

Tulsa Law Review

Volume 40
Issue 3 *The Legislative Backlash to Advances in
Rights for Same-Sex Couples*

Spring 2005

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Recommended Citation

Camille M. Quinn, & Shawna S. Baker, *Essential Estate Planning for the Constitutionally Unrecognized Families in Oklahoma: Same-Sex Couples*, 40 *Tulsa L. Rev.* 479 (2013).

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ESSENTIAL ESTATE PLANNING FOR THE CONSTITUTIONALLY UNRECOGNIZED FAMILIES IN OKLAHOMA: SAME-SEX COUPLES

Camille M. Quinn and Shawna S. Baker*

I. INTRODUCTION

Same-sex couples in America face dilemmas and issues unlike those of heterosexual couples. Estate planning attorneys must become acutely astute in the recognition of substantive issues, the establishment of rapport with gay clients, and the acquisition of a working knowledge of appropriate instruments that provide specific protections for same-sex partners and their families. Throughout this article, the legal hardships confronting same-sex couples in the arena of estate planning will be contrasted with the legal rights enjoyed by and afforded to those who are legally entitled to marry under the laws of the state of Oklahoma.¹

Because this article only begins to touch the surface of the estate planning hardships facing same-sex couples, it is imperative that attorneys understand that the risks inherent in undertaking representation of same-sex couples far exceed those found in typical estate planning scenarios for legally married couples. A successful estate planning practice requires a thorough understanding of tax law and the ability to employ legal strategies to effectively and efficiently transfer assets at death. The representation of same-sex clients adds additional dimensions of both responsibility and liability to an already intricate area of law.

Attorneys who represent same-sex couples must gain a working knowledge of not only estate planning law but also probate, family law, and tax law in order

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1. In a general election held on November 2, 2004, Oklahoma voters approved State Question No. 711. As a result, marriage in Oklahoma is now constitutionally defined as:

A. Marriage in this state shall consist only of the union of one man and one woman. Neither this Constitution nor any other provision of law shall be construed to require that marital status or the legal incidents thereof be conferred upon unmarried couples or groups.

B. A marriage between persons of the same gender performed in another state shall not be recognized as valid and binding in this state as of the date of the marriage.

C. Any person knowingly issuing a marriage license in violation of this section shall be guilty of a misdemeanor.

Okla. Const. art. II, § 35.

to employ suitable strategies to maximize advantages while minimizing the patent discrimination which still exists for same-sex couples despite the recent strides made toward gay and lesbian equality. In order to understand the complexity of the task at hand for estate planning attorneys representing same-sex couples, this article will consider a scenario drawn from a composite of client experiences.

Throughout the course of this paper we will examine the treatment of spouses versus same-sex partners when dealing with the intricacies of healthcare, death, and estate taxes. In order to illustrate the disparity in the law, we will follow two couples, one married couple and one same-sex partnership, through a timeline of events. As the events unfold, new information will be provided to the reader. As an introduction to our couples, assume that Suzanne and Judy have lived as a couple in a committed relationship for ten years and that their friends, Lucy and Bob, have been legally married during the same ten year time frame. Further assume that the couples are involved in an auto collision while traveling together on their way to dinner one evening. As a result of the collision, Bob and Judy were hospitalized with severe injuries. Neither Bob nor Judy had previously executed any estate planning documentation or health care authorizations. The following section contrasts the recognition of health care rights and benefits of Suzanne, Judy's partner, with those of Lucy, Bob's wife.

II. IN SICKNESS AND IN HEALTH: ASSURING SAME-SEX COUPLES THAT THEY WILL NOT BE DIVIDED IN TIMES OF MEDICAL TREATMENT

In Oklahoma, by virtue of the legal status of marriage, Lucy will be allowed to visit Bob in his hospital room, to review his medical records, to confer with his doctors, to share her wishes for Bob's treatment, and to give her consent for any necessary surgical procedure.

Since Oklahoma does not recognize same-sex partnerships through marriage,² civil unions, or a domestic partner registry, by law, Suzanne will not be regarded as family, nor will she be afforded preferential treatment in terms of her ability to visit Judy in her hospital room. Without the necessary health care authorizations, Suzanne will be faced with the grim reality that she can, and will, be legally excluded from physically being with Judy and from participating in Judy's treatment plan. In order to avoid this fate and to ensure that Suzanne has rights and privileges similar to those afforded to Lucy, Suzanne and Judy would need to consult with an attorney and have a number of specific documents drafted and executed prior to Judy's hospitalization.

Unfortunately, no one document confers all necessary health care powers to a same-sex partner. In order to prevent one's partner from being excluded in times of a health care crisis and to safeguard the patient's desires for his or her partner's participation in his or her care and treatment, it is essential that all of the health care documents discussed herein are included in a same-sex couple's estate plan. Estate planning attorneys, and their same-sex clients, should be advised that

2. *Id.*; Okla. Stat. tit. 43, § 3.1 (2001).

the health care documents explained herein work in tandem to maximize the protection that they afford, yet are often interdependent in their effect. The importance of executing each document, separately and together as a comprehensive package, will be fully examined.

A. Designation of Agent

In order for a person to visit a patient in a medical facility, the patient must consent to the presence of that individual, unless the visitor is a family member. A partner may be considered as “family” when so designated by the patient. When patients are alert, they can admit or deny admission of certain visitors. If the patient is unconscious, however, the hospital may have no information regarding the patient’s wishes and may limit visitors to “immediate family.” A hospital accredited by the Joint Commission on Accreditation of Healthcare Organizations (“JCAHO”) may consider evidence of the patient’s wishes regarding the person(s) the patient would prefer to be present.

JCAHO, the governing body for international health care accreditation, defines “family” as: “The person(s) who plays a significant role in the individual’s life. This may include a person(s) not legally related to the individual.”³ JCAHO is a not-for-profit organization whose board is composed of physicians, nurses, and consumers.⁴ Institutions seeking JCAHO accreditation or re-accreditation receive on-site inspections a minimum of once every three years.⁵ In order to receive accreditation or re-accreditation each institution must comply with JCAHO standards, which address both patient health and patient safety.⁶ There are over one thousand accredited facilities within a two hundred and fifty mile radius of Tulsa, Oklahoma.⁷ All four of Tulsa’s major hospitals, Hillcrest, St. John’s, St. Francis, and Southcrest, have received accreditation and hence, have agreed to the definition of family set forth by JCAHO.

Although an accredited JCAHO institution should recognize a same-sex partner under the definition of “family,” there are no guarantees that it will. Further, simply because a same-sex partner may be recognized as “family” under the JCAHO definition, he or she will still not meet the legal definition of spouse as defined in Oklahoma law, and as such, will be unable to participate in the health care treatment of his or her partner without a Designation of Agent.⁸ A Designation of Agent directive can be used to address many common issues that affect same-sex partners in health care settings. This single tool can be utilized for the purposes outlined below:

3. Jt. Commn. on Accreditation of Healthcare Orgs., *2001 Hospital Accreditation Standards: Standards, Intents* 322 (Jt. Commn. Resources 2005).

