

HEALTHCARE PLANNING FOR LOW INCOME INDIVIDUALS

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Background on LGBT Caregiving

In the United States, an estimated eighty-five percent of all eldercare is provided on an informal (i.e., unpaid) basis, mostly by younger relatives.¹ These younger relatives include primarily adult children, nieces, and nephews. However, in the LGBT community, spouses, partners, and friends provide almost ninety percent of the care received by older LGBT adults; adult children only provide roughly three percent of the care.² This may not be surprising given that older LGBT folks are less likely to have adult children than their non-LGBT peers. However, what is striking is that even though the many in the LGBT community have a strong support system, those in the support system rarely have any legal authority to aid their friends and loved ones.

Chosen families, however, have two major drawbacks. First and foremost, they are not recognized as next of kin under the law and, therefore, have no legal standing in terms of property rights or decision making.³ Moreover, chosen family networks are at a significant disadvantage in terms of caregiving burdens because they tend to be comprised of individuals who are in the same age cohort.⁴

Essentially, in addition to the normal demands of aging, LGBT elders must pre-plan to work within the legal fragility of their chosen family, widespread financial insecurity, and anti-LGBT bias that exists in the healthcare setting. Healthcare planning offers LGBT elders the opportunity to define their family and memorialize their wishes, which for a very low income client may be more important any traditional estate issues.

¹ Susan C. Eaton, *Eldercare in the US: Inadequate, Inequitable, but not a Lost Cause*, in WARM HANDS IN COLD AGE: GENDER AND AGING 38 (Nancy Folbre, Lois B. Shaw, & Aneta Stark, eds., 2007). Informal eldercare includes assistance with the “instrumental activities of daily living,” such as shopping and transportation, as well as more intimate personal care. See *infra* text accompanying notes 102 – 03.

² Karen I. Fredriksen-Goldsen, et al., *The Aging and Health Report: Disparities and Resilience among Lesbian, Gay, Bisexual, and Transgender Older Adults* (2012), available at <http://depts.washington.edu/agepride/wordpress/wp-content/uploads/2012/10/Full-report10-25-12.pdf> [hereinafter Fredriksen-Goldsen, *The Report*]. As used in the article, the term “LGBT older adult” means some age fifty or older.

³ Nancy J. Knauer. "Gay and Lesbian Elders: Estate Planning and End-of-Life Decisionmaking" *Florida Coastal Law Review* (2010) Available at: http://works.bepress.com/nancy_knauer/22/.

⁴ Intergenerational relationships are not common in the gay and lesbian community. See Andrew J. Hostetler, *Old, Gay, and Alone? The Ecology of Well-Being Among Middle-Aged and Older Single Gay Men*, in *Gay and Lesbian Aging*, *supra* note 47, at 143, 159.

Health Care Planning: Living Will and Health Care Power of Attorney

Each state has its own set of statutes and statutory form that is recognized by health care providers. These forms should also be honored outside the client's home state. New federal Medicare regulations require every medical or health care facility that receives federal funds to honor the directives.

A more expansive document is an **Advanced Health Care Directive**. This document allows the client to specifically define the type of treatment she wants. California¹¹ has a form that includes information about the person's primary care physician, the agent's authority and when it becomes effective, the agent's post-death authority and end-of-life decisions. This form can be adapted and added to any Living Will and Health Care Power of Attorney.

Even though these documents are included in an estate plan, the client needs to discuss the choices with her doctor, especially if the client has a terminal illness or other significant medical condition.

The client should include as much information as possible in the Living Will and Health Care Power of Attorney to be sure her wishes are carried out and everyone knows what she wants done. Clients need to know this is not a time for secrecy or confidentiality.

Special Considerations for the LGBT Community

1. **Naming an Agent** that is different from the statutorily decided agent
2. **Including Respectful Relations from Providers**, such as recognizing same-sex marriage or gender identity, including preferred pronoun and name

Sample Clause for: GENDER IDENTITY

I want, and hereby grant my agent, named above, to have full power and authority to make healthcare decisions for me, including, but not limited to, the following powers:

To direct any healthcare provider, medical staff, or other person to address me by my name and gender pronouns of choice, and to preserve to the fullest extent possible an appearance consistent with my gender identity.

3. **Respectful Treatment**, such as language regarding an individual's appearance or where a patient is housed when a facility includes a male and female wing.

Sample Clause for: RESPECTFUL RELATIONS [Delete for clients
unconcerned with gender identity]

During any period of treatment, I direct my physician and all medical personnel

to refer to me by the name of _____ irrespective of whether I have obtained a court-ordered name change, changed my gender marker on any identification document, or undergone any transition-related medical treatment.

During any period of treatment, I direct my physician and all medical personnel to use the _____ pronoun in reference to me, my chart, my treatment, etc., irrespective of whether I have obtained a court-ordered name change, changed my gender marker on any identification document, or undergone any transition-related medical treatment.

