantee does not become bound by mere acceptance of the deed to pay the mortgage debt, but if the deed contains a stipulation that the land is subject to a mortgage which the grantee assumes and agrees to pay, a duty is imposed upon him by the acceptance of the deed, and the law implies a promise to perform his undertaking.”).

Currently, ten states have passed legislation that allows for transfer of real estate outside of probate by use of a beneficiary deed or a transfer on death deed. The statutes generally follow the Uniform Probate Code, but vary in complexity from state to state. The intent of all of these statutes, however, is the same: to allow owners of real property to directly pass title upon their death to a chosen beneficiary without the real property being subject to the usual probate proceedings.

Transfer on death deeds enable one to execute a deed during life, conveying all or a portion of a specific interest to a named grantee while, at the same time, expressly stating that the conveyance has no effect until the grantor’s death. This facilitates the avoidance of probating real property left under a will by immediately granting title to the beneficiary upon the grantor’s death, but reserving to the grantor all rights and title to the property during his or her life. The grantor is solely in control of the disposition of the property, including alternate conveyance, leasing, or encumbrance while living. The deed remains fully revocable during life. These deeds offer more flexibility in terms of formalities than a traditional trust arrangement, are significantly less expensive, and substantially speed up the process by which the beneficiary has access to the actual property and the benefits of it upon the grantor’s death.

The main limitation on such deeds is liens to the state department of health or human services for benefits or services provided the grantor during life. In some states, the grantor will not be eligible to receive benefits if he or she has executed a transfer on death deed; while in others, the deed is affected subject to the claim of


124. Burda, supra note 122; Clifford & Jordan, supra note 122; Kirtland & Seal, supra note 122.

125. E.g., Colo. Rev. Stat. Ann. § 15-15-403 (West 2005) (“No person who is an applicant for or recipient of medical assistance for which it would be permissible for the department of health care policy and financing to assert a claim pursuant to section 26-4-403 or 26-4-403.3 C.R.S., shall be entitled to such medical assistance if the person has in effect a beneficiary deed.”).
the benefit provider. 126 Still other states are less clear, including somewhat ambiguous language as to the rights of creditors. 127

C. Rented Property

There are a number of reasons that couples who do not own their homes should also plan for the future. In cases where a couple’s home is rented or leased, renter’s insurance is necessary. While landlords will generally hold insurance on the premises themselves, the contents and personal belongings of the tenants are not covered under that type of policy. To prevent against a surviving partner being asked to leave a rented home after the death of the other, both partners should ensure their names are on the lease and that the lease allows one to remain in the house without the other. Despite strides in the law, the treatment of same-sex couples has not changed since life partners were determined to be family members. 128 Naming both parties on the lease will protect against economic or orientation prejudices.

D. Homestead

One option that may benefit same-sex couples in Massachusetts is the Homestead Act. 129 The Homestead Act allows the owner of real estate to protect his or her primary residence. The Act states:

An estate of homestead to the extent of $500,000 in the land and buildings may be acquired pursuant to this chapter by an owner or owners of a home or one or all who rightfully possess the premise by lease or otherwise and who occupy or intend to occupy said home as a principal residence. Said estate shall be exempt from the laws of conveyance, descent, devise, attachment, levy on execution and sale for payment of debts or legacies . . . . 130

126. ARK. CODE ANN. § 20-76-436 (West 2001 & Supp. 2007) (providing that the property conveyed remains subject to claim against the grantor's estate in favor of the Department of Human Services); see also id. § 28-14-109(b) (stating that transfer on death provisions “do not limit the rights of creditors . . . against other beneficiaries and other transferees under other laws of this state”).
127. E.g., MONT. CODE ANN. § 72-6-111(2) (“This section does not limit rights of creditors under other laws of this state.”).
129. MASS. GEN. LAWS ch. 188, §§ 1-10 (2006).
130. Id. § 1.
In order to register a homestead, the couple should file a "Declaration of Homestead."\(^{131}\) This document is filed in the county where the property is located.\(^{132}\) If the parties are married, the homestead will continue for the surviving spouse.\(^{133}\) If the couple is not married, then a homestead can be used if the couple owns the property jointly.\(^{134}\) The Homestead Act is a valuable tool to protect the family's primary residence, as it helps to protect the family from losing their housing if they have significant debts.\(^{135}\)