4. Jt. Commn. on Accreditation of Healthcare Orgs., *What is the Joint Commission?* <http://www.jcaho.org/general+public/who+jc/index.htm> (accessed Apr. 4, 2005).

5. *Id.*

6. *Id.*

7. Jt. Commn. on Accreditation of Healthcare Orgs., *Quality Check–Search Results*, <http://www.jcaho.org/qualitycheck/directry> (accessed Apr. 4, 2005).

8. An example of a Designation of Agent form is provided in Appendix A.

- To identify one's partner as "family" within the JCAHO definition;
- To give a medical provider permission to release a patient's personal property to the patient's partner;
- To permit the partner access to the patient's medical records;
- To authorize the release of medical records to the partner in compliance with Health Insurance Portability and Accountability Act of 1996 mandates;
- To admit or discharge the patient into or out of any institution; and
- To authorize autopsies, make funeral arrangements or otherwise arrange for disposition of the patient's remains;⁹ and gives other instructions as desired.¹⁰

Same-sex couples should take extra precautions to include important life decisions, such as funeral and burial arrangements, in a Designation of Agent directive. Often these decisions can become a source of contention between the same-sex widow and the decedent's family of origin. If the decedent has not assigned his or her same-sex partner the right to make burial and funeral arrangements, then the right to make such decisions shall proceed in accordance with statutory authority.¹¹ In the absence of such information being included in the Designation of Agent directive, relatives have the authority to choose funeral and burial arrangements on behalf of the decedent and to exclude the same-sex partner from participating in the arrangements and/or even attending the service.

A Designation of Agent directive not only provides clear instructions from the patient to the medical facility and/or medical provider, but it also provides a means for accountability should the medical facility and/or medical provider not honor the patient's wishes. Each Designation of Agent directive must be uniquely crafted on a case-by-case basis in order to address the specific needs of each same-sex couple. Attorney Joan Burda, however, has created a Designation of Agent form for use by attorneys concerned with the challenges that same-sex couples are faced with.¹² A form of this nature should only be used as a guide, however, as it may contain too few or too many authorizations.

Although a directive regarding the patient's wishes with respect to the accommodation of his or her partner by the medical provider and/or medical facility and the patient's desire for the partner's participation in his or her health care can be provided verbally, it should be in writing, executed in advance of any illness or disability. Oral instructions are often incomplete, not extensively recorded in the patient's file, and subject to misinterpretation. Therefore, if the patient's wishes are discussed verbally, the patient is advised to obtain a copy of his or her medical chart to review the physician's notation of the partner's status

9. Okla. Stat. tit. 21, § 1151 (2002).

10. *See app. A.*

11. Okla. Stat. tit. 21, § 1158.

12. Joan M. Burda, *Estate Planning for Same-Sex Couples* 138-39 (ABA Publ. 2004).

and rights. An accurate copy of the patient's charts should then immediately be given to the patient's partner.

It should be noted that the Designation of Agent directive is not a widely utilized document. The need for such directives has arisen as a result of the disparaging treatment frequently received by same-sex partners compared to their heterosexual counterparts. Therefore, every effort should be made to provide an original executed copy of the Designation of Agent, along with its companion documents, to the patient's medical facility and/or medical provider for retention in the patient's medical file, so that in a time of medical crisis a partner need not be frantically searching for documents at home when he or she could be holding his or her partner's hand.

B. Advance Directive for Health Care

An Advance Directive for Health Care ("ADHC")¹³ was born in response to *Cruzan v. Director, Missouri Department of Health*,¹⁴ a case which challenged Americans' definition of death and forced an examination of the contemporary view of an individual's right to die. Nancy Cruzan suffered irreparable brain damage from injuries sustained in a motor vehicle accident on the night of January 11, 1983.¹⁵ After recognizing the extent of Nancy's injuries and the permanence of her condition, Nancy's parents requested that the treating hospital terminate all life-sustaining treatment being administered for the benefit of their daughter.¹⁶ The Missouri state hospital that was treating Nancy refused to honor the Cruzans' wishes without a court order.¹⁷

The Cruzans first pled their case to a state trial court, which ultimately held that an individual has a right "to refuse or direct the withdrawal of 'death prolonging procedures.'"¹⁸ Further, the trial court held that statements made by Nancy a year prior to her accident to a friend that she would not want to live as a "vegetable" evidenced her intent that she would not wish to continue with artificial hydration and nutrition in her circumstances.¹⁹ On appeal, the Missouri Supreme Court, *en banc*, reversed the trial court's decision. The court cited legal issues such as privacy and state policy favoring the preservation of life, and also found that Nancy's statements were "unreliable for the purpose of determining her intent."²⁰ The case was then appealed to the United States Supreme Court, which granted certiorari to consider the question of whether Nancy had a "right under the United States Constitution which would require the hospital to withdraw life-sustaining treatment"²¹ under the present circumstances.

13. An example of an Advanced Directive for Health Care form is provided in Appendix B.

14. 497 U.S. 261 (1990).

15. *Id.* at 266.

16. *Id.* at 267.

17. *Id.* at 268.

18. *Id.* (quoting Pet. for Writ of Cert. at A99, *Cruzan*, 497 U.S. 261).

19. *Cruzan*, 497 U.S. at 268.

20. *Id.* (quoting *Cruzan v. Harmon*, 760 S.W.2d 408, 424 (Mo. 1988)).

21. *Id.* at 269.

In a 5-4 decision, the U.S. Supreme Court ruled that the state of Missouri can apply a clear and convincing evidence standard regarding a patient's wishes when a guardian desires to discontinue nutrition and hydration for an individual whose medical diagnosis is a persistent vegetative state.²² Additionally, the Court held that the "substituted judgment" of family members on behalf of the patient is not a constitutional right afforded to family members through the Due Process Clause.²³ Hence, the Missouri Supreme Court decision was affirmed.

In response to the federal Patient Self-Determination Act of 1990²⁴ and the dicta contained in Justice O'Connor's concurring opinion in *Cruzan*,²⁵ many states began to enact legislation which authorized the use of a legal vehicle through which patients could set forth in writing their wishes for their health care treatment and provide for the election of a health care proxy.²⁶ Oklahoma responded by enacting legislation which became effective in September of 1992.²⁷ By doing so, the legislature removed the onus of determining whether extraneous documents and/or statements made by the patient rise to the level of "clear and convincing" evidence.

