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ELDER LAW AND ESTATE PLANNING FOR GAY AND LESBIAN INDIVIDUALS AND COUPLES

Ralph Randazzo*

According to the National Gay and Lesbian Task Force, at least one to three million people in the United States who are over the age of sixty-five are gay or lesbian.¹ Those numbers will increase proportionately as baby boomers enter retirement.

Over the last ten years, elder law has become a significant area of legal practice, and bar associations across the nation have formed committees and groups to educate and train practitioners in services intended to meet the needs of the aging. This education, however, has been focused on heterosexual individuals and couples. While certain groups, particularly in large cities, advocate for the needs of gay and lesbian seniors, the legal community has yet to recognize the size and specific needs of this underserved community. Heterosexual persons have become aware of and are served by a large group of highly experienced elder law attorneys, while the gay and lesbian population is largely served by practitioners who are familiar with the estate planning and life planning needs of the general population but not the more specialized and unique needs of the aging gay and lesbian population. This article addresses some

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of the broad distinctions and issues that must be considered and understood in order to properly represent gay and lesbian seniors.

**ELDER LAW AND ESTATE PLANNING GENERALLY**

On the most basic level, estate and life planning with an attorney who has an awareness and understanding of elder law issues is essential for gay and lesbian individuals. Currently, most continuing legal education courses, institutes, articles, and books on estate planning and elder law are geared toward the heterosexual community and married individuals. The laws of the majority of states provide basic protection for these same individuals. For example, the law of most states recognizes the right of a lawful spouse to make health care decisions or the right of a spouse to inherit at least a portion of their spouse's estate. Generally, gay and lesbian individuals do not have the protection or recognition provided by these laws. In a majority of states, unless an individual has a valid health care proxy, a hospital can still deny a same sex partner the right to make his partner's health care decisions. In New York, a same sex couple can be in a relationship for twenty-five years or more and if one partner dies without a will with assets in her individual name, those assets shall be distributed, through the law of intestacy, to the nearest living blood relative of the deceased partner. The duration or quality of a relationship without legal recognition will never override the basic premise of nearly all state laws - that blood relatives, children, or lawful spouses are the natural surrogate decision makers and recipients of a decedent's estate.

A married couple that fails to execute a durable power of attorney with Medicaid planning powers may encounter additional costs if they need to engage in Medicaid planning through a guardianship or conservatorship proceeding, but most Medicaid planning for married couples could be done within a

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2. The recent recognition of same sex marriage in Massachusetts and the earlier enactment of the Vermont Civil Union Law have changed the rights of some gay and lesbian individuals; however, none of these changes affect any rights under federal law. The effect of the Federal Defense of Marriage Act and various similar state laws prevent the out of state recognition of the rights granted by Massachusetts and Vermont. The true impact and effect of a Massachusetts' marriage or a Vermont civil union will develop and evolve through litigation that has already begun. This article assumes that our gay and lesbian clients will not receive full marriage equality for many years and, thus, there is no reliance on any state or federal law or program to meet the client's estate or life planning objectives.
guardianship court. A same sex couple will not necessarily have the same opportunity, especially if there is no proof of the sick partner's wishes. Even if the sick partner's wishes can be established, the healthy partner may be challenged by the biological family, a group that is usually given preference in guardianship proceedings under most state law, or by the biases of a particular judge.

Though legal marriage for same sex couples is presently a national issue and available in Massachusetts, national recognition of such a marriage may take years to become law and may never become a reality if a Constitutional Amendment banning same sex marriage is passed. At this point, thorough and appropriately detailed life and estate planning is the best way to provide gay and lesbian clients with some of the rights and protections of legal marriage.

In fact, unmarried heterosexual couples, as well as gay and lesbian persons, either single or partnered, most genuinely need the protection that a well-drafted estate and life plan provides. A mutually dependent couple sharing a home, assets, and possibly raising a child should address all aspects of life and estate planning. That planning and all advance directives must be completed with considerations of aging and potential long-term care needs. If this planning is not done with an attorney who understands the elder law issues that the couple or individual may face, significant opportunities and protections may be lost, and the attorney could be liable for damages for failure to create an appropriate plan.

Throughout this article, the author will assume that readers have a basic understanding of the concepts of elder law and estate planning. However, distinctions will be addressed as they pertain to the gay and lesbian communities, specifically with regard to: 1) advance directives; 2) capacity issues and guardianship; 3) long-term care coverage, including Medicaid; 4) trusts for a variety of people, including the disabled; 5) estate planning and administration; and 6) estate and gift taxation. In doing so, this article will focus on the specialized needs, considerations, and services required for gay and lesbian individuals and couples.
The Case of Jackie and Sue

Jackie J. and Sue D. became life partners in 1982. Within months Jackie and her four-year-old daughter, Ella, moved in with Sue and her mother in Mrs. D.'s home in Queens, New York. Sue had a history of social anxiety and never maintained employment; thus, Jackie became the breadwinner of the family while Sue and Mrs. D. focused on childrearing. Jackie was the only source of income for the family.

In 1989, Sue's mother, Mrs. D., became seriously ill and bedridden. Jackie provided the personal care and assistance Mrs. D. required until she died in 1991. Thereafter, Jackie and Sue completed their own estate planning with a local attorney, which included executing wills, each of which left their respective property to the other.

Due to difficulty overcoming the grief associated with her mother's death, Sue became increasingly agoraphobic and also began to suffer from severe psoriasis, an unsightly and painful skin condition. In 1992, and then again in 1994, Sue suffered a stroke, the second leaving her substantially paralyzed and blind. Doctors recommended that Sue be discharged to a nursing home on a long-term basis. However, Jackie refused the doctors' recommendation and, after a four-month hospital stay, Sue returned home. Once home, Jackie carried Sue up the stairs, assisted her with walking, and provided the delicate treatment required for Sue's psoriasis. Through Jackie's ongoing hands on care and management of the household, together with the assistance of friends and Ella's contribution, Sue was able to stay at home with her family. Simultaneously, however, and due to her tremendous discomfort and infirmity, Sue became increasingly demanding. In addition, for the first time since 1982, Sue and Jackie were forced by the situation to have separate bedrooms.

At Sue's request, the family attorney prepared a power of attorney giving Jackie the authority to manage her money and maintain the home, which Sue executed appropriately. An SSI application was also made by Jackie on Sue's behalf, and, once approved, Sue received a small income and Medicaid coverage.

Thereafter, the situation took an unfortunate turn as Jackie became disabled in 1996 and was unable to continue working.

3. All names, domiciles, and courts have been changed.
The family was forced to survive on Jackie and Sue's combined disability income and SSI benefits.

By the late nineties, Ella, now grown with children of her own, occupied the upper floor of the house that Jackie had renovated into an apartment for them. Ella paid rent and continued to shop and cook for the entire family.

Because of her own physical limitations and Sue's increasingly demanding need for specialized care, Jackie applied for Medicaid home care on Sue's behalf. With the assistance of Sue's doctors, and based upon their limited income and multiple appeals, Sue was granted eight hours of care per day. However, the condition of Sue's skin and her difficult demeanor immediately led to problems obtaining and keeping quality aides through Medicaid to cover the eight-hour shifts. Aides were reluctant to touch her, left her in soiled clothing, and refused to complete certain tasks. With increasing frustration and concern for Sue's well being, Jackie demanded that the aides arrive on time, complete their assigned tasks, and provide appropriate care to Sue. These demands led to conflicts between Jackie and the aides, and the aides in turn made a report to Adult Protective Services that Jackie was abusive.

In early 2003, Sue was served with a guardianship petition initiated by Adult Protective Services. In the petition, Jackie was accused of abuse and neglect. Because the family could not afford legal counsel, the court appointed an attorney for Sue. However, being unfamiliar with nontraditional families, Sue's attorney concluded that, because the two women did not share a bed, they were not a "couple" or a "family," and she advised Sue not to tell the court that she and Jackie were a couple. Sue maintains that she always said she and Jackie were a couple and a family.