During any period of treatment, if I am unable to personally maintain my _____ appearance, I direct my physician and all medical personnel to do so to the extent reasonably possible, irrespective of whether I have obtained a court-ordered name change, changed my gender marker on any identification document, or undergone any transition-related medical treatment.

4. **Pregnancy Concerns**, are often overlooked, but should be included because of unforeseen circumstances.

Sample Clause: IN CASE OF PREGNANCY [Delete for clients unconcerned with pregnancy]

If I am pregnant, my agent shall follow these specific instructions:

- i. I direct that my agent shall make any determination, in my agent's sole and absolute discretion, to provide, continue, withhold or withdraw life-sustaining measures during such pregnancy.*

>>OR<<

- ii. I direct that my agent shall make any determination to provide, continue, withhold or withdraw life-sustaining measures during such pregnancy based upon my best interests and based upon my preference that my life not be prolonged through the use of such measures simply for the purposes of sustaining the pregnancy.*

>>OR<<

- iii. I direct that my agent shall make any determination to provide, continue, withhold or withdraw life-sustaining measures during such pregnancy based upon the best interest of my infant in gestation.*

1. **Visitation Concerns** are easily put into this document and can include a list of person not allowed to visit the client. Additionally, a client can include language on who has unlimited visitation access to a patient. I also want my agent to:

Sample Clause for VISITATION CONCERNS

I want, and hereby grant my agent, named above, to have full power and authority to make healthcare decisions for me, including, but not limited to, the following powers:

- a. Be permitted to ride with me in an ambulance if ever I need to be rushed to the hospital; and*
 - b. Be able to visit me if I am in a hospital or any other healthcare facility.*
 - c. To make decisions regarding visitation (i.e., who may visit me) during any time that I am admitted to any health care facility, consistent with the following directions:*
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Teach your client how to use these documents:

Once client has executed the document, which is usually done by signing the document in front of two witnesses (and in some jurisdictions in front of a notary), the original should be kept by the client. A copy should be provided to named agents as well as **all** care providers. This document should be discussed with providers as well the person's agent so that everyone fully understands the client's wishes. A client should be advised that carrying these documents when travelling is important. Using electronic copies or placing them in a cloud-based environment (like Dropbox, iCloud, Google) makes it easier. Leaving copies with people at home is also helpful. The document should not be kept in a safe deposit box because it is more difficult to access and may not be useful if others cannot reach it.

Clients must be aware that all the legal documents available may not prevent ignorant people from refusing to accept them. Wills, powers of attorney, and advance health care directives can go a long way to provide LGBT elders with a measure of security, but they are ultimately not sufficient to transform chosen family into "next of kin."⁵

⁵ A testator's next of kin have standing to challenge a will provided they have a pecuniary interest in it—that is, provided they would gain financially if the will were set aside. *See* In re Estate of Getty, 149 Cal. Rptr. 656, 658 (Cal. Ct. App. 1978) (holding contingent trustee lacked standing to challenge the will of J.P. Getty because she did not have a *pecuniary interest* in the outcome). As a result, disappointed heirs will have legal standing to challenge any non-normative testamentary disposition. *Id.* In the absence of marriage or its statutory equivalent, when a surviving same-sex partner is the primary beneficiary under the will, the decedent's intestate heirs will have standing to challenge the will because they would take under the rules of

Disposition of Bodily Remains

Some state laws allow an individual to name anyone they want to make funeral arrangements.⁶ Even in a state that does not provide statutory language regarding a disposition of bodily remains, it is best to advise clients to execute the document.⁷ A client should be advised that in many states such documents are susceptible to challenge by next of kin on multiple grounds, including lack of mental capacity and undue influence.

Most states allow only the decedent's immediate family to make funeral arrangements. In the more restrictive states, the family has the right to overrule or ignore the decedent's wishes. They may also exclude the surviving partner from the memorial service and burial. These documents are important when considering not only challenges from the next of kin, but also third party contractual parties, such as funeral homes or cemeteries.⁸

Sample Clause from Disposition of Bodily Remain Document:

intestacy if the will were disregarded. *See* UNIF. PROBATE CODE § 2-103 (1993) (shares among heirs other than spouse).

⁶ Virginia expressly authorizes the designation of an individual who "shall make arrangements . . . for [the declarant's] funeral and the disposition of [the declarant's] remains, including cremation . . . upon [the declarant's] death." VA. CODE ANN. § 54.1-2825 (2001). *See* Jennifer E. Horan, "When Sleep at Last Has Come": Controlling the Disposition of Dead Bodies for Same-Sex Couples, 2 J. GENDER RACE & JUST. 423 (1999) (discussing obstacles encountered by surviving same-sex partners).