Under Oklahoma law, an ADHC allows a patient to direct health care providers to withhold or withdraw life sustaining treatment²⁸ in certain circumstances pursuant to the Oklahoma Rights of the Terminally Ill or Persistently Unconscious Act ("Act").²⁹ Because of the finality and gravity of the health care decisions in an ADHC, only the patient may complete the necessary provisions. The ADHC must be executed while one is competent, that is, while he or she can appreciate the significance of the document and the potential effects of signing it.³⁰ Additionally, it must be witnessed by two adults neither of whom may be designated in the text as a health care proxy or alternate proxy.³¹ It is important to note that the format of the ADHC must be substantially the same as

22. *Id.* at 284.

23. *Id.* at 285-87.

24. Pub. L. No. 101-508, Title IV, §§ 4206, 4671, 104 Stat. 1388, 115-204; 42 U.S.C. § 1395cc (2003).

25. 497 U.S. at 287-92.

26. Charles H. Baron, *Life and Death Decision-Making, Judges v. Legislators as Sources of Law in Bioethics*, *J. Health & Biomedical L.* 107, 122 (2004); Tara Renee Shewchuk, *Completing Advance Directives for Healthcare Decisions: Getting to Yes*, 4 *Psychol. Pub. Policy & L.* 703, 705 n. 16 (1998).

27. Okla. Stat. tit. 63, § 3101.1 (2004).

28. The Act defines "life-sustaining treatment" specifically as:

[A]ny medical procedure or intervention, including but not limited to the artificial administration of nutrition and hydration if the declarant has specifically authorized the withholding and withdrawal of artificially administered nutrition and hydration, that, when administered to a qualified patient, will serve only to prolong the process of dying or to maintain the patient in a condition of persistent unconsciousness. The term 'life-sustaining treatment' shall not include the administration of medication or the performance of any medical treatment deemed necessary to alleviate pain nor the normal consumption of food and water.

Id. at § 3101.3(6).

29. *Id.* at §§ 3101-3102A.

30. *Id.* at § 3101.4(A).

31. *Id.*

the format set out by the legislature in order to be effective.³² The ADHC will be relied upon for direction only if the patient is unable to communicate his or her wishes for medical decisions.³³

The Act provides for utilization of the ADHC for patients who are unable to communicate their wishes, either because they are “persistently unconscious” or because they suffer from a “terminal condition.” A patient may choose to reject artificial food and hydration, as well as medical treatment and/or the administration of drugs, if the patient is deemed to be either persistently unconscious or terminally ill and unconscious. Under the Act, “persistently unconscious” indicates an irreversible condition in which “thought and awareness of self and environment are absent.”³⁴ This condition must be verified by two physicians.³⁵ On the other hand, a “terminal condition” is defined as “an incurable and irreversible condition that, even with the administration of life-sustaining treatment, will, in the opinion of the attending physician, result in death within six (6) months.”³⁶ This medical state must also be confirmed by two physicians.³⁷

An important feature of the Act is the authority granted to a declarant to nominate a “health care proxy” of his or her choosing. According to the Act, a health care proxy is defined as:

[A]n individual eighteen (18) years old or older appointed by the declarant as attorney-in-fact to make health care decisions including but not limited to the withholding or withdrawal of life-sustaining treatment if a qualified patient, in the opinion of the attending physician and another physician, is persistently unconscious, incompetent, or otherwise mentally or physically incapable of communication.³⁸

Since the only requirement is for the proxy to be an individual eighteen years of age or older, an individual unrelated to the declarant may be named. This is an important feature for same-sex couples.

In nominating one’s partner as a health care proxy, a declarant is appointing the partner to make decisions in place of the patient, who is unable to communicate. The ADHC specifically authorizes the proxy to make decisions as the maker outlines in the document. Particularly notable is the proxy’s duty to *communicate on behalf of the patient, making decisions the proxy believes the declarant would make in accordance with the instructions left in the ADHC, but not decisions to further the proxy’s own wishes for the treatment of the patient.* In the event that the health care proxy’s decision or mandate conflicts with the instruction in the ADHC, the ADHC will control as it represents the wishes of the patient.

32. Okla. Stat. tit. 63, § 3101.4(B).

33. *Id.* at § 3101.5(A)(2).

34. *Id.* at § 3101.3(7).

35. *Id.*

36. *Id.* at § 3101.3(12).

37. Okla. Stat. tit. 63, § 3101.3(12).

38. *Id.* at § 3101.3(5).

An ADHC is of particular significance to same-sex partners for three main reasons: (1) many partners spend significant amounts of time together and, in the event of an accident, the partner is likely to accompany the injured partner to the hospital and will be available to make decisions, if needed; (2) because of the close nature of the relationship, similar to the relationship imputed by society on married couples, both are likely acutely aware of each others' feelings and thoughts regarding sensitive issues such as end of life decisions and are the best equipped to make a decision on behalf of the injured partner; and (3) the ADHC relieves the hospital of liability for involving the partner when the exact nature of the relationship cannot be ascertained from the patient.

Oklahoma law expressly forbids another individual, in person or through any written document, to make declarations on behalf of a patient.³⁹ The exception to this rule was addressed by the Oklahoma Legislature through the Hydration and Nutrition for Incompetents Act,⁴⁰ which requires medical providers to adhere to the presumption that all incompetent patients wish to have food and water provided to them in the amount necessary to sustain life.⁴¹ That act prohibits the withdrawal of food or hydration sources unless one of the following criteria is met: (1) a patient who is deemed to be terminally ill or persistently unconscious so consented while still competent; (2) two physicians agree that it is medically impossible to administer artificial food or hydration, or that it would cause intractable pain; or (3) two physicians agree that the patient is at the end of life and that death is likely to occur as a product of the disease regardless of the administration of artificial food or hydration.⁴² If any single criterion listed above is met, a proxy may give the directive on behalf of the patient to withdraw the administration of artificial nutrition and hydration.⁴³

Oklahoma law currently holds that one who is appointed to serve as a health care proxy does not enjoy the same status as an agent in a Durable Power of Attorney for Health Care ("DPA-HC").⁴⁴ The two must be appointed separately and distinctly.⁴⁵ The appropriate use of both documents, then, gives same-sex partners tools to make sure their partners' health care concerns are handled as the patient-partner would wish. The distinguishing characteristics of a DPA-HC will be discussed in the following section.

39. *Id.*

40. *Id.* at §§ 3080.1-3080.5 (2004).

41. *Id.* at § 3080.3.

42. Okla. Stat. tit. 63, § 3080.4(A).

43. *Id.*

44. *Id.* at § 3101.3(5), (7), (12); Okla. Stat. tit. 58, § 1072.1(1) (Supp. 2005). An example of a Durable Power of Attorney for Health Care form is provided in Appendix C.