E. **Automobiles**

While most states have provisions for the transfer of an automobile to a spouse or blood relative upon death,\(^{136}\) few allow such a transfer to a person of one's own choosing. Five states (Connecticut, California, Kansas, Missouri, and Ohio)\(^{137}\) have specific transfer on death statutes, allowing an owner to register in specific form his or her intent to title a vehicle in the name of another at their death. There is a trend across the country to enact similar laws. A recent example is Indiana, where the bill passed the full Senate on its second reading.\(^{138}\)

F. **Pensions and Employer Benefits**

Another monetary issue to consider is that same-sex couples should be sure to check what benefits their employer will offer on retirement and death. As one scholar illustrates, "[u]nlike traditional defined benefit annuities, which continue only for surviving spouses, a 401(k) or IRA account balance can be conveyed at death to the unmarried participant's (same-sex or heterosexual) domestic partner—or anyone else."\(^{139}\) Same-sex couples can designate their partner as a beneficiary on their various retirement savings devices.


\(^{132}\) Id.


\(^{134}\) Id. § 1.


\(^{138}\) Ind. Code § 29-1-8-1 (West 1999).

Under the Pension Protection Act of 2006 (PPA),140 inherited pension benefits could be rolled over to an IRA on a tax-free basis beginning in 2007.141 This change eliminated the need for partners to take a disbursement of funds and pay the full taxable amount as a penalized withdrawal. However, the employer needs to offer and specifically designate that such a rollover is allowable or the non-spousal rollover will not be available.142 The PPA specifically requires that plan amendments implementing the operational provisions be adopted before the end of 2009.

The PPA also facilitates new rules of withdrawal for hardship purposes, again allowing participants to withdraw funds to cover financial hardships incurred by a nonspouse if that person is designated as the participant’s beneficiary.143 This rule, though, does not apply to defined benefit plans but does to 401(k), 403(b), 457(b), employee stock ownership plans, profit sharing, and deferred compensation plans.144

Some companies allow a beneficiary to use inherited funds to buy an annuity. In this instance, the inheriting partner will pay only the tax on the income as it is received under the annuity.145

The PPA also has integral provisions for rollovers:

Starting in 2008, funds from [an] employer retirement plan can be rolled directly to a Roth IRA—with, however, federal income tax due on pre-tax contributions and earnings. Once money has been moved to a Roth IRA, additional earnings accumulate tax-free.

The [PPA] also eliminates the Roth rollover ceiling starting in 2010, which prevented a person earning over $100,000 in modi-
fied adjusted gross income from converting to a Roth. Starting in 2010, anyone—regardless of income—can convert funds from a 401(k) plan to a Traditional or Roth IRA.

Beneficiaries other than a spouse named on 401(k) plan documents can roll the plan funds they inherit directly to their own IRA. Prior to the change, nonspouse beneficiaries had to receive the 401(k) funds in whatever manner the plan documents prescribed, usually a lump sum distribution, creating an immediate state and federal tax burden and potentially pushing the beneficiary into a higher income tax bracket. Nonspouse beneficiaries also can be included in those for whom hardship withdrawals qualify, giving families more resources in the event of a medical or other emergency.146

Other inroads are also underway: last summer, the International Longshore and Warehouse Union changed its pension policies in response to a lawsuit filed by Marvin Burrows, the surviving partner of a deceased union member. Burrows had shared his life with his partner for fifty-one years; they registered as domestic partners in California and were married in San Francisco in 2004.147

V. Nonmonetary Concerns in Estate Planning

A. Children

Among the many concerns that unmarried same-sex partners have are the rights and responsibilities of a nonbiologically-related partner to children raised in that relationship.148 As of 2000, 21.6% of lesbian households and 5.2% of gay male households were raising children.149 The National Gay and Lesbian Task Force estimates that the total number of children with at least one gay or lesbian parent to be somewhere between six and fourteen million.150 These "alternative" families do not conform to a traditional family construct. Children in same-sex households may be from previous heterosexual relationships, adoption, or fertility treatments such as in vitro fertilization and artificial insemination. The

148. See, e.g., Gomes, supra note 8, at 14.
149. Gesing, supra note 5, at 845.
150. Gomes, supra note 8, at 14.
lack of a legal relationship can mean that a partner has no responsibility to support a child, even if he or she was a part of the decision to have that child.\textsuperscript{151} The lack of a legal relationship could also mean that the child has no right to participate in end-of-life decisions or to inherit from a person he or she has long considered a parent.