After four months of periodic hearings where Sue was represented by counsel who refused to recognize the relationship between Sue, Jackie, and Ella, the court appointed a temporary guardian for Sue and ordered that she be removed from her home, contrary to her stated wishes, and put into a nursing home. The court rejected Jackie's claim that the problem was incompetent aides provided by Medicaid and further found that Sue was "codependent" upon Jackie. Because Sue was determined to be "codependent," the court did not respect her request to remain in her home with her family. Beyond that, the court revoked Sue's power of attorney to Jackie without any
evidence of financial mismanagement and against Sue's stated desire to have Jackie handle her finances.

After nearly six months of hearings, issuance of the order appointing a temporary guardian, and the removal of Sue from her home and family, Jackie found an attorney to advocate for the family. Through the testimony of a social worker at Senior Action in a Gay Environment (SAGE), the judge was educated about this relationship and the fact that Jackie and Sue could still consider themselves a couple and family despite the fact that they had separate bedrooms. After viewing photos of the neglect Sue was suffering in the court ordered nursing home placement and hearing subsequent testimony on behalf of the family, Sue was permitted to return to her home.

Notwithstanding, the city and court continued to maintain that the "codependent" relationship between Sue and Jackie was an appropriate basis for a guardianship proceeding and that Jackie should pay rent to live with Sue. The court ultimately rejected the idea that this was a family unit and that they should have the right to live collectively on the family income. In addition, the court threatened that Jackie would be removed from the house if she failed to pay rent. The court would not consider the eighteen hours of daily care and supervision provided by Jackie as a contribution to the family. The court also rejected the fact that if Sue did not have Jackie to provide for her personal needs and care management, Sue would have to live in a nursing home, as she could not reside alone at home with the eight hours of Medicaid covered home care per day.

Though the hearing was never concluded and the temporary guardian was relieved by the court, the court refused to dismiss the guardianship proceeding and made personal home visits. The court's position was that this family needed to be watched, and over the objections of Jackie's counsel and Sue's counsel, the action having continued for over one year without a determination of incapacity, the court continuously refused to dismiss the action.

In considering Jackie and Sue's story, several questions come to mind. Had this couple been legally married would the court have threatened to evict a spouse for nonpayment of rent? Would this couple have been treated similarly if they were a heterosexual couple occupying separate bedrooms? Would the court have ordered a guardianship over any mentally competent individual who, like Sue, is dependent upon her caregiver, in a
more traditional relationship?

This case highlights several significant issues that may affect gay and lesbian couples, the potential for which increases as they age. In this case, Jackie and Sue had valid powers of attorney, health care proxies, and long-standing wills. Their estate plans were complete. Yet, because of Jackie's vocal objections to inadequate and incompetent services from Medicaid and the Medicaid worker's retaliation with accusations of neglect against Jackie, her family was nearly separated, her companion of twenty years was almost permanently placed in a nursing home despite willing and able caregivers in the community, and Sue's companion and the child they raised together were nearly evicted. As the temporary guardian stated to the court, this was a case of poverty. If these women had money to pay privately for quality home care the court would not have intervened in their lives, but because they relied upon government programs and social services to meet their basic care needs, their entire relationship and lives were on trial. Had this been a heterosexual couple, they may not have faced such difficulty or challenge in proving the foundation of their relationship.

**SPECIAL CONSIDERATIONS FOR GAY AND LESBIAN CLIENTS**

**THE NATURE OF RELATIONSHIPS**

Relationships in the gay and lesbian community generally lack the societal recognition of heterosexual relationships. The absence of a legally recognized marriage, together with a tendency by some gay and lesbian seniors to be silent about their "private" lives and relationships and the long-standing discrimination that exists against homosexual individuals, creates circumstances and difficulties that attorneys working in this area should be prepared to address. Specifically, counsel should anticipate the need to work with surrogate decision makers to educate caregivers, courts, and all participants in society as to the appropriateness and necessity in respecting clients, to the extent their clients are prepared to assert such rights.

In my experience with senior gay and lesbian couples that have been together for a long time, many remain very private about their relationships. This desire for privacy, despite its
potential negative impact on their personal circumstances, is based in part upon fears that grew from the pre-Stonewall era, the AIDS pandemic, and years of discrimination due to sexual orientation. Although their relationships are stable and long-term, some clients have what appears to be an unjustified fear that written acknowledgment of their relationship will result in discrimination or harassment. Though the attorney can educate many clients, this fear cannot be fully alleviated and must be recognized and dealt with through the planning and counseling process.

Many gay and lesbian seniors live in quiet isolation. Though family and heterosexual friends accept the individual or couple, no verbal or public acknowledgment of the relationship or its sexual nature may have ever been made. Modesty may have been the initial basis for silence. Many seniors feel that having been accepted as a couple, even if the relationship is not discussed or acknowledged openly, is sufficient, and there is no reason for discussion of what is already known or "understood." This silence can cause problems if a guardianship proceeding is ever necessary for one of the partners or if a will is challenged upon a partner's death.

Finally, the structure of a family must sometimes be defined for a court through the advocacy of counsel. In the case of Jackie and Sue, the court and the attorney for the alleged incapacitated person both denied the existence of a family unit because the two women occupied separate beds. Because the partners did not "sleep" together, the court rejected the idea, and the direct statement by the women, that two women who raised a child together and continued to live in a mutually dependent, committed relationship were entitled to recognition as a family. While this convention denies the reality of even heterosexual relationships, it presented a unique need to educate the court on the nature of a specific relationship and how to appropriately define the word "family."

4. On Friday evening, June 27, 1969, New York City police raided a popular Greenwich Village gay bar, the Stonewall Inn. This raid and the ensuing riot was a significant turning point in the quest for gay and lesbian equality. The riot was the first non-passive response of a community familiar with police scrutiny and societal discrimination. From what is now popularly known as "Stonewall," the gay and lesbian civil rights movement was born. For the first time there was an organized effort to end police harassment and systemic discrimination of gay men and lesbians.
JOINT REPRESENTATION OF SAME SEX COUPLES

Conflict of interest issues can become significant in planning for same sex couples. While there is a general and reasonable desire to treat a same sex couple as much like a married couple as possible, it is essential that counsel evaluate whether the parties should have separate representation. In particular, an attorney should fully evaluate whether representing both parties in the creation of an estate and life plan might compromise either plan.

Many couples have dramatic age, education, or asset disparities that could cause a cohabitation agreement, power of attorney, or will to be challenged based upon claims of undue influence, fraud, or duress. Though these challenges are difficult to mount and win, the attorney must consider and advise the clients of the potential conflicts and make a threshold determination of whether the plan will be better insulated from attack by separate representation.

Once counsel decides that joint representation is appropriate, full disclosure of any potential conflict of interest and the scope of joint representation should be spelled out. To best accomplish this, both clients should execute a signed retainer agreement, which identifies and waives the conflict of interest and demonstrates the clients' consent to joint representation.

THE NEED FOR ADVANCE DIRECTIVES

Advance directives are legally enforceable or recognized documents that establish and/or substantiate an individual's wishes with respect to management of their finances, healthcare decision making, and specific healthcare decisions. A same sex partner may be able to verbalize her partner's wishes with respect to financial decision making, but under most, if not all circumstances, the verbal statement of someone else's wishes, even under oath, will not be sufficient and should not be relied upon. For example, a same sex partner can go to the bank and state "Sue always told me that if she could not manage her finances I should continue to do so on her behalf," but without a legally enforceable advance written directive, even a sympathetic bank manager will refuse to grant access to the ill partner's assets. Advance directives in the form of powers of
attorney, advance medical directives, health care proxies, and living wills, have been established by the legislature in most jurisdictions, since the need is widely recognized. Though some states recognize certain statutory rights of same sex couples, counsel for same sex couples should protect their clients with written advance directives to reinforce any statutory rights.