45. In 2001, Oklahoma House Bill 1410 was introduced in part to allow the named proxy in an ADHC to also serve as an agent under a DPA-HC. The proposal was a simple addition to the ADHC's proxy election that would have eliminated the necessity of also drafting a DPA-HC. The measure died in committee after the House and Senate authors were unable to agree on a finalized version of the bill, resulting in the continued requirement of the use of both documents for a patient to transfer health care decisionmaking authority to another. Okla. H. 1410, 48th Leg., 1st Sess. (May 23, 2001). The history of this bill can be obtained at <http://www4.lsb.state.ok.us/bill/status.htm>.

Finally, an ADHC allows an individual to express his or her wishes with respect to organ donation. Many couples contemplate the possibility of organ and tissue donation while making their estate plans. Since a standardized form was not commonly accessible to Oklahomans who were interested in organ donation, the Oklahoma Rights of the Terminally Ill or Persistently Unconscious Act provides an option for an individual to choose to make an organ donation.⁴⁶ The individual may choose to donate a single organ, a collection of organs, or his or her entire body.⁴⁷ Furthermore, the individual can choose the destination of the organ—for transplantation, for research, or for either.⁴⁸

An ADHC provides a multitude of instructions for the named proxy. Although many of the instructions may be difficult to carry out, the proxy will know that he or she is meeting the wishes of his or her loved one. For same-sex couples the designation of a proxy will ensure that a same-sex partner (proxy) participates in the health care treatment and ultimate end-of-life decisions made with respect to his or her partner.

C. Durable Power of Attorney for Health Care

One of the major components of a patient's health care preparation is a Durable Power of Attorney for Health Care.⁴⁹ The document is called "Durable" because of its capability to survive the principal's later incompetence. The "attorney in fact" or "agent" named by the patient is given the authority to make a variety of medical decisions on behalf of the principal. The agent may be given the discretion to make health and medical decisions, to choose health care providers, to select living arrangements, to review the patient's medical records, to elect hospice treatment or to serve as the patient's agent under the Oklahoma Do-Not-Resuscitate Act.⁵⁰ However, as previously discussed, a DPA-HC specifically excludes an agent from executing an ADHC and making decisions reserved only for a health care proxy appointed in an ADHC, or making other life-sustaining treatment decisions.

The maker of a DPA-HC may choose any or all of the powers delineated above or any combination thereof to transfer to the agent. Finally, the maker may decide whether the powers are effective at the time of the execution of the document ("immediate") or whether the power will occur in the future ("springing").⁵¹ A springing power becomes effective only at the time of the patient's incapacity, as determined by the attending physician.

The DPA-HC form was created by the Oklahoma Department of Health and Human Services in an attempt to simplify the process of conferring health

46. Okla. Stat. tit. 63, § 3101.4(B) (2004).

47. *Id.*; *id.* at § 2205(b).

48. *Id.* at § 2205(c).

49. *Infra* app. C.

50. Okla. Stat. tit. 63, §§ 3131.1-3131.14 (2004).

51. Okla. Stat. tit. 58, § 1072.1(A)(2) (Supp. 2005).

care powers of attorney.⁵² A DPA-HC's format is not statutorily mandated as is the ADHC's. Rather, the power for the instrument is derived from Oklahoma's Uniform Durable Power of Attorney Act ("UDPAA").⁵³ As such, a DPA-HC must be executed by a competent person, witnessed by two persons, and notarized.⁵⁴

A DPA-HC provides each patient an opportunity to communicate his or her desires by use of a fill-in-the-blank form that guides patients to, in writing, discuss:

- goals for health care;
- fears about health care;
- spiritual or religious beliefs and traditions;
- the effect of the patient's health care on family;
- the options of receiving health care at home vs. a nursing home or similar institution.⁵⁵

Because of the deep level of intimacy shared between same-sex partners who have formed a committed union, shared their lives with one another, and created a home together, a same-sex partner is often best equipped to convey the wishes of the unconscious partner to medical personnel. The agent-partner would know the particular wishes and needs of the patient-partner in terms of choices regarding medical treatment and end of life living environments. In difficult times, however, the partner may look to the patient's DPA-HC for reassurance and guidance. Through the patient's written discussion of the topics outlined above, such as fears and goals of health care, the partner benefits in two ways: the partner is comfortable that the decisions he or she is making are in fulfillment of the patient's wishes and the partner is protected from potential attacks by the partner's family because the fears and goals for health care are clearly those of the patient, and the partner is simply acting in compliance with those wishes.

Estate planning attorneys should remain cognizant of the intricate combination of instruments necessary to assure that their same-sex clients' wishes are addressed. Same-sex couples need to be aware of the complexity of the instruments created on their behalf and the possible bases for challenges to the legitimacy of the instruments. With thorough planning and proper drafting, same-sex couples can create instruments which will ensure that their relationships will be respected by health care providers, health care facilities, financial institutions, and the partners' families.

52. Okla. Dept. Human Servs., *Durable Power of Attorney (With Health Care Powers Only)*, <http://www.okdhs.org/aging/Documents/99-63.pdf> (accessed Apr. 4, 2005).

53. Okla. Stat. tit. 58, §§ 1071-1077 (1995).

54. *Id.* at § 1072.2.

55. *Id.*

D. Durable Power of Attorney

Care must be exercised not to confuse a Durable Power of Attorney (“DPA”) with a DPA-HC. Although it is possible to combine a DPA and a DPA-HC, each instrument typically has a distinct purpose and stands alone. Once again, both instruments are authorized by the UDPAA.

A DPA is a versatile instrument in which the principal (the document’s maker) grants authority to an agent for a myriad of powers.⁵⁶ Traditional powers of attorney were rendered inoperative at the incapacity of the principal, hence the need for a DPA. “Durable” speaks to the ability of the power to survive the incompetence of the principal.⁵⁷ The principal can determine whether he or she desires the DPA to be “springing” in nature, giving the agent the powers outlined in the DPA only when the principal’s incapacity has been established, or effective immediately upon valid execution of the document.⁵⁸ In order to ensure that the instrument is effective and can withstand a legal challenge, the DPA must be executed in compliance with the statutorily mandated format.⁵⁹

A valid DPA can empower the agent with general or limited powers in order to conduct the business authorized by the principal on the principal’s behalf.⁶⁰ General powers can grant the agent authority to conduct a variety of business transactions on behalf of the principal including, but not limited to, real property transactions; stock and bond transactions; banking and other financial institution transactions; transactions regarding benefits from Social Security, Medicare, Medicaid, or other governmental programs; and retirement plan transactions. Also, general powers usually grant the agent the authority to conduct any one or more of the above-referenced powers for an unlimited period of time, and the power(s) granted may also be effective as of the date of the instrument’s execution.

In contrast, limited powers of attorney are typically narrower in both time and scope. A limited power may be authorized for a single event and terminate upon the happening of the event, or it may be intended to last throughout the lifetime of the principal but only for a certain power. For example, a principal may give her agent the power to do all of her personal banking; a limited power of attorney of this sort has a narrow purpose but may last years. Alternatively, a limited power of attorney might empower an agent to act on the principal’s behalf to close the sale of a specific real estate transaction and then terminate. Whether general or limited in power, a DPA is revocable as long as the principal is competent.