In general, adoption grants inheritance rights.\textsuperscript{152} Second parent adoption is a useful and necessary tool for protecting the rights of the children of same-sex relationships and may be an important part of a comprehensive estate plan. Second parent adoption is not a perfect solution because of the "onerous process" involved, but it may be an important step.\textsuperscript{153} Second parent adoption requires the nonlegal mother to prove that she is functioning as a parent.\textsuperscript{154} This process may require invasive and time-consuming procedures, as well as the determination of the "best interest of the child" by a family court judge, simply to confer parental status on a woman without whom the child would not have been brought into the world.\textsuperscript{155}

Marriage may also protect the rights of children raised in same-sex relationships. It is unclear whether the "presumption of parenthood" granted to heterosexual marriages, will apply to same-sex marriages.\textsuperscript{156} If it applies, the fact that a couple is married may

\begin{itemize}
\item \textsuperscript{151} T.F. v. B.L. 813 N.E.2d 1244 (Mass. 2004). In T.F. v. B.L., a same-sex couple was involved in a long-term relationship. \textit{Id.} at 1246. The couple had a commitment ceremony and mutually decided to start a family in 2000. \textit{Id.} at 1247. One partner became pregnant, but before the child was born, the couple broke up. \textit{Id.} at 1247-48. The biological mother sought child support from her former partner and the Massachusetts Supreme Judicial Court held that a nonbiological, or nonadoptive, partner in a same-sex couple was not obligated to pay child support. \textit{Id.} at 1251-52.
\item \textsuperscript{152} See, e.g., MASS. GEN. LAWS ch. 210, § 7 (2006) ("A person adopted in accordance with this chapter shall take the same share of that property which the adopting parent could dispose of by will as he would have taken if born to such parent in lawful wedlock, and he shall stand to the kindred of such adopting parent in the same position as if so born to him. If the person adopted dies intestate, his property shall be distributed according to chapters one hundred and ninety and one hundred and ninety-six among the persons who would have been his kindred if he had been born to his adopting parent in lawful wedlock."). Therefore, same-sex couples with adult children should consider adoption in order to protect an adult child's right to inherit or to make decisions for their nonbiological parent.
\item \textsuperscript{153} Ruthann Robson, \textit{Making Mothers: Lesbian Legal Theory & the Judicial Construction of Lesbian Mothers}, 22 WOMEN'S RTS. L. REP. 15, 19 (2002).
\item \textsuperscript{154} \textit{Id.}
\item \textsuperscript{156} MASS. GEN. LAWS ch. 209C, § 6 (2006). It is interesting to note that a California court recently applied a paternity presumption to a same-sex copartner. Elisa B.
provide enough support to put both partners' names on a birth certificate. This may provide enough protection to ensure that the child will have the right to make decisions for an elderly parent and have the right to inherit from that parent if property is distributed through intestate succession.

Same-sex couples can also protect their children through guardianships. In a will, an individual can designate who they want to care for their children when they pass away. The biological parent may use this designation to ensure that the nonbiological parent retains custody of the child, or both parents may use it to designate a third party.

There are two other guardianship options that may prove useful to same-sex parents. There may be times when a guardianship is only temporarily needed. In these instances, a standby guardianship proxy or an emergency proxy may be used. A standby guardianship allows a parent to file, with the probate court, a petition for guardianship that will come into existence upon the occurrence of certain events: incapacity, death, or consent. This can be

v. Superior Court of El Dorado County, 117 P.3d 660, 662 (Cal. 2005) (granting a same-sex coparent legal maternity because she held the children out as her own).

157. Id.

158. MASS. GEN. LAWS ch. 201, § 3 (2006) ("A father or mother may by will appoint a guardian for a minor child, whether born at the time of making the will or afterward, to continue during minority . . . .").

159. Id. §§ 2B, 2G.

160. Id. § 2B (stating that a parent or parents may designate, in writing, an adult person or persons to be appointed as standby guardianship proxy or proxies hereinafter referred to as proxy of the person or estate, or both, of a minor, whether or not such minor is born at the time of such designation). Chapter 201, section 2D, of the Massachusetts General Laws states:

The proxy's authority to act shall commence upon; (i) the death of the minor's parent or parents; (ii) the consent of the minor's parent or parents; or (iii) the incapacity of the minor's parent or parents to make and carry out day-to-day child care decisions concerning the minor for whom the proxy has been appointed, as established by the written certification of a licensed physician.