**DURABLE POWERS OF ATTORNEY**

Many states have statutory powers of attorney. Many use statutory or commercial forms, some of which are approved by state bar associations. However, an attorney must review these forms and add appropriate, essential modifications to avoid future problems, especially for homosexual clients. For example, in New York, the Statutory Short Form Power of Attorney\(^5\) includes a limited gifting power, which enables "gifts to my spouse, children and more remote descendants, and parents" but not to domestic partners or any other unrelated individual. Unless counsel reviews the form, which many otherwise competent attorneys do not, and makes necessary and appropriate changes, such a document would not provide any authority to gift to a domestic partner or children of a domestic partner, who might be a client's most natural beneficiary of any such gift.

In addition, in the long-term care planning context, practitioners must consider and discuss with their clients whether to add long-term care planning authority, commonly referred to as a Medicaid planning powers, to the client's power of attorney document. To have Medicaid planning authority, an agent on a power of attorney essentially must have unlimited gifting power. That power may be vital to protect the couples' assets if one of the partners becomes incapacitated and requires extensive home care or nursing home services through a needs-based program such as Medicaid. If included, this power should give the attorney-in-fact the authority to make unlimited transfers of assets to a named domestic partner (who potentially is the attorney-in-fact) or other named individuals. Without this power, a court could reasonably infer that the grantor of a power of attorney did not wish to preserve her assets for a domestic partner. In a mutually dependent relationship, whether the

\(^5\) N.Y. GEN. OBLIG. LAW §§ 5-1501 to 5-1506 (McKinney 2004).
assets are jointly owned or separately owned, the consequences of this oversight could be catastrophic to the healthy partner.

**Advance Medical Directives**

Advance medical directives that specifically appoint an agent to make health care decisions for a person who is unable to do so are essential for anyone over eighteen years of age but is especially important for gay and lesbian individuals. In New York, the document used to do this is called a health care proxy\(^6\) and, if completed properly, it can be used to identify the chosen decision maker, specify the scope of decision making authority and rights to visitation, and enable access to medical records. Several states and municipalities have begun to enact legislation authorizing visitation and medical decision making by domestic partners, but until these rights are universally available and readily respected, it is far easier for a partner or friend who is appointed to make medical decisions to provide a hospital or physician with a properly executed advance medical directive than to argue with medical providers during a medical crisis.

In addition, the enactment and implementation of the Health Insurance Portability and Accountability Act (HIPAA)\(^7\) creates significant new limitations on who is permitted to obtain personal, financial, and medical information. These limitations have resulted in hospital and financial institution denials of access to records by duly appointed health care agents. As a result, it is essential that elder law practitioners include specific authority to access medical and financial records and reference HIPAA within any advance medical directive prepared for a client. This is significantly more important for unrelated persons, domestic partners, and unmarried individuals who may lack any other legal basis for access to such information.

Professional opinions vary, as do jurisdictional considerations, as to whether there is a need for and what benefits result from having a living will. As commonly used, a living will identifies specific treatments that an individual wants or rejects. However, if used, the attorney should make certain that a living will is sufficiently broad to avoid placing

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7. Health Insurance Portability and Accountability Act of 1996, commonly referred to as "HIPAA."
unintentional limitations on the health care agent's authority to make any necessary and desired decisions in light of all existing circumstances at the time of a crisis. In that we cannot anticipate every possible health care contingency, a living will should not attempt to do so either; therefore, a living will may be prepared to give the health care agent and provider practical guidance and assistance but should avoid unintentional limitations. Importantly, in times of ultimate crisis, a living will can substantiate a domestic partner's claim that their partner did not want to receive life-sustaining treatment in a particular circumstance where a biological family member contests or otherwise opposes such a course of action.

GUARDIANSHIP

Guardianship\(^8\) practice is a large component of any elder law practice. Generally speaking, a guardianship proceeding is necessary when an individual is unable to provide for their own personal or property management needs and has not otherwise provided for such contingencies. For same sex couples, guardianship proceedings present unique and sometimes significant problems. Attorneys practicing in this arena must be prepared to address issues of standing, protecting the client's unique relationship, advocating for the right to plan for Medicaid or other public assistance (if appropriate and necessary), and potentially losing support for a partner, to name a few. Most guardianship proceedings, though not all, are initiated because a person failed to engage in adequate planning for incapacity with appropriate advance directives. In such instances, an attorney may need to prove or defend a domestic partner's appropriateness to serve as the guardian without any prior written representations from the incapacitated partner.

The actual course of a guardianship proceeding may be determined, in part, by who initiates the proceeding. In New York, a guardianship proceeding may be initiated by "the person with whom the alleged incapacitated person resides" or "a person otherwise concerned with the welfare of the person alleged to be incapacitated."\(^9\) This very broad class of persons

\(^8\) Guardianship is the term used in New York and many other jurisdictions, although others may refer to this area of practice as "conservatorship" or other similar terms.

\(^9\) N.Y. MENTAL HYG. LAW § 81.06(a)(5)-(6) (McKinney 2004).
who may initiate a guardianship clearly includes the domestic partner or companion of a gay or lesbian person who is incapacitated, which establishes the standing of those individuals. It is very important that a specific state's statute be consulted to confirm standing to initiate or even to intervene in a guardianship action. For instance, in the case of Jackie and Sue, Sue's court-appointed counsel argued and espoused the position that Jackie did not have standing to appear in the case despite the clear and broad language of the statute. It was her counsel's position, despite her stated experience in New York guardianship matters, that a domestic partner did not have standing under the New York statute. While this fact was surprising and problematic, the court quickly recognized Jackie's standing once it was raised and accepted Jackie's cross petition for guardianship.

New York further provides that notice of a proceeding must be given to the person with whom the alleged incapacitated person resides, any person designated as attorney-in-fact, and any other person who has displayed "a genuine interest in promoting the best interests of the person alleged to be incapacitated such as by having a personal relationship with the person, regularly visiting the person, or regularly communicating with the person."

Again, this statute is sufficiently broad to require notice to a domestic partner or companion of the alleged incapacitated person, even if the parties do not live together. However, the requirement of notice is not universally respected, and a domestic partner can be easily overlooked by hospital administrators, social service agencies, or other entities with standing to commence a guardianship proceeding who are personally unfamiliar with the alleged incapacitated person, as well as by family members who wish to deny the existence of a same sex relationship.

The New York guardianship statute is sufficiently broad to give a domestic partner standing to initiate or intervene in a guardianship proceeding for their domestic partner. This type of access through the courts is essential for the couple that fails to engage in appropriate life planning with effective advance directives. It provides the domestic partner with an opportunity to present a case and request appropriate relief for their partner from a fair and unbiased court, at the time of a crisis.

Notwithstanding access to the courts, an attorney may encounter significant challenges in proving to a court that a person who had not been designated as their partner's agent should be appointed as the guardian. In the gay and lesbian senior community, it may be difficult to prove the existence of a committed and trusted relationship, particularly where family members intervene and object when they realize money is involved. If the incapacitated person has individually owned assets and does not have a will, an unfortunate but common situation, biological family members may be in a strong position to argue to an often sympathetic court that the domestic partner should not be appointed the guardian over the property.

Within a guardianship proceeding, support of dependents and the right to protect assets from being dissipated by long-term care expenses can also become significant issues. In a guardianship proceeding for a heterosexual spouse, courts commonly authorize the payment of support to a healthy spouse or the transfer of assets to the healthy spouse for asset protection or Medicaid planning purposes. In New York, the right to such Medicaid planning for a spouse through a guardianship proceeding is authorized and protected. However, there is no such precedent or protection for any similar type of planning for a domestic partner, especially without objective proof of the intent to provide for the domestic partner by the incapacitated person.

Under New York's Mental Hygiene Law, the statutory authority for guardianship proceedings, a court can authorize a guardian to make gifts on an incapacitated person's behalf. To do so, the statute requires specific disclosures in the guardianship petition. These disclosures include: 1) the incapacitated person's gifting history; 2) a list of presumptive distributees; and 3) the provisions of the incapacitated person's current will, among other things. The statute further requires

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12. N.Y. MENTAL HYG. LAW § 81.21 (McKinney 2004).
13. According to N.Y. MENTAL HYG. LAW § 81.21(b), the other considerations include:
1. whether any prior proceeding has at any time been commenced by any person seeking such power with respect to the property of the incapacitated person and, if so, a description of the nature of such application and the disposition made of such application;
2. the amount and nature of the financial obligations of the incapacitated person
notice to the presumptive distributees. Unfortunately, notice to presumptive distributees that a domestic partner is requesting court authority to transfer assets to herself, particularly when the presumptive distributee is often a family member who may not respect the same sex relationship, is a potential, if not probable, invitation to contest the requested authority.