DPA’s can be an extremely useful estate planning tool for same-sex couples in terms of convenience and necessity. Clearly, for many couples, the ability to complete each other’s business and access information on behalf of one’s partner

56. *See id.* at § 1072.1.

57. *Id.* at § 1072.

58. Okla. Stat. tit. 58, § 1072.

59. *Id.* at 1072.2.

60. *See id.* at §§ 1072-1072.1.

makes a DPA a useful tool. Additionally, in the event of a health crisis, the partner is granted continued access to the injured partner's finances, real property, and other miscellaneous interests through the DPA. Furthermore, as previously discussed, in instances of a health crisis a DPA-HC will ensure that the same-sex partner is granted continuous access to his or her injured partner and the authority to make health care decisions.

In the event that an individual becomes unable to manage his or her affairs, the agent named in the DPA may begin administering the incapacitated individual's affairs. However, if an individual has not executed a DPA, a guardian may be appointed by the court. The court may name a guardian for one's person, for one's estate, or for both. When determining who should be appointed to serve as guardian, the court's selection is statutorily defined.⁶¹ A same-sex partner would not receive recognition for such an appointment unless the partners had resided together for over six months and the incapacitated partner's biological relatives were found to be ineligible by the court.⁶²

One important caveat that estate planning attorneys must not fail to discuss with their clients is that in the event the same-sex couple decides to terminate their partnership, a DPA will need to be revoked in writing and delivered to all persons and institutions who had been previously honoring it. Without notice of the revocation, an institution which continues to conduct business with the agent on behalf of the principal in reliance upon the original DPA will not be held liable by a court of law for conducting ongoing business matters with the agent.⁶³

E. Health Insurance Portability and Accountability Act of 1996

The Health Insurance Portability and Accountability Act of 1996 ("HIPAA")⁶⁴ has made it unlawful for medical providers to release "protected health information"⁶⁵ to third parties absent written authorization from the patient.⁶⁶ Protected health information is defined by the Act as "individually identifiable health information"⁶⁷ held or transferred by a covered entity or its business associate. To confer authority to disclose health information, an Authorization for Access by Patient or Disclosure of Protected Health Information ("HIPAA release") must be completed by a patient.⁶⁸

Without a HIPAA release, either as a stand-alone document or as an incorporated section within the Designation of Agent directive or another legal document, many of the documents discussed heretofore could be rendered ineffective because the information being requested is considered to be protected health care information under HIPAA.

61. Okla. Stat. tit. 30, § 3-104(A) (2004).

62. *Id.* at § 3-104(A)(8).

63. Okla. Stat. tit. 58, § 1076.

64. Pub. L. No. 104-191, 110 Stat. 1936.

65. 45 C.F.R. § 160.103 (2004).

66. *Id.* at § 164.508.

67. *Id.* at § 160.103.

68. *Id.* at §§ 164.502(a)(iv), 164.508.

Unless revoked or otherwise indicated, the Authorization for Access by Patient or Disclosure of Protected Health Information expires one year from the date of its execution.⁶⁹ The signer may choose to make the authorization valid until the occurrence of a specific event or may remove any expiration date.⁷⁰ The authorization otherwise remains revocable at the patient's discretion.⁷¹

Most health care providers have HIPAA release forms available upon request. Patients can request a release form and upon executing the proper provisions ask that the completed form be placed in their patient files. Same-sex couples who have not executed Designation of Agent directives should execute stand-alone HIPAA releases and leave them with each of their treating physicians. Doing so will provide the maximum protection for the same-sex partner who will act as the health care proxy and/or agent.

F. Conclusion

Clearly, the requisite number of documents needed in Oklahoma to guarantee fair treatment and recognition of same-sex couples by medical facilities and medical providers can make managing one's health care cumbersome and confusing. Estate planning attorneys should vigilantly explain to their clients the benefits and the potential detriments of each document, as well as the potential problems inherent in an incomplete set of estate planning documents. Attorneys should have their clients execute multiple original copies of their executed health care documents. So that a medical provider and/or medical facility will not question the document as a duplicate, attorneys may consider having their clients execute their documents in blue ink, or in the alternative include a provision in the document stating that a photocopy will have the effect of an original. An original set of documents should be delivered to the patient's primary health care physician, as well as to the patient's primary treatment facility. Furthermore, additional original copies should be kept in a secure location that both partners have access to, such as a safe-deposit box or other safe but accessible place, with a written explanation from the patient's attorney of the rights and powers conferred to the partner within each of the executed documents. Attorneys may choose to have a separate written explanation attached to a photocopy of each health care document so that a partner, friend, or other family member, is able to quickly identify the appropriate document during a medical emergency.

III. UNTIL DEATH DO US PART: THE LEGAL TOOLS NECESSARY TO ENSURE RECOGNITION OF UNRECOGNIZED LOVE

This portion of the article will compare the problems faced by Lucy and Suzanne, Bob's wife and Judy's partner respectively, if both Bob and Judy died during their hospitalization without any estate planning. First, Oklahoma's

69. *Id.* at § 164.508(b)(2)(i), (c)(1).

70. 45 C.F.R. § 164.508(b)(2)(i).

71. *Id.* at § 164.508(b)(5).

intestate succession statutes and their eventual effects on survivors will be discussed. As will become evident, same-sex widows are not entitled to inherit property under the intestate succession statutes. As a result, various estate planning arrangements must be made by same-sex couples in order to afford protection to same-sex widows upon the death of their partners. Next, this article will explore a sampling of common estate planning tools which can provide a means to ease the financial suffering same-sex widows often experience during the intestate administration process—such as wills, revocable trusts, and charitable remainder trusts. Finally, this section of the article will address a less common estate planning remedy known as a family limited partnership. Each of the estate planning tools which shall be discussed not only provides tools that will ease the financial burden on the same-sex widow, but also provides both partners, during life, with the knowledge that their assets will be transferred upon their deaths in accordance with their wants and desires.

A. *Intestate Succession*

Assuming neither Bob nor Judy had memorialized any estate plans prior to the accident, their estates would be administered quite differently as a result of the legal status afforded their relationships under the law of Oklahoma. Since Bob and Judy both died intestate, only property owned in their names is subject to administration.⁷² Hence, any property owned by a trust, corporation, limited liability partnership, or by joint tenants with right of survivorship (“JTROS”) will be excluded from the administration process as title vests in the entity or the surviving tenant upon decedent’s death.