Immediately upon the death or consent of the minor's parent or parents, or upon the written certification of incapacity as established by a licensed physician, the proxy shall assume all duties as proxy of the minor as previously determined by the order appointing the proxy.

The proxy shall not be valid unless accompanied by the dated consent form, physician's letter or death certificate. The proxy of the minor shall have the authority to act as a guardian of the minor without direction of the court for a period of up to ninety consecutive days, provided that the authority of the proxy may be limited or terminated by a court of competent jurisdiction.

Upon the commencement of authority of the proxy, pursuant to the consent of the minor's parent or parents, such authority shall not, itself, divest the parent or parents of any parental or guardianship rights, but shall confer upon
a useful tool to ensure that the nonbiological parent can retain custody and the right to care for the child should there be an emergency that affects the biological parent. It can also protect the minor child by designating a caring third party should both partners become incapacitated. A standby guardianship is valid for ninety days, after which time the guardian should file for a permanent guardianship. Furthermore, a standby guardianship will terminate if the parent regains capacity or revokes his or her consent.

An emergency guardianship allows a parent to appoint, in writing, a person to make decisions for his or her child for up to sixty days, without court approval. An emergency proxy has authority to act as a guardian of the person, not of the estate. This can be useful if the parents are going away for a short time and anticipate being unavailable to make day-to-day decisions for their child.

Older same-sex couples may need to be especially cautious about their adult children and how much decision-making power they want those children to have. Without a recognized legal relationship between partners, adult children from a previous relationship may have the right to make decisions or the right to inherit over the same-sex partner. It may be unclear who is responsible for decision making and traditional familial preferences may mean that the same-sex partner is not given the opportunity to make decisions for his or her partner in an emergency.

The proxy concurrent authority with respect to the minor. Within ninety consecutive days of the commencement of authority of the proxy, the proxy shall file or cause to be filed, pursuant to section two, a petition for the appointment of a guardian of the person or estate, or both, of the minor.

_id_ § 2D.

161. _Id._
162. _Id._ §§ 2E-2F.
163. _Id._ § 2G.
164. _Id._ § 2F.

It may also be important for the nonbiological parent of an adult child to ensure that the child will have the familial rights that accompany a parent and child relationship. With no legal relationship, the adult child may not be able to access medical or financial information or have any right to inherit by intestacy. As one commentary illustrates:

Unless there is a formal adoption, the other partner is a legal stranger to the child and the child has no right to inherit from the nonbiological parent. In most cases, children are entitled to inherit intestate from their natural or biological parents or their adoptive parents. While the general rule is that children can have only two legal parents, determining who can recover intestate from a decedent is a power delegated to the states, and the procedure followed differs from state to state. However, states are reluctant to grant inheritance rights to a child of someone who is not a legal parent. 166

**B. Health Care and End-of-Life Decisions**

Same-sex partners should be careful to take advantage of the existing legal structures to designate who is responsible for their decision making, both medical and financial, if they become incapacitated. Without a legally recognized relationship, the same-sex partner will not be the first choice to make these decisions.

Generally, people are entitled to make medical choices—including planned and emergency health care—for themselves.167 However, there are a number of situations that may require one to name a third person to make medical decisions. The most common conditions of aging are progressive, but some may be sudden, like dementia and Alzheimer's disease. The most common vehicle for designating a decision maker is by a health care proxy or durable power of attorney. Without these documents, most states dictate that the person named must be a family member,168 but inroads have been made over the years to allow for more flexibility and to


specifically allow health care decision-making powers to be designated to life partners.\textsuperscript{169}

GLBT people often have "unique family structures and gender role differences" that require specific attention to caregiving in case of disability, end-of-life planning, and retirement.\textsuperscript{170} In a first-of-its-kind study in 2006, GLBT baby boomers were polled about their experiences and expectations about aging and caregiving.\textsuperscript{171} The study found that one in four had "provided care for an adult friend or family member" in the six months prior to answering.\textsuperscript{172} Of those surveyed, thirty-six percent were caring for parents, eighteen percent for partners, and twenty-six percent for friends or other nonrelatives.\textsuperscript{173} The number of respondents caring for partners jumped to twenty-nine percent for those living in civil unions, domestic partnerships, or marriages.\textsuperscript{174} These statistics indicate that, of the members of the GLBT community that are caregivers, approximately eighty percent reported providing some assistance for someone in their lives, including bill paying, performing household tasks, driving, or similar aid.\textsuperscript{175}