The New York Mental Hygiene Law states specific considerations for a court in the determination of whether the gifts should be authorized and requires clear and convincing

including funds presently and prospectively required to provide for the incapacitated person's own maintenance, support, and well-being and to provide for other persons dependent upon the incapacitated person for support, whether or not the incapacitated person is legally obligated to provide that support; a copy of any court order or written agreement setting forth support obligations of the incapacitated person shall be attached to the petition if available to the petitioner or guardian;

3. the property of the incapacitated person that is the subject of the present application;

4. the proposed disposition of such property and the reasons why such disposition should be made;

5. whether the incapacitated person has sufficient capacity to make the proposed disposition; if the incapacitated person has such capacity, his or her written consent shall be attached to the petition;

6. whether the incapacitated person has previously executed a will or similar instrument and if so, the terms of the most recently executed will together with a statement as to how the terms of the will became known to the petitioner or guardian; for purposes of this article, the term "will" shall have the meaning specified in section 1-2.19 of the estates, powers and trusts law and "similar instrument" shall include a revocable or irrevocable trust:

7. a description of any significant gifts or patterns of gifts made by the incapacitated person;

8. the names, post-office addresses and relationships of the presumptive distributees of the incapacitated person as that term is defined in subdivision forty-two of section one hundred three of the surrogate's court procedure act and of the beneficiaries under the most recent will or similar instrument executed by the incapacitated person.

14. N.Y. MENTAL HYG. LAW § 81.21(d) states that, "in determining whether to approve the application, the court shall consider:

1. whether the incapacitated person has sufficient capacity to make the proposed disposition himself or herself, and, if so, whether he or she has consented to the proposed disposition;

2. whether the disability of the incapacitated person is likely to be of sufficiently short duration such that he or she should make the determination with respect to the proposed disposition when no longer disabled;

3. whether the needs of the incapacitated person and his or her dependents or other persons depending upon the incapacitated person for support can be met from the remainder of the assets of the incapacitated person after the transfer is made;

4. whether the donees or beneficiaries of the proposed disposition are the natural objects of the bounty of the incapacitated person and whether the proposed
evidence, the highest civil evidentiary standard, that: 1) the incapacitated person lacks the mental capacity to make the gifts for which approval has been sought or has the requisite capacity and consents to the proposed disposition; 2) a competent, reasonable individual in the position of the incapacitated person would be likely to make the gifts under the same circumstances; and 3) the incapacitated person has not manifested an intention inconsistent with the gifts at some earlier time when she had the requisite capacity or, if such intention was manifested, the person would be likely to have changed such intention under the circumstances existing at the time of the filing of the petition.\(^5\)

For a same sex couple living together that never executed wills and never had a gifting history between them, the inability to establish a historical pattern or plan for distribution of the estate to a domestic partner can create an insurmountable hurdle despite mutual interdependence. The presumption of the statute is that the incapacitated person would have displayed her intent to pass assets to a domestic partner through prior gifts or a will. Without such history, the statute considers the intestate beneficiaries as the natural recipients of the incapacitated person’s assets. Counsel should study the local statute and be prepared to prove a gifting history, a testamentary plan, and mutual interdependence, to the greatest extent possible. This may be an area where creativity is required. In addition, counsel should anticipate claims of statutory distributees and be prepared to refute any such claims as to the incapacitated person’s intent to leave his estate to presumptive distributees.

To enhance the likelihood of success, the domestic partner who requests authority to transfer assets to herself must also advise the court of the impact of gifts on the incapacitated partner’s potential long-term care public assistance eligibility. In New York, the healthy or community spouse has the right to receive unlimited transfers from their spouse without creating a disposition is consistent with any known testamentary plan or pattern of gifts he or she has made;

5. whether the proposed disposition will produce estate, gift, income or other tax savings which will significantly benefit the incapacitated person or his or her dependents or other persons for whom the incapacitated person would be concerned; and

6. such other factors as the court deems relevant.

15. N.Y. MENTAL HYG. LAW § 81.21(e)(1)-(3) (McKinney 2004).
Medicaid ineligibility period for nursing home coverage.\textsuperscript{16} To the contrary, transfers to a domestic partner will create a Medicaid ineligibility period for certain Medicaid programs.

In the long-term care context and in the absence of a valid power of attorney with broad gifting power, a guardianship proceeding may be the only means by which a domestic partner can seek authority to transfer assets and engage in long-term care planning. In the absence of the power or authority to engage in such planning for a partner with whom there has been financial interdependence, it may be necessary to spend all of an incapacitated person’s assets on the cost of his care, or, in the alternative and in an attempt to "preserve" some of the assets, a court may authorize gifting to the presumptive distributees rather than to the same sex partner.

The availability of the courts to a same sex couple is important. However, even with access to the courts, the healthy partner must have the ability to prove the existence and mutual interdependence of the relationship. Without such proof and strong advocacy it will be difficult to establish the appropriateness of the appointment of a same sex partner as the guardian for the incapacitated person or to establish the right of a same sex partner to engage in appropriate long-term care or Medicaid planning.

Even in New York City, although typically considered a liberal jurisdiction, members of the judiciary may be uneducated about same sex couples and even outwardly homophobic. Some of these issues can be addressed in a guardianship proceeding by providing the court with a written memorandum regarding the legal issues in the case, anticipating the need for extensive testimony about the relationship, and providing documentary proof of the mutual interdependence of the parties. Each case will be determined on its facts, but, as the case of Jackie and Sue demonstrates, unless the parties have advocates who understand the relationship and are willing to fight for its recognition, even same sex couples with a significant history of support and commitment are at risk of losing their home and family. Unfortunately, socioeconomic factors may have a significant impact on the ability to hire and retain competent counsel.

While it may not be possible or even desirable to avoid a

\textsuperscript{16} Medicaid is discussed infra pp. 22-32.
guardianship proceeding, clients who engage in appropriate basic planning may potentially avoid an unwanted and unnecessary court intervention in their relationships by executing appropriate advance directives, including a durable power of attorney, health care proxy, living will, nomination of a guardian, or other similar documents which are available within their state and jurisdiction. If a guardianship proceeding is later initiated for some unexpected event or change of circumstances, such documents can serve as an important basis to prove the intent of the parties with respect to their own affairs.

Planning for Long-Term Health Care

Long-term care is assistance provided when a person is unable to provide for their own personal and health care needs as the result of a disability or a prolonged illness. It ranges from personal assistance with dressing, eating, and other activities of daily living, to trained medical services in a skilled care facility or nursing home. Traditional long-term care may be offered through home care agencies, senior centers, adult day care programs, traditional nursing homes, and retirement communities that provide ongoing care.

Long-term care, whether provided in the home, in an assisted living facility, or in a nursing home, is costly. In New York, private pay home health aides charge between $10 and $20 per hour; this may be discounted for twenty-four hour live-in arrangements, although the weekly cost still averages about $2,000. The average cost of nursing home care in New York is about $10,000 per month, far beyond most individuals' and couples' ability to pay on an ongoing basis. However, in that we have no right to long-term health care coverage in this country, a person is expected to personally cover the cost of his or her own health care needs through his own assets or in full or in part by privately secured long-term care insurance. Many people, and especially today's seniors, do not have such private insurance. After all private funds and potential insurance are exhausted, public assistance will be available to cover the cost but only if the individual meets the eligibility requirements. In New York, the public assistance program for long-term health

17. Medicare, the federal health care program available to qualified individuals sixty-five years of age or older, does not provide long-term health care coverage.
care coverage is called Medicaid, which will be discussed in greater detail shortly.