Often couples elect to own property, homes, cars, investments, and bank accounts as JTROS. At the death of one partner, the survivor simply presents a death certificate to the bank or tag agency and has the property re-titled solely in the survivor’s name. Real property owned jointly may be easily re-titled. Upon the death of any joint tenant (whether a same-sex partner, a spouse, a sibling, or any unrelated co-investor), the survivor(s) can file with the county clerk, in the county in which the property is located, a certified death certificate along with an affidavit of surviving joint tenant. The county clerk then re-deeds the property to the surviving partner.

Ownership of joint assets must be carefully considered for its benefits as well as its possible detriments. Unlike payable on death (“POD”) accounts, which will be discussed herein, an account placed in JTROS is immediately accessible to both owners. Therefore, if a partner conveys her sole ownership interest in an investment or real property to herself and her partner as joint tenants, then the asset can be sold or otherwise transferred only with the consent of both parties. The transfer into joint ownership may be detrimental if the parties decide at a later date to terminate their relationship.

72. Okla. Stat. tit. 58, § 1 (Supp. 2005).

The intestate administration process also excludes contracts the decedent had with third parties such as life insurance; retirement accounts, and other accounts which have POD provisions.⁷³ Individually owned bank accounts, life insurance policies, and retirement accounts may be designated by the owner as POD to any individual or entity (such as a trust) to whom the account should be distributed upon presentation, to the bank or other custodian, of proof of the owner's death (usually a certified death certificate). The account owner simply signs a directive instructing the custodian to distribute the account proceeds to the partner at death.

During the lifetime of the account owner she is free to revoke the POD designation or to name another individual as beneficiary. Unlike JTROS accounts, the designee has no present interest in the account (i.e., no right to the account during the lifetime of the POD account owner). The benefit of a POD designation is the ability of the widowed partner to access the deceased partner's accounts with ease and minimal inconvenience. The only caveat is that the Oklahoma Tax Commission has a right to place a lien on any of the decedent's accounts until the Commission is certain that the estate tax obligation will be fulfilled and/or has been met.⁷⁴ At that time, the Commission will issue a lien release.⁷⁵

All decedents dying without prior estate arrangements fall under intestacy statutes. Under Oklahoma's intestate succession law, a court supervised process must be conducted in order to properly distribute the property owned solely by the decedent (i.e., all property except that which is jointly owned or has a POD designation).⁷⁶ The administration process begins with the filing of a petition for administration.⁷⁷ Any "interested" person may file a petition in district court to have the estate administration opened.⁷⁸ Under Oklahoma Statutes Title 68, Section 122, interested persons are defined and prioritized as:

1. The surviving husband or wife, or some competent person whom he or she may request to have appointed.
2. The children.
3. The father or mother.
4. The brothers or sisters.
5. The grandchildren.
6. The next of kin entitled to share in the distribution of the estate.

73. Okla. Stat. tit. 6, § 901(B)(1) (2001).

74. Okla. Stat. tit. 68, § 811(A) (Supp. 2004).

75. *Id.* at § 811(B).

76. Okla. Stat. tit. 58, § 1.

77. *Id.* at § 127.

78. *Id.*

7. The creditors.
8. Any person legally competent.

After a petition for administration is filed with the district court, an initial hearing will be scheduled in the county where decedent was living at the time of death.⁷⁹

At the initial hearing the court will name an administrator to oversee the administration of the estate and determine the decedent's heirs.⁸⁰ Also, the court will charge the administrator with the tasks of itemizing all of the decedent's personal property and hiring court-approved appraisers to assign a value to all of the property.⁸¹

In order to prepare an inventory and appraisal of the decedent's property, the administrator or another court appointed official will be required to walk through the decedent's home and/or business to conduct a complete inventory and appraisal.⁸² Interestingly, by statute, the court is required to appoint three "disinterested" persons to serve as appraisers, any two of whom may act.⁸³ The duty of the appraisers is to affix a value to each item listed by the administrator in the inventory.⁸⁴ The appraisers are not required to have any credentials or prior experience as an appraiser.

Under Oklahoma law, the inventory made by the administrator or other court appointed officials must:

[C]ontain all of the estate of the decedent, real and personal, a statement of all debts, partnerships and other interests, bonds, mortgages, notes and other securities for the payment of money belonging to the decedent, specifying the name of the debtor in each security, the date, the sum originally payable, the endorsements thereon, if any, with their dates and the sum which, in the judgment of the appraisers, may be collected on each debts, interest or security.⁸⁵

The inventory and valuing process continues for each item in a decedent's home, regardless of the personal nature of the property. Following the completion of the inventory and appraisal, the same must be filed with the court.⁸⁶

Next, the obligations of the decedent's estate must be determined. One such potential obligation is a monthly allowance. If the decedent has a surviving spouse s/he may be entitled to a family allowance, which is a court-approved monthly allowance, lasting for a maximum of one year, to aid with domestic expenses.⁸⁷ The administrator is in charge of overseeing that the monthly living allowance is paid to the surviving spouse in the amount directed by the court.⁸⁸ Not only will the monthly allowance be used to support the surviving spouse, but it also

79. *Id.* at § 5.

80. *Id.* at § 1(C)(2).

81. Okla. Stat. tit. 58, §§ 281-282, 284.

82. *Id.*

83. *Id.* at § 281-282.

84. *Id.* at § 283.

85. *Id.* (footnote omitted).

86. Okla. Stat. tit. 58, § 281.

87. *Id.* at §§ 314-315.

88. *Id.*

effectively reduces the size of the decedent's estate. Furthermore, the monthly allowance enjoys a higher priority in payment than most expenses,⁸⁹ and therefore helps keep the decedent's assets in the hands of the surviving spouse versus the estate's remaining creditors.

The second obligation of the decedent's estate is to identify, approve, and pay outstanding debt owed to creditors by the decedent. The administrator is charged with creating a list of the decedent's debts and notifying each creditor of the decedent's death.⁹⁰ Creditors must be given the opportunity to enter claims against the estate.⁹¹ In order to ensure that all of a decedent's creditors have knowledge of the decedent's death and are given the opportunity to file claims against the estate, the administrator must publish a notice on a weekly basis for two consecutive weeks in two separate publications that routinely publish legal notices.⁹² All approved creditor claims which were filed within the time frame approved by the court must be paid.⁹³ Since creditors' claims, as well as the inventory and appraisals, are filed with the court, the decedent's financial affairs become a matter of public record, accessible by anyone.