In the same study, GLBT people further reported that they fear significant incidence of discrimination in their own aging experience. Twenty-seven percent reported it as a significant worry,\textsuperscript{176} and nineteen percent specifically said they have "little or no confidence that medical personnel will treat them with dignity and respect" as an aging GLBT person.\textsuperscript{177} Yet, more than half (fifty-one percent) of respondents to the same survey reported that they did not have care-planning documents in place for themselves, dictating their long-term care desires or end-of-life wishes.\textsuperscript{178} This concern is especially valid in Massachusetts where physicians and facilities

\textsuperscript{169} The seminal case in this field is \textit{Guardianhip of Kowalski}, 478 N.W.2d 790 (Minn. Ct. App. 1991) (holding that Kowalski's lesbian partner should have been appointed as her guardian). \textit{See Tamar Lewin, Disabled Woman's Care Given to Lesbian Partner}, N.Y. TIMES, Dec. 18, 1991, at A26.


\textsuperscript{171} \textit{Id.}

\textsuperscript{172} \textit{Id.}

\textsuperscript{173} \textit{Id.}

\textsuperscript{174} \textit{Id.} at 8.

\textsuperscript{175} \textit{Id.} at 9.

\textsuperscript{176} \textit{Id.} at 5.

\textsuperscript{177} \textit{Id.} at 14.

\textsuperscript{178} \textit{Id.} at 5.
have a statutory right to refuse to honor the instructions of a health care agent if the provider would have made the same refusal to the principal because the direction is contrary to the provider's moral or religious beliefs.\textsuperscript{179}

Under the Uniform Health-Care Decisions Act,\textsuperscript{180} individuals can name anyone as their health care agent or proxy.\textsuperscript{181} When an individual has failed to do so, the Act designates a hierarchy of family classes who may act, in descending order: "(1) the spouse, unless legally separated; (2) an adult child; (3) a parent; or (4) an adult brother or sister."\textsuperscript{182} This list embodies a very narrow definition of family and fails to recognize same-sex partners on its face. The Act does, however, provide that if any of these designated family members is unavailable or unable to act, then "an adult who has exhibited special care and concern for the patient, who is familiar with the patient's personal values, and who is reasonably available may act as surrogate."\textsuperscript{183} Because this quasi-protection would likely require legal action in order to enforce it, it is little better than having no protection at all.

On occasion, a formal court proceeding must be sought to obtain a guardian to make decisions. This may occur if the patient has no close family or friend willing or able to serve, or it may be the result of warring family. To GLBT individuals who are much more likely to have formed a family of choice stronger than their biological ties, the designation of a proxy prior to needing one is critical.

C. \textit{Durable Power of Attorney}

A durable power of attorney is a document in which the principal can authorize an agent to handle his or her financial affairs.\textsuperscript{184} A durable power of attorney can take effect immediately upon execution, or can be designed to "spring" into effect if certain conditions exist.\textsuperscript{185} In Massachusetts, a durable power of attorney is authorized pursuant to chapter 201B of the Massachusetts General Laws, which allows the decision-making authority to continue past

\footnotesize{
\begin{itemize}
  \item \textsuperscript{179} \textit{Mass. Gen. Laws} ch. 201D, §§ 14, 15 (2006) (stating that the doctor can only exercise this right if a patient can be transferred to an equivalent place of care).
  \item \textsuperscript{181} \textit{Id.} § 5(b).
  \item \textsuperscript{182} \textit{Id.}
  \item \textsuperscript{183} \textit{Id.} § 5(c).
  \item \textsuperscript{184} Cukier \& Kolz, \textit{supra} note 76, at 205.
  \item \textsuperscript{185} \textit{Id.} at 205-06. This way the individual can designate that the power of attorney only comes into effect when the individual loses capacity.
\end{itemize}
}
the disability of the principal. Same-sex couples can use a durable power of attorney to grant to one another decision-making ability over each other’s property and finances. This is one way that same-sex couples can protect each other as they age.