To date, no predominantly gay or lesbian nursing homes or assisted living facilities have been established in this country. We are, however, making some progress in that roughly ten states have laws prohibiting discrimination against gay or lesbian persons in licensed nursing homes or assisted living facilities. Notwithstanding, these facilities struggle with issues of sex and sexuality for all of their patients or residents, and it is likely these issues are exacerbated for homosexual individuals. For now, clients should consider speaking with the administrators, directors, and social work staff of any such facilities to evaluate their experience with gay and lesbian persons and relationships, whether a same sex couple could share a private room, and whether staff is trained to address the needs and respect the rights of gay and lesbian individuals. On the home care front, New York is fortunate to have Lifemax Senior Services, the first and most comprehensive nonmedical home care service provider for the gay and lesbian community in the country. Over time, more such agencies will emerge to fill a growing need as successful models are developed.

LONG-TERM CARE INSURANCE

Long-term care insurance is not for everyone but does make sense for some. Whether such insurance is appropriate depends on the client's age, health, retirement objectives, income, and wealth, as well as considerations of the actual policies that may be available. The purchase of a policy should not cause financial hardship for the person seeking coverage or force them to forego other financial needs. Long-term care insurance policies are for people who have assets that they want to preserve for their partner or family members, who want to assure their own independence in connection with their potential future health care needs, and who want the ability to stay home with appropriate home care services under circumstances that might otherwise require nursing home placement. For same sex couples, quality long-term care insurance can eliminate the need to engage in Medicaid planning and enable them to avoid all of the potential issues such planning presents.

Practitioners need knowledge about long-term care insurance before being able to advise their clients appropriately
in the selection of a policy. Long-term care insurance coverage will vary depending upon the policy selected, but it is available to potentially cover any of the following levels of care:

**Skilled nursing care,** which is for medical conditions that require care by specially trained and usually state-licensed nurses or therapists. This level of care is usually necessary during or just after the severest level of an illness and typically requires twenty-four hours per day of coverage. Skilled nursing care can be provided in a person's home, with a combination of aides and nurses, or in a nursing home.

**Intermediate nursing care,** which is associated with stable conditions that require daily supervision, but not around-the-clock care. This level of care is less specialized than skilled nursing care, often involving predominantly personal care, and is generally supervised by registered nurses. Intermediate care may be required for months or even years, and it can be provided in a person's home or in a nursing home.

**Custodial care,** which is intended to assist a person with his or her activities of daily living, including bathing, eating, dressing, and other routine activities. Special training and medical skills are generally not required. Such care may be provided by unskilled but properly trained nursing assistants or aides in nursing homes, day care centers, and at home.

In selecting a long-term care insurance policy, practitioners should be aware that insurance carriers can give special meaning to terms under their own contracts, so it is important to always read the contract closely and to compare contracts fully before one is selected. In doing so, attorneys should be familiar with the following general terms:

**Daily benefit,** which is the amount of coverage or protection you are purchasing on a daily basis. For example, daily benefits range from $100 per day to $300 per day in most standard policies. The amount of coverage should be determined based upon the client's other resources and the cost of care in the area.

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18. In New York, attorneys are not permitted to sell insurance to their clients. The role of a New York attorney is usually to help the client compare policies.
where the client lives. In New York, $300 is a reasonable minimum for most people. In Florida, $150 per day may be adequate.

*Elimination period*, which is the period of time after meeting the medical qualification for benefits before the benefit will begin to be paid. Ninety to one hundred days is a reasonable elimination period since Medicare will typically cover the majority of the cost of the first 100 days of long-term care in a facility.

*Inflation rider*, which is a policy addition that can be purchased to increase the daily benefit by simple or compounded interest to help keep the daily benefit at pace with the increasing cost of care due to inflation. Five percent compounded is the standard inflation rider, but it does result in a substantial increase in the cost of the policy.

*Duration of benefits*, which is the amount of time for which insurance is being purchased. A client may select three years, five years, six years, or an unlimited duration.

*Coverage*, which is the benefits to be covered by the policy. A policy may be for nursing home, assisted living, home care, or any combination thereof. For instance, many policies limit the home care benefit to 50% of the daily nursing home benefit, which means that if you purchase three years of nursing home coverage, the home care coverage could potentially extend to six years.

Your client's ultimate selection among these various features will determine the cost of his or her policy. It is wise to advise your client that he should reasonably expect to be able to pay the premium for such insurance well into the future in that, once a premium is not paid, all potential coverage will terminate.

Long-term care insurance policies are medically underwritten and generally are not available to people who have been diagnosed with cognitive impairments related to Alzheimer's disease or Parkinson's disease and certain other progressive and chronic illnesses. However, an attorney should confirm that any policy considered by a client will cover future
cognitive impairments and that it is reasonable with respect to when coverage will commence. Generally, a reasonable policy provides that coverage starts upon the occurrence of a significant cognitive impairment or the inability to perform two or more activities of daily living.19

On a practical level, clients interested in purchasing long-term care insurance should always consider purchasing a policy with sufficient home care benefits to cover the anticipated cost of home care. While nursing home care may potentially be necessary, most seniors prefer to remain in their home and some only relocate to a nursing home because they cannot afford the cost of necessary home care.

Finally, in advising clients on the purchase of long-term care insurance, counsel should consider the impact of the policy cost on the client's standard of living. If a client has little or no assets, it is inappropriate for them to incur the expense of long-term care insurance. However, if one partner has all or most of the assets in her name individually and the other partner is financially dependent, it may be appropriate for the partner with the assets to purchase a policy for her own potential long-term care needs, or those of her partner, to protect the dependent partner. Alternatively, certain other long-term care planning methods may be available to same sex couples, although it may not be entirely possible to protect all of a couple's assets through such planning.

MEDICAID AND MEDICAID PLANNING

Medicaid is a needs-based program created by federal law in 1965, and adopted by New York in 1966,20 which is potentially available to cover long-term health care costs. Most other states adopted this program at about the same time, although some states do not call their program "Medicaid."21 Each state administers its Medicaid program based upon various federal requirements, and benefits can vary significantly state by state.22 In New York, Medicaid is funded roughly 50% by the federal government, 40% by the state, and 10% by the counties.

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19. The activities of daily living are ambulating, toileting, transferring, dressing, and eating.
22. New York State Medicaid Regulations are found at id.
Medicaid is administered by county, with each county having its own policies and procedures.

Generally, Medicaid benefits are available to individuals of any age who meet certain financial criteria and are disabled or medically needy.\textsuperscript{23} Supplemental Security Income (SSI) recipients\textsuperscript{24} are also automatically enrolled in Medicaid.

**COVERED SERVICES**

Medicaid is available to pay for doctor visits, laboratory work, medications, medical equipment and therapies, physical therapy, nursing care, home care, and nursing home care for qualified individuals.\textsuperscript{25} In the community, Medicaid may provide recipients with care tailored to meet an individual's personal circumstances based upon an independent assessment of his or her specific medical or social needs. Such care may include skilled nursing care, personal assistant services, and medical services all in the person's own home. In skilled care facilities, Medicaid pays qualified expenditures for recipients who reside in such facilities whether they are custodial residents, who require monitoring because of dementia, or patients with skilled nursing needs.

In both the community and skilled care settings, Medicaid pays the cost of all such approved services directly to the participating service providers. All covered fees are set by state regulations, and the participating provider must accept the fees as set by the state. Where a Medicaid recipient has and continues to retain private health insurance coverage, Medicaid is the payer of last resort and will cover that portion of the approved fee after payment has been made by the private insurance company.

**FINANCIAL ELIGIBILITY FOR SPOUSES AND INDIVIDUALS**

For purposes of Medicaid eligibility, any individual with a same sex partner is evaluated as a single person because the same sex partner, or even a domestic partner, is not considered a

\textsuperscript{23} N.Y. SOC. SERV. LAW § 366 (McKinney 2004).

\textsuperscript{24} Supplemental Security Income (SSI) is a federal program that gives a cash allowance to individuals who are aged, blind, or disabled and who do not qualify for Social Security Disability benefits.