One of the final obligations of a decedent's estate is tax liability. After the creditors' claims have been filed with the court, the administrator must then determine the amount of income tax owed by the decedent for the year in which the death occurred and the amount of estate taxes due on the value of the estate.⁹⁴ Also incumbent upon the administrator is the responsibility to pay any unpaid income taxes from previous years.⁹⁵ Upon calculating the taxes due, the administrator must file the respective state and federal tax returns and pay any outstanding taxes from the assets of the estate.⁹⁶ Releases from the appropriate taxing authorities must be filed with the court before the estate can be closed.⁹⁷

Finally, after the decedent's assets have been valued and all expenses related to the decedent's last illness, funeral, outstanding creditors' claims, and taxes have been satisfied, the administrator will be able to distribute any remaining assets according to statutory distribution scheme. The distribution scheme outlined in the Oklahoma statutes specifically dictates that the decedent's biological relatives and/or spouse shall inherit when no will is found.⁹⁸

The distribution scheme differs greatly depending upon the marital status of the decedent at the time of death. By statute, if a married person dies intestate without children, the decedent's spouse is entitled to inherit the entire estate

89. *Id.* at § 315.

90. *Id.* at § 331.

91. Okla. Stat. tit. 58, §§ 331-333.

92. *Id.* at § 331.

93. *Id.* at § 591(7).

94. *Id.* at § 591(4).

95. *Id.*

96. Okla. Stat. tit. 58, § 591(4).

97. *Id.* at § 635.

98. Okla. Stat. tit. 84, § 213 (2001).

assuming that the decedent's parents and/or siblings are no longer living.⁹⁹ If the decedent had children from a previous relationship and dies intestate, then the current spouse will inherit one-half of the decedent's estate earned during the course of the marriage, while the children receive the remaining one-half portion of the marital property.¹⁰⁰ If the administrator is unable to identify any biological relatives, then the decedent's estate must be liquidated and the proceeds given to the State of Oklahoma's General Education Fund.¹⁰¹ "Unrelated" friends, such as same-sex partners, will not inherit unless the decedent's wishes were reduced to writing.

Assume not only that Bob died without a will but also that he and Lucy had no children, and that Bob's parents and siblings predeceased him. Because Lucy will have the statutory priority to serve as administrator of Bob's estate, she would be the party responsible for returning an inventory. Additionally, household property is presumed to be joint property and hence would immediately pass to Lucy. Lucy will also immediately succeed in ownership to any property jointly titled in Bob and Lucy's name and also to any accounts on which Lucy was listed as POD beneficiary. During the course of the estate's administration Lucy can receive a monthly living allowance to subsidize her monthly income. Finally, after all debts are paid, Lucy will inherit the entirety of Bob's personal estate.

Under the same factual scenario, Judy's same-sex partner, Suzanne, will be excluded from the intestate administration process and any inheritance because the two share a relationship which is not afforded any legal recognition under Oklahoma law. Suzanne, for purposes of serving as an administrator, would not be recognized as an "interested person" in terms of a surviving spouse or next of kin, but rather would only be recognized as "[a]ny person legally competent."¹⁰² Therefore, distant family members who had never met Judy, or creditors of Judy's estate, could lawfully be appointed to serve as administrator ahead of Suzanne, Judy's same-sex partner of ten years. Furthermore, Suzanne, unlike Lucy, is not entitled to receive a court-approved monthly living allowance during the administration of Judy's estate.

After Judy's administrator is appointed, Suzanne would have to endure the most invasive process required under the intestacy statutes—the inventory of Judy's personal property. All of Judy and Suzanne's personal property will be inventoried and appraised in order to determine Judy's proportionate ownership in each item. Suzanne may be asked to produce a receipt to prove her portion of ownership in each and every item of personal or real property.¹⁰³ Once Judy's personal property is appraised it will be combined with the value of other assets to determine the value of her estate for tax purposes.

99. *Id.* at § 213(B)(1)(a).

100. *Id.* at § 213(B)(1)(c)-(B)(1)(d).

101. *Id.* at § 213(B)(3).

102. Okla. Stat. tit. 58, § 122(8) (1995).

103. Okla. Stat. tit. 68, § 807(A)(4) (Supp. 2004). It should be noted that a legal spouse will also have to conduct this exercise if he or she alleges that the couple held separate personal property and/or other heirs, such as children, exist.

Often the inventory and appraisal process is especially difficult and cumbersome for the grieving same-sex widows if the couple utilized two individual banking accounts when making purchases. Many same-sex couples have arrangements which provide for one partner to pay for “x” while the second partner will pay for “y.” As a result, both partners have purchased the same value of goods or real property and believe that both x and y are jointly owned. However, when creating an inventory those pieces of property purchased by the decedent will be found by the court to be solely owned by the decedent.

Similarly, if the same-sex couple utilizes only one checking account from which all purchases were made, Suzanne will be forced to document the proportion of the account contributed by each partner’s salary. This proportion will then be used to assess the amount of ownership each woman has in the property. For any piece of property in which Suzanne is unable to prove her ownership interest, the Oklahoma Tax Commission will determine that the item belonged exclusively to Judy. Hence, Judy’s estate inventory will include that piece of property, and the appointed appraisers will assess its fair market value.¹⁰⁴

An issue further complicating matters for same-sex couples is home ownership. For example, suppose that Judy and Suzanne purchased their home together and had each written checks of equal amounts for the down payment and all of the closing expenses. If each of the two women wrote monthly checks to the mortgage company for one-half of the total monthly payments, a determination of Judy’s share of ownership is straightforward. Since each had paid exactly one-half of the cost of the house, and that can be documented, each owns one-half of the house. Judy’s estate would be taxed on one-half of the fair market value of the home as of the date of Judy’s death. However, it is rarely that simple.

Most same-sex couples who cohabit establish their own methods of debt service. As a result, determining the exact proportion of the home owned by each becomes difficult to ascertain at the death of the first. Suppose, unlike the example above, that Judy owned her home two years prior to beginning her relationship with Suzanne. Once Judy and Suzanne began living together, the couple agreed they wanted to co-own the home. In order to accomplish this they made an oral agreement that Suzanne would pay for a substantial remodeling project so that they would share the two years worth of equity in the house, and that following the project, Suzanne would be responsible for paying the utility bills, the repairs, and the groceries and other incidentals on a monthly basis. Judy, on the other hand, would continue to pay the monthly mortgage payments, homeowners insurance, and applicable property taxes. If their agreement was not reduced to writing or could not be otherwise documented, ownership of the entire home would be attributed to Judy’s estate. As a result, Suzanne may be evicted from her home by the administrator of Judy’s estate or she may be asked to pay rent to the estate or to purchase the property for its fair market value.¹⁰⁵

104. *See id.*

105. Okla. Stat. tit. 84, § 213(B) (2001).

Oklahoma law clearly protects a widowed spouse throughout the intestate succession process, while a widowed same-sex partner has no legal rights or privileges to either participate in or inherit a portion the deceased partner's estate. Unfortunately, until Oklahoma chooses to recognize the important familial bonds that exist between same-sex couples they will continue to experience discrimination and hardship as a result of the intestate succession process. Therefore, same-sex couples must create the legal rights and privileges that married couples are afforded by statute through the use of estate planning tools such as wills, trusts, family limited partnerships, and other business entities.