D. Health Care Proxy

The other common tool for designating decision-making ability to another individual is the health care proxy. The health care proxy grants an agent the right to make health care decisions for the principal. Health care proxies allow individuals to designate another to make health care decisions for them in the event that they become incapacitated and cannot make these decisions themselves.

In addition to the health care proxy, another tool that may be available to same-sex couples is the creation of living wills to advise both family and health care professionals as to their preferences for medical treatment. Depending on the state, however, a living will could take the form of a health care proxy as outlined above, or could be a more formal document.

---

186. Massachusetts General Laws, chapter 201B, section 1, states: A durable power of attorney is a power of attorney by which a principal, in writing, designates another as his attorney in fact and the writing contains the words, “This power of attorney shall not be affected by subsequent disability or incapacity of the principal,” or “This power of attorney shall become effective upon the disability or incapacity of the principal,” or similar words showing the intent of the principal that the authority conferred shall continue notwithstanding the subsequent disability or incapacity of the principal. Mass. Gen. Laws ch. 201B, § 1 (2006).


188. See Cukier & Kolz, supra note 76, at 207. In Massachusetts, for example, health care proxies are authorized pursuant to Massachusetts General Laws, chapter 201D, section 2.

Every competent adult shall have the right to appoint a health care agent by executing a health care proxy. Said health care proxy shall be in writing signed by such adult or at the direction of such adult in the presence of two other adults who shall subscribe their names as witnesses to such signature. The witnesses shall affirm in writing that the principal appeared to be at least eighteen years of age, of sound mind and under no constraint or undue influence. No person who has been named as health care agent in a health care proxy shall act as a witness to the execution of such proxy. For the purposes of this section, every adult shall be presumed to be competent and every health care proxy shall be presumed to be properly executed unless a court determines otherwise. Mass. Gen. Laws ch. 201B, § 2.

189. Black’s Law Dictionary describes a living will as “an instrument, signed with the formalities of a will, by which a person states the intention to refuse medical treatment and to release health care providers from liability if the person becomes both terminally ill and unable to communicate such a refusal.” Black’s Law Dictionary, supra note 2, at 953.
will may not be statutorily recognized, and, therefore, doctors are not required to follow the individual’s stated preferences.\textsuperscript{190} Living will preferences, however, can be stated directly in the health care proxy.\textsuperscript{191} This way if the individual fears that there will be conflict between the family and a partner with regards to their health care choices, that individual’s stated preferences are in writing for the family to review. It may also give the health care proxy, and partner, reassurance that difficult end-of-life decisions are the right choice.

In order for a health care proxy or durable power of attorney to come into existence, the individual must lack capacity.\textsuperscript{192} However, due to concerns about confidentiality, a doctor may be reluctant to disclose when the individual reaches the point of losing capacity.\textsuperscript{193} Therefore, it is a good idea for same-sex partners to execute HIPAA\textsuperscript{194} waivers so that the partner with capacity can have access to the medical information which will allow him or her to decide if it is time for the health care proxy or durable power of attorney to spring into place.\textsuperscript{195}

E. Do Not Resuscitate (DNR)

Individuals should consider their end-of-life values and whether there will be any disagreement with their families. It is a good idea for an individual to prepare for whether or not he or she would wish to have extraordinary medical treatment to prolong his or her life.\textsuperscript{196} In Massachusetts, for example, an individual can file a comfort care or do not resuscitate order with the State.\textsuperscript{197} A valid comfort care form is the only way that an emergency crew will

\begin{footnotes}
  \textsuperscript{190} See Cukier & Kolz, supra note 76, at 207.
  \textsuperscript{191} Id.
  \textsuperscript{192} See, e.g., MASS. GEN. LAWS ch. 201D, § 6.
  \textsuperscript{193} For an overview of the national standards on medical privacy, see generally U.S. Dep't of Health & Human Servs., Office for Civil Rights, Medical Privacy: National Standards to Protect the Privacy of Personal Health Information, http://www.hhs.gov/ocr/hipaa (last visited Feb. 4, 2008).
  \textsuperscript{195} See Cukier & Kolz, supra note 76, at 207-08.
  \textsuperscript{196} Id. at 208.
\end{footnotes}
know that an individual does not want extraordinary means to be taken to save his or her life.