⁷ In the absence of legislation, it may not be clear whether an individual has the authority to direct the terms of her funeral and burial arrangements, but the document will serve as indicia of the individual's wishes, Knauer, Nancy J., LGBT Elders in a Post-Windsor World: The Promise and Limits of Marriage Equality (December 4, 2014). Texas Journal of Women and the Law, Vol. 24, No. 1, 2014; Temple University Legal Studies Research Paper No. 2015-06. Available at SSRN: <http://ssrn.com/abstract=2557402>.

⁸ 2 Cynthia Friedman died at age thirty-five and left a will naming her partner of thirteen years, Sherry Barone, as executor. *See* Debbie Woodell, Gay Partner Battles for Rights Even at the Grave, AUSTIN AM.-STATESMAN, May 31, 1997, at C8. The will expressly authorized Barone to "arrange for the disposition" of Friedman's remains. *See* Murray Dubin, Dispute Involving Headstone Epitaph Now A Federal Case, PHILA. INQUIRER, June 26, 1997, at C01. The cemetery where Friedman was buried refused to inscribe her headstone with the epitaph directed by Barone because Friedman's parents objected to the use of the term "beloved life partner." *See* Claudia N. Ginanni, Cemetery To Inscribe Headstone, Pay \$ 15,000, LEGAL INTELLIGENCER, Sept. 8, 1997, at 5. Shortly before the third anniversary of Friedman's death, the cemetery acceded to Barone's wishes as part of a settlement agreement reached in the federal lawsuit Barone brought against the cemetery.

By this letter, written on _____, I, _____, hereby specify the procedures that I want to be followed for my funeral and the disposition of my body.

I designate and direct that my _____, _____, be fully and solely in charge of the disposition of my bodily human remains. I authorize this agent to make all decisions necessary for the disposition of my bodily human remains; performance of funeral and memorial services; to publish in any newspaper an obituary notice containing whatever information she/he may choose; to contract with any competent person or company for the rendering of professional services by any funeral director of his/her choosing. I also desire that any supplemental arrangements not specified herein should be made by this agent. This agent is not obligated in any way to permit other persons to participate in these decisions, but I leave to him/her discretion whether to request the opinions of other persons, such as my next of kin.

AGENT _____ can be reached at PHONE _____ or ADDRESS _____.

Power of Attorney

A power of attorney is accepted in all states, but the rules and requirements differ from state to state. The financial durable power of attorney is an extremely useful and powerful document that has gained widespread acceptance and use over time. However, this deceptively simple document can cause a plethora of problems when it is misunderstood or its powers are abused. If the account holder is disabled and the POA is deemed invalid, the only alternative may be a guardianship or other court action. The good news is that LGBT elders are more apt to know they need a durable power of attorney. According to recent research, more than two-thirds of LGBT older adults have a will and nearly as many indicate that they have a durable power of attorney.⁹

Make sure that your client knows how to use the document once it is executed. Banks can be especially difficult to work with and may have their own forms that they want the client to use. A Durable Power of Attorney should supercede bank forms, but in many cases filling out the bank form also works and may be less work for the client and for the attorney.

⁹ Fredriksen-Goldsen, *The Report*, *supra* note 11, at 39 (seventy percent of LGBT older adults have a will and sixty-four percent have a durable power of attorney); *Where There is a Will . . .*, AARP RESEARCH GROUP (April 2000), <http://assets.aarp.org/rgcenter/econ/will.pdf> (60% of people 50 years of age and older have a will and 45% have a durable power of attorney).

The **General Durable Power of Attorney for Finances** is generally recognized as an important part of the estate plan for LGBT clients. Because it is so powerful, clients need to carefully consider whom they name as the agent and successor agents. The fact that individuals in a chosen family tend to be in the same age cohort also complicates fiduciary designations. In a traditional estate plan, an individual would usually appoint his or her spouse and then a child or perhaps even a grandchild to serve as the alternate fiduciary. When the grantor of the power of attorney, the attorney-in-fact, and the alternate attorney-in-fact are all in the same generation, it is important to name more than one alternate to guard against the possibility that the attorneys-in-fact may not be able to serve due to death or incapacity, thereby resulting in the need for a guardianship.¹⁰

Conclusion

The LGBT Community should use estate planning tools such as a will, power of attorney, advance directive, and disposition of bodily remains in order to protect themselves and their loved ones as they age. Special consideration and language to protect individuals should be used. Despite a lack of uniform legislation, language provides healthcare providers, as well as the court systems a clear intent and such clauses can often serve as indicia of the person's wishes.

¹⁰ Knauer, Nancy J., LGBT Elders in a Post-Windsor World: The Promise and Limits of Marriage Equality (December 4, 2014). Texas Journal of Women and the Law, Vol. 24, No. 1, 2014; Temple University Legal Studies Research Paper No. 2015-06. Available at SSRN: <http://ssrn.com/abstract=2557402>.