B. *Probate*

Contrary to a commonly held belief that a last will and testament excuses survivors from the tedium of probate, it instead assures Court involvement. However, wills are a very useful instrument to transfer both real and personal property to an heir of one's choosing after death. As long as a will is found to be valid, the intentions of the decedent recorded therein shall be honored.

A valid last will and testament serves to legally identify the maker's (testator or testatrix) legatees and devisees. The terms heirs, legatees, and devisees are often used interchangeably, but can be distinguished. Heirs are considered to be individuals who are due to inherit property by intestate succession.¹⁰⁶ Legatees are individuals named in a will to inherit personal property from the decedent.¹⁰⁷ Devisees, on the other hand, are individuals named in a will to inherit real property under the will.¹⁰⁸ A same-sex partner may be considered by the court as either a legatee or devisee.

The validity of a will is established by the evidence introduced in court. This evidence is sworn testimony taken from the petitioner, who is often seeking letters of administration.¹⁰⁹ Once the court accepts the validity of the will, the personal representative can request that the court order the distribution of a decedent's property in accordance with the decedent's wishes.

Oklahoma law recognizes several types of wills, nuncupative,¹¹⁰ holographic,¹¹¹ non-self proving,¹¹² self-proving, and pour-over wills. Because self-proving wills and pour-over wills require the testator/testatrix to state his/her intentions regarding the execution of the will at the time of signing, these wills are difficult to successfully contest and therefore, they provide greater amounts of protection and assurances to same-sex couples. For these reasons, only self-proving wills and pour-over wills will be discussed in this article.

106. *Black's Law Dictionary* 740 (Bryan A. Garner ed., 8th ed., West 2004).

107. *Id.* at 916.

108. *Id.* at 484.

109. Okla. Stat. tit. 84, § 253 (2001).

110. *Id.* at §§ 46, 51.

111. Okla. Stat. tit. 84, § 54.

112. Okla. Stat. tit. 58, § 30 (1995).

1. Self-Proving Will

A self-proving will is the most widely used type of will. By virtue of the “self proving” affidavit following the will, the witnesses need not appear in court or attest to the testator’s capacity at the time of the will’s execution. In essence, the will speaks for itself. The formal prerequisites for a self-proving will are set out as follows:

Every will, other than a nuncupative will, must be in writing; and every will, other than a holographic will and a nuncupative will, must be executed and attested as follows:

1. It must be subscribed at the end thereof by the testator himself, or some person, in his presence and by his direction, must subscribe his name thereto.
2. The subscription must be made in the presence of the attesting witnesses, or be acknowledged by the testator to them, to have been made by him or by his authority.
3. The testator must, at the time of subscribing or acknowledging the same, declare to the attesting witnesses that the instrument is his will.
4. There must be two attesting witnesses, each of whom must sign his name as a witness at the end of the will at the testator’s request and in his presence.
5. Every will, other than a holographic and a nuncupative will, and every codicil to such will or to a holographic will may, at the time of execution or at any subsequent date during the lifetimes of the testator and the witnesses, be made self-proved, and the testimony of the witnesses in the probate thereof may be made unnecessary¹¹³

The will is proved through testimony which establishes the identity of the decedent, the marital status at the time of death, the identity of any children (or children of deceased children) of the decedent, the county of the decedent’s domicile, the approximate size and/or value of the probate estate, and the identity of the person nominated by the decedent to perform the duties of personal representative (“PR”) of the estate.¹¹⁴ If the evidence accepted by the court is adequate, the court will issue Letters Testamentary to the PR named in the will so that he or she may oversee the estate administration.¹¹⁵

The PR is the individual who is charged by the court with the duties of gathering assets, conducting an inventory of the estate’s assets, having those assets appraised, identifying creditors, paying debts, collecting money owed the decedent at the time of death, and, if appropriate, filing a guardianship petition if minor children are involved.¹¹⁶ Other matters may be assigned to the PR if pertinent information is sought by the court.¹¹⁷ The PR assumes the same or similar duties

113. *Id.* at § 55.

114. Okla. Stat. tit. 58, §§ 23, 137 (1995).

115. *Id.* at § 101.

116. *Id.* at § 1(A).

117. *Id.* at § 1(A)(10).

as those overseen by an administrator under the intestate succession process. The distinguishing differences between intestate succession and probate are that the PR is selected by the deceased, as he or she is specifically named in the will, and the PR will ultimately distribute the estate to the individuals selected by the decedent versus those selected by the state of Oklahoma.

2. Pour-Over Wills

A pour-over will is often a self-proving will which serves only a narrow function. Typically, a pour-over will is utilized in conjunction with a revocable trust. In some instances, a decedent will fail to transfer ownership of all his or her property into the name of the revocable trust. This may happen through simple oversight, negligence, or procrastination, or it may be that the grantor inherited or was gifted property shortly before death and never had the opportunity to complete its transfer. Because property belonging to the decedent is owned at the time of death, the decedent's estate, which contains the non-trust owned property, must be probated.

The term "pour-over" indicates that the property subject to probate should be poured over into the existing trust and administered in accordance with the terms and conditions set out therein. The pour-over will asks the court to order any assets subject to its administration to be placed into the trust and administered as trust property. In essence, a pour-over will captures omitted property and transfers it into a trust.

Often grantors create stringent requirements for the distribution of trust property. Perhaps, after the death of the grantor, all assets belonging to the trust must be retained by the trustee and distributed only when certain conditions are met. A common trust directive is to distribute trust monies to children in portions upon their attainment of certain ages, for example, one-third when each child reaches the age of twenty-five, one-half of the remainder when the child reaches the age of thirty, and all remaining funds to be distributed when the child reaches the age of thirty-five. If assets belonging to the decedent are discovered after death, and hence are subject to probate, then the grantor's desire and intent may be shattered.

Failure to execute a pour-over will may completely skew the grantor's intentions because all intestate property will be distributed according to the intestate succession statute. Ultimately, a pour-over will is an estate planning tool which ensures that all of the decedent's property shall be transferred upon death to his or her trust. If a trust is properly created, correctly funded, and adequately maintained, then a pour-over will may be unnecessary. However, as a precautionary measure a pour-over will is advisable to ensure that a grantor's error or oversight in life will not invalidate his or her ultimate intentions.

3. Will Contests

Many times, family members will file a will contest if they are excluded from a will, are inheriting less than they believe is their rightful share, or are upset by

bequests of assets to a third party, such as a same-sex partner. Any interested party,¹¹⁸ that is a party who would inherit if the will were invalid, can assert that the will offered in court does not truly represent the decedent's intentions. Although Oklahoma law explicitly states that the true intention of the decedent should control in the event the will seems ambiguous in any part,¹¹⁹ the family of the deceased may be able to persuade the court that the testator's true intent was not set forth in the will.

One of three contentions is generally relied upon to challenge a will and to establish for the