The Comfort Care/DNR form is the only means for ambulance services and their emergency medical technicians and paramedics (EMTs) to verify that a patient has a valid Do Not Resuscitate (DNR). If EMTs are not shown a properly executed Comfort Care/DNR form for the patient, EMTs are required to resuscitate per their Protocols.\textsuperscript{198}

Therefore, copies of these forms should be easily accessible in the home and when traveling.\textsuperscript{199}

F. Funeral Decision Making

Families unfamiliar with or intolerant of a same-sex relationship may make after-death arrangements contrary to a couple’s wishes.\textsuperscript{200} The general rule is that body disposition, including funeral arrangements, is under the purview of the next-of-kin absent specific alternate instructions by the deceased.\textsuperscript{201} Therefore, an individual should give specific instructions regarding his or her remains or designate the specific go-to person for these decisions.\textsuperscript{202} The individual should also consider writing out the specific instructions with regard to his or her disposition and provide this information to a chosen funeral home.\textsuperscript{203}

While all of these health care and end-of-life decision-making tools are important, they can only be helpful if they are easily accessible. These documents should be copied and always kept with the couple. This is especially important when partners travel. For ex-

\textsuperscript{198} Id.

\textsuperscript{199} One suggestion would be to keep all of these end-of-life decision-making documents in the glove compartment of your car.

\textsuperscript{200} See infra note 175.

\textsuperscript{201} DENIS CLIFFORD, FREDERICK HERTZ & EMILY DOSKOW, A LEGAL GUIDE FOR LESBIAN AND GAY COUPLES 133 (14th ed. 2007).

\textsuperscript{202} Rhode Island, for example, has enacted a law to specifically address this issue. Daryl J. Finizio, Funeral Planning Agent Designation: An Unused but Useful Tool for Same Sex Couples, R.I. B.J., Mar. 2007, at 31, 31 (“Same sex partners were concerned that a partner’s desire for a burial process, such as cremation, could be overruled by a surviving parent or family member who would have more legal right to determine the disposition of the decedent’s remains. To address these concerns, the Funeral Planning Agent Designation law was enacted. This law provides a legal means of designating an agent who would have authority to conduct the decedent’s funeral and oversee the disposition of the decedent’s remains.”).

\textsuperscript{203} This information can also be included in the will, but it is a good idea to also provide this information in a separate document in case it takes time to locate the will after the death.
ample, many elderly people travel south for the winter. While the elderly couple may have a recognized relationship in Massachusetts or Connecticut, if they travel to Florida for the winter, that marriage or civil union will not hold any weight. The couple should carry copies of their will, health care proxy, durable power of attorney, and HIPPA waivers to be sure that all of their hard work and planning will not be ignored.

CONCLUSION

Now we will examine our case studies. What benefit could J or T have received from a more comprehensive estate plan? Both J and T live in Massachusetts, and so could have avoided some difficulties through marriage. With marriage, the laws of intestacy would have preferred T over members of L's family. With marriage, J would have been entitled to a living allowance from the probate estate of D, and would not have gone into the same amount of debt in order to pay bills that had been jointly owned by D and J.

Had the property been jointly owned, D and J's property would have transferred to J automatically rather than going through the probate process, thus, ensuring that J had access to their assets right after D's passing, rather than after the lengthy probate process.

With a will and advanced directives regarding her funeral arrangements, L could have been sure that T would not have had to deal with the disapproval of L's family.

Everyone should be cautious about planning for their future, and ultimately, their death, but it is especially important for same-sex couples who do not have the benefit of default rules for legally recognized relationships to plan for the future to ensure that their loved ones are protected.

204. See supra Introduction Parts A-B.
205. See supra Introduction Part B.
206. See supra Introduction Part A.

† Editor's note: On May 15, 2008, as this Article was going to press, the California Supreme Court struck down the state's ban on same-sex marriage in a 4-3 decision. In re Marriage Cases, 43 Cal. 4th 757 (Cal. 2008). The state began issuing marriage licenses to same-sex couples on June 17, 2008, the day the ruling took effect. Carolyn Marshall, California Sets June Date for Same-Sex Marriage Licenses, N.Y. TIMES, May 29, 2008, available at http://www.nytimes.com/2008/05/29/us/29gays.html?key=nyregion.

In addition, New York State has taken steps to recognize same-sex marriages entered into by couples in other states. On May 17, 2008, New York Governor David A. Paterson issued a directive to all state agencies, instructing them to revise their policies