\textsuperscript{25} N.Y. SOC. SERV. LAW §§ 363-369 (McKinney 2004).
"legally responsible relative." Alternatively, a legally married spouse is held by Medicaid regulations to be a "legally responsible relative," and, as a result, is obligated to provide for the maintenance and financial support of their lawful spouse. As such, the assets of both spouses are included in the determination of financial eligibility for either one of the spouses seeking Medicaid coverage. This is the most significant distinction from the treatment of same-sex couples in the context of a Medicaid application. It is important to note, however, that while this distinction in treatment provides certain planning advantages for same-sex couples in the context of Medicaid home care eligibility, it also eliminates certain other significant Medicaid planning opportunities available to legally recognized spouses for nursing home and other skilled care programs under Medicaid.

The most significant benefit same-sex couples are denied under the current Medicaid program is the unlimited exemption that exists for the transfer of assets between spouses. Unmarried couples and same-sex couples are denied this exemption. As a result, this disparate treatment of same-sex partners in the context of Medicaid drastically impacts the planning a same-sex couple has available to them and their potential financial security.

A second advantage that same-sex couples are denied in connection with a Medicaid application relates to the opportunity for spousal impoverishment budgeting. In 2004 in New York, a lawful, nonapplicant spouse (referred to as the "community spouse") is entitled to retain resources of between $74,820 and $92,760, the couple's home, and enough of the applicant spouse's income to raise the community spouse's income to $2,319 per month. This type of budgeting is not available to same-sex partners. As a result, a same-sex partner will never be permitted to retain the income of an applicant spouse, the applicant's house, or any of the applicant spouse's resources without use of a specific exemption, advance

27. N.Y. COMP. CODES R. & REGS. tit. 18, § 360-4.3(f) (2004).
30. These numbers are increased annually for inflation.
planning, or other extraordinary measures.

Another important consideration for all applicants, married or not, is that assets owned by an applicant jointly with another person are presumed to belong entirely to the Medicaid applicant. This is a rebuttable presumption but one that can be difficult to rebut.

FINANCIAL ELIGIBILITY FOR INDIVIDUALS IN NURSING HOMES

An individual is eligible for Medicaid nursing home benefits, called "chronic care benefits" in New York, if they have resources of $3,950 or less, together with a prepaid irrevocable funeral trust, and, potentially, a burial fund. If the applicant expresses the intent to return home, their home may also be exempt. With respect to income, a Medicaid recipient in a nursing home may only retain $50 per month of their gross income, plus the cost of health insurance premiums. Excess income is paid to the nursing home on a monthly basis and helps defray the cost to Medicaid. Transfers of assets made by a Medicaid applicant within three or five years prior to the initial date that Medicaid coverage is being requested may create a period of ineligibility for nursing home benefits, which will be discussed in greater detail shortly. If the transfer of assets has created a period of Medicaid ineligibility, that period, commonly referred to as a "penalty period," must expire before the applicant will qualify for nursing home benefits.

FINANCIAL ELIGIBILITY FOR INDIVIDUALS SEEKING HOME CARE

An individual is eligible in New York for Medicaid home care if they have resources of $3,950 or less. As stated above, an applicant may also have a prepaid irrevocable funeral trust or a

37. Income from certain enumerated sources is exempt. Those exemptions are beyond the scope of this article.
In the home care context, an applicant's home is exempt. In New York, a home care Medicaid recipient may currently retain $679 per month of their gross income. Any excess income must be spent down on medical expenses before the Medicaid program will pick up the approved expense.

In reality, the meager income an individual is permitted to retain while on community Medicaid makes home care impractical for the majority of individuals in most cities, and certainly in New York, unless they have an unmarried partner or other family member who is willing to cover the majority of the applicant's housing and living expenses or are eligible to create a Special or Supplemental Needs Trust. Because a same sex partner is not a "legally responsible relative," the healthy partner can cover those expenses, thus enabling the Medicaid recipient to remain at home despite the minimal income he is permitted to retain.

In New York, Medicaid home care does not currently have a look back period or means to calculate a penalty for transfers as is required and authorized by federal statute in the nursing home Medicaid context. Thus, in New York, it is possible for an applicant to transfer 100% of her assets to her same sex partner one month and be technically eligible for Medicaid benefits in the community the very next month. Because the same sex partner is not a "legally responsible relative," the non-applying partner's income and resources are not considered in the determination of the applicant's eligibility. This one unique advantage available to same sex couples does not exist for married couples.

43. As a general rule there are two sets of rules for determinations of Medicaid eligibility, Nursing Home Rules and Home Care Rules. The Nursing Home rules have a thirty-six or sixty month look back period, and periods of ineligibility are calculated for gift transfers. Current law does not have such a look back period under the traditional Home Care rules. There are some nontraditional home care programs for which the Federal Government has granted waivers; eligibility for those programs is determined based upon the Nursing Home rules.
44. The applicant must be mindful that if their needs change and nursing home care is required after assets are transferred, there will be a thirty-six or sixty month look back period, and transfers of assets within that time period may result in a period of ineligibility.
45. New York offers lawful spouses the right of spousal refusal, Social Services Law § 366(3)(a), which creates a similar result. Spousal refusal enables a community spouse to retain assets in excess of the Medicaid eligibility limits while not causing the applicant spouse's Medicaid application to be denied. N.Y. SOC SERV. LAW § 366(3)(a). When a
It is important to be aware that some states, including New York, have specialized Medicaid home care programs that provide additional skilled services or benefits; however, these programs require an application process similar to that used for Medicaid nursing home coverage and, therefore, include a look back period for transfers and the potential calculation of a penalty period. In addition, based on severe fiscal problems, many states are considering adding a look back period for transfers and their consequent penalty periods to the process of applying for Medicaid home care benefits in the future.

THE LOOK BACK WINDOW

When an individual applies for Medicaid nursing home benefits or certain waivered programs, he must voluntarily permit a review of all financial records and transactions. Where the assets of an applicant are held outside of a trust, the period of time for which financial documentation must be provided is thirty-six months prior to the date the applicant is seeking Medicaid coverage. Where the applicant held assets inside of a trust, financial documentation must be provided for the sixty months prior to the date coverage is requested with respect to such trust assets. This is referred to as "the look back window." Regardless of which look back window is applicable, the applicant is obligated to provide Medicaid with all of his or her financial records, including bank statements, canceled checks, and certificates of deposit, and to explain any transactions for which Medicaid requests an explanation. Failure to properly document and explain a transaction can be grounds for denial of a Medicaid application.

INELIGIBILITY PERIOD

A period of ineligibility for Medicaid, sometimes called a penalty period, is created for an individual who makes a nonexempt transfer of assets or a gift within the applicable look

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community spouse signs a spousal refusal, the Medicaid application must be evaluated as if the applicant spouse were single. *Id.* However, since the lawful spouse has a legal obligation of support to the applicant spouse, the law provides Medicaid with the right to sue the refusing spouse for money actually paid on behalf of the applicant. *Id.*

back window. The ineligibility period is calculated by dividing the regional monthly nursing home rate (as established by Medicaid regulations) by the value of any uncompensated transfer or transfers of assets within the look back window. The regional cost of nursing home care for specific regions is revised on an annual basis. The present regional monthly nursing home rate in New York City is $8,695. Accordingly, if a New York City resident made a gift of $86,950 to her unmarried, same sex partner within her look back window, she would create a Medicaid nursing home ineligibility period of ten months ($86,950 divided by $8,695). In applying the ineligibility period, the penalty will run from the first day of the month following the date of the gift. In the example, if this New York City resident made the gift on September 15, 2003, the ineligibility period would run for ten months beginning on October 1, 2003 and ending on July 31, 2004.

The ineligibility period for an applicant whose assets were not maintained in a trust should generally not exceed thirty-six months and may be less with proper planning. For example, if an individual were to transfer a $500,000 cooperative apartment to their unmarried partner and that transfer occurred within the individual's look back window in relation to a Medicaid application, an ineligibility period of 57.5 months ($500,000/$8,695) would result. However, if the individual were advised properly and waited until the thirty-seventh month after the transfer was completed to apply for Medicaid nursing home benefits, the transfer would be outside of the applicant's look back window, Medicaid would not be aware of the $500,000 gift, and no ineligibility period would result. Alternatively, without proper advice, if the applicant applied for nursing home Medicaid benefits before the thirty-seventh month, the transfer would be disclosed to Medicaid because it would have been within the look back window and, as indicated above, the applicant would be subject to the full 57.50 month ineligibility period. Clearly this demonstrates the importance of considering all prior transfers and circumstances with appropriate and knowledgeable counsel before applying for nursing home Medicaid benefits.

47. Id.
49. Id.
THE RULE OF HALVES

When a person suddenly requires nursing home care and has not done Medicaid planning, it may be possible to save approximately one half of the individual’s assets for their beneficiaries or heirs. This may be one of the best alternatives for a same sex partner in immediate need of nursing home care who wishes to engage in Medicaid planning to protect a healthy partner who is remaining in the community. As a general rule, this type of planning will require a well-drafted power of attorney with unlimited authority to make gifts or a guardianship action and sufficient proof of the person’s intent to make the transfer of assets.

As indicated previously, if a person who is about to enter a nursing home transfers one half of their assets immediately before admission to the nursing home it will result in an ineligibility period for Medicaid coverage. However, the remaining assets in the nursing home resident’s name, together with their monthly income, will still be available to cover the cost of the nursing home care during the ineligibility period that was created by the transfer. For example, if an applicant enters a nursing home that costs $9,000 per month, has $300,000 in assets on the date of the nursing home admission, and receives $1,500 in income each month, the rule of halves will apply as follows: by making a gift of $150,000 an ineligibility period of 17.25 months will result ($150,000/$8,695). In the meantime, the cost of the nursing home for the eighteen-month ineligibility period will be $162,000 ($9,000 per month for eighteen months). The applicant will be able to use the remaining $150,000 of his assets, plus his monthly income totaling $27,000 over the eighteen-month period (eighteen months at $1,500 per month), for a grand total of $177,000, which would more than cover the $162,000 in nursing home care cost. This will leave the applicant with $15,000 extra for incidentals during the ineligibility period. Accordingly, eighteen months after the gift is made, the assets that were retained will be nearly exhausted, the ineligibility period will have expired, and it will be appropriate to file an application for Medicaid nursing home coverage.

Frequently, rule of halves planning is the only form of Medicaid planning available to a same sex couple with an immediate need for coverage for one partner. Attorneys practicing in this area should be well versed on its use.
A client's home is an exempt asset in the context of Medicaid nursing home coverage as long as she has the intent to return. Unlike spouses who can make an exempt transfer of the home between one another, transferring a home or any interest in a home between same sex partners or unmarried persons is considered a gift and can create a period of ineligibility for Medicaid. In calculating the potential ineligibility period, the value of the transfer is the fair market value of the home on the date it was transferred. For a client's protection, the consequences of such a gift should be considered before the gift is made.

Under New York Law, transfer of a home or apartment is exempt if it is transferred to: 1) a spouse, disabled, or minor child; 2) an adult caregiver child who resided in the home as a caregiver for two years prior to the transfer; 3) a trust for the benefit of a disabled child; or 4) a sibling with an equity interest in the property who resided in the property for at least one year prior to the Medicaid application. In certain circumstances, these exempt transfers may be available to a gay or lesbian client; however, the most appropriate transferee in a same sex relationship, the partner, is unavailable and not protected under current law.

TRANSFERS OF REAL ESTATE WITH A RETAINED LIFE ESTATE

When a client transfers his home to a person other than an exempt transferee, an ineligibility period for Medicaid nursing home benefits will be incurred. It is possible to reduce the value of such a transfer by transferring only a remainder interest in the property to the otherwise unprotected third party while retaining a life estate for the client. By doing so, the value of the gift is limited to the value of the remainder interest. The value of the remainder interest is calculated by multiplying the

51. Cooperative apartment boards may not approve such a transfer. A cooperative is a form of property ownership, common in New York, whereby individuals purchase stock in a corporation that owns residential or commercial real property and the right to the exclusive use and possession of a certain portion of the real property; however, the purchase or transfer can only be made after the approval and consent of the board of directors of the corporation.
fair market value of the property by the remainder interest factor for a person of the donor's age on the date of the transfer. These remainder interest factors are stated on the Life Estate and Remainder Interests Table as issued by the Health Care Finance Administration of the Centers for Medicare and Medicaid Services.\(^52\) The value of the remainder interest is significantly less than the total fair market value of the property; therefore, the ineligibility period calculated using that reduced value will be of shorter duration than if the gift had been given outright and was valued at the fair market value. Further, upon the death of the life tenant, the value of the life estate is zero, and Medicaid will have no right of recovery against the property.

For example, if a seventy-year-old, New York City resident transfers real property with a fair market value of $300,000 to a third party without a life estate, the period of ineligibility that results for Medicaid purposes is 34.5 months ($300,000/$8,695). However, that same transfer with the retention of a life estate will substantially reduce the value of that gift. Specifically, based upon the client's age of seventy, the remainder interest, which is the value of the gift, will be calculated as .39478 of the total value, or $118,434 ($300,000 multiplied by .39478), and the resulting ineligibility period will be only 13.6 months ($118,434/$8,695). Further, the retention of a life estate usually preserves senior citizen and veterans tax exemptions for the life estate holder, and, under current tax law, enables a stepped-up tax basis for the remainder interest holder if the property is sold after the death of the life estate holder. Be aware, however, that in 2011, the stepped-up tax basis rules change significantly.

For same sex couples, the gift of a remainder interest and the retention of a life estate may be a viable planning tool since it reduces the value of the gift to the partner. For many couples their home is their most significant asset. This fact, together with the fact that one partner often owns the home individually, may make this type of planning essential to preserve a healthy partner's right to remain in the home if Medicaid nursing home benefits are needed for the property owner, as well as after that partner's death.

Once the owner of property gives the remainder interest in

his property to someone, he can no longer sell the property without the remainder interest holder's consent. If both owners consent to the sale, the proceeds are divided in accordance with the remainder interest table for an individual who is the same age as the life estate holder at the time of the sale.

TRANSFERS OF REAL ESTATE TO AN IRREVOCABLE TRUST

If a client is not certain that she will want to reside in her home for the balance of her lifetime, the use of the life estate approach may be inappropriate, and an irrevocable grantor trust may be a better alternative. Briefly stated, the transfer of real property to an irrevocable trust will create a period of ineligibility based upon the full value of the property as of the date of the transfer; however, once the ineligibility period has expired, the property will not be considered an available resource for Medicaid purposes. Additionally, if the home is sold during the lifetime of the client, the $250,000 capital gains tax exclusion may be available to shelter some or all of the proceeds of the sale of the property, and liquidated assets that continue to be held within the trust are available to purchase another residence or generate income for the beneficiary during her lifetime. Furthermore, upon the death of the beneficiary, the trust assets will pass to another designated beneficiary as stated in the trust, without any opportunity for Medicaid to seek reimbursement from the trust assets.

ESTATE PLANNING

Despite the widespread marketing of revocable trusts and similar products, they are not appropriate or necessary for the majority of heterosexual people to whom they are marketed. In the gay and lesbian community, however, revocable trusts can be useful tools to insulate an estate plan from attack by relatives who may disagree with a client's testamentary plan and to expedite the estate administration process. The considerations for determination of appropriate documents and estate planning tools are discussed below.

LAST WILL AND TESTAMENT

In most jurisdictions, including New York, the probate of a
will requires notice of the proceeding to the nearest living blood relatives of the decedent. In any estate, this process inherently creates two potential problems. First, it may be difficult for the nominated executor to locate the necessary family members. Second, the mandatory notification to blood relatives who have no personal relationship to the decedent and who have nothing to lose almost encourages challenge to the will.

In interviewing a client with regard to his or her estate plan, it is important to collect information on the client's family tree. Counsel should ascertain the client's closest living relatives, where they live, and whether the client reasonably anticipates any challenge by them to his or her testamentary plan. Missing or unknown relatives, as well as any foreseen will contests, can create significant problems in probating a will. While a last will and testament may be sufficient and appropriate for a client, when problems such as those just mentioned are anticipated, the additional cost of establishing a trust may be appropriate.

**REVOCABLE TRUSTS**

Assets properly maintained and managed in a trust are not subject to probate and, because no probate is necessary, there will be no requirement to locate or notify the biological family members who would be entitled to notice in a probate proceeding. However, a trustworthy and competent trustee and alternate trustee are particularly important because, unlike the supervision of an executor in a probate proceeding, the trustee is not generally subject to any judicial oversight or formal accountability. If an appropriate trustee is in place, a trust can manage assets during a person's lifetime and enable the prompt administration of the estate upon death.

The use of a trust as the central planning tool for a client can be beneficial, but only to the extent it is properly drafted, funded, and supported by a pour-over will. Standard trust forms do not provide authority to support a dependent, same sex partner or to engage in Medicaid planning; thus, attorneys should be cautious about using them and should make sure to add provisions to meet the client's specific needs and wishes. Most important to the attorney drafting a client's trust should be a full understanding of what the client wants to accomplish with

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53. N.Y. SURR. CT. PROC. ACT LAW § 1403 (McKinney 2004).
the trust and the client's ability to fund and manage the trust appropriately.

In circumstances where one member of an unmarried couple holds the majority of the assets or the home, the trust agreement should provide for the other partner's continued residence in the home, as well as the use of other trust assets for her support, in the event the partner with the assets becomes incapacitated or institutionalized. Because this type of protection of a same sex partner may require Medicaid planning, the trust agreement should allow for contingency planning, including liquidation of trust assets and return of trust assets to the grantor to enable such planning to be done.\textsuperscript{54}

For a trust to work effectively, individually owned assets must be transferred into the trust or the trust will not control how such assets will ultimately pass. If the assets are not transferred to the trust, the individually owned assets will be subject to the client's will or the intestacy laws of the decedent's domicile. Accordingly, attorney supervision and confirmation of the transfer of assets into the trust is suggested. Left to their own devices, clients frequently fail to transfer assets into trust accounts despite specific, detailed instructions to do so. To best serve the needs of your client, it is recommended that the transfer of real property and the assignment of tangible personal property into the trust be completed by the attorney immediately after execution of the trust agreement and that any durable power of attorney prepared on the client's behalf specifically include a provision authorizing the transfer of assets into the trust.

As a matter of extra protection, no trust should be executed without a pour-over will. A pour-over will is used to collect all individually owned nontrust property subject to probate so that it may be transferred into the trust through the will and ultimately distributed in accordance with the trust's provisions. To do so, the pour-over will must identify the trust as the primary beneficiary of all probate assets. In addition, and as added protection, the contingent beneficiary or beneficiaries named in the pour-over will should be a mirror image of the

\textsuperscript{54} As discussed above, Medicaid presently has a sixty-month look back period for transfers to or from a trust. If the trust assets are returned to the person who created the trust before any Medicaid planning or gifting is done, the look back period can be reduced to thirty-six months and more reasonable Medicaid planning may be possible. See supra note 45 and accompanying text.
death beneficiaries included in the trust agreement. Such duplication as to a client's intended beneficiaries provides further insulation from a challenge to the will in that it provides further evidence of the client's testamentary plan. Further, certain assets, including cooperative apartments, may not be readily transferable into the trust, and the pour-over will would be the mechanism used to collect the assets, or the proceeds of the sale of assets, for deposit into the trust and for ultimate distribution through the trust.

**ESTATE AND GIFT TAXATION**

Federal and state estate tax returns for unmarried persons may be subject to special scrutiny, especially where there is significant jointly owned property. Many gay and lesbian couples own real estate, bank or asset accounts, and personal property as joint tenants with rights of survivorship. This is done for various reasons, but the most significant of which is the immediate transfer of the asset to the surviving joint owner upon the first partner's death. However, this form of ownership can have significant estate and gift tax consequences.

For example, when Tom purchases real property for $100,000 and transfers it to himself and Bob as joint tenants with rights of survivorship, Tom made a completed gift to Bob of $50,000. While most people, and even many attorneys, do not recognize this as a completed gift, it is a completed gift because either party, here Tom or Bob, could unilaterally sever the joint ownership, thus severing the unity of time and, as a result, creating ownership as tenants in common. Thus, it is important to be aware that a potentially taxable, reportable gift occurs even if the joint tenancy can only be severed by a partition action. The value of the gift is determined by the percentage interest each person would be entitled to in the partition action, which is usually fifty percent.

Where no gift has been given and joint property is accumulated by a same sex couple, attorneys should be mindful of other tax issues. Specifically, pursuant to section 2040 of the Internal Revenue Code, there is a rebuttable presumption that

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56. In New York, the deed severing the joint tenancy must be recorded prior to the death of the severing joint tenant in order to be valid. N.Y. REAL PROP. LAW § 240-C (Mckinney 2004).
the full value of a nonspousal joint interest in real or personal property is part of the gross estate of the first joint owner to die. The presumption can be rebutted with documentary proof of actual consideration paid by each joint owner, but this may involve considerable expense to the client if such rebuttal becomes necessary.

Consider the following. An unmarried couple in New York City collectively purchased a condominium in 1979 for $150,000. The deed was to Ann and Barbara as joint tenants with rights of survivorship. The down payment of $50,000 was paid by Ann. The mortgage was in both Ann and Barbara's names. Ann and Barbara deposited their paychecks into a joint bank account and all bills, including the mortgage, were paid from the joint bank account. The mortgage was paid in full by 1999. Ann died in 2003 and the apartment was appraised at $2,000,000 dollars (a reasonable possibility in New York City today). The only other assets were Ann and Barbara's joint checking and savings accounts with a total value of $500,000.

For decedents dying in 2004, up to $1,500,000 in assets could pass to an heir without incurring any estate tax liability. For purposes of completing the federal estate tax return, commonly referred to as the 706, Ann and Barbara's apartment and joint checking and savings accounts must be included on Part 2 of Schedule E at their date of death values of $2,000,000 and $500,000 respectively, unless Barbara can prove actual consideration that she personally paid towards the acquisition of the property. Unfortunately, the obligation to include the full value of the assets on Ann's federal estate tax return could potentially result in a tax liability of approximately $500,000.

In this example, Barbara would like to avoid this significant liability. To do so, Barbara must be able to provide twenty-five years of bank statements, which demonstrate her contributions to the joint bank accounts that were used to pay the mortgage and, if she and Ann had roughly equal salaries, Barbara may be able to exclude 50% of the value of the assets. In the process of doing so, the IRS may investigate whether a gift tax return was filed for Ann's gift to Barbara in 1979 (the down payment on the property) and, if not, penalties and interest could be assessed for

57. I.R.C. § 2040.
58. Id.
59. Fifty percent of A's taxable estate of $1,000,000.
failure to file the gift tax return.

As this example demonstrates, counsel should be prepared for special scrutiny of a 706 for a deceased same sex partner who dies with a potentially taxable estate. Any attempt to exclude a portion of the value of joint interests will likely raise such scrutiny. Counsel should simultaneously consider using the full value of the joint interest to the surviving partner's advantage in that it may maximize the step-up tax basis of the property if it is included on the decedent's estate tax return.60

CONCLUSION

While the basic concepts of elder law for gay and lesbian seniors are not necessarily different from the concepts of elder law as they apply to heterosexual seniors, state and federal laws treat these two groups with very similar needs quite differently. Notwithstanding, by being aware of this differential treatment and applying particular sensitivity in addressing the planning needs of same sex couples and gay and lesbian individuals, any capable, caring, and conscientious elder law practitioner will be able to effectively represent, protect, honor, and advocate for their clients' rights and interests. All clients, gay, lesbian, or straight, should have the opportunity for such legal representation.

60. I.R.C. § 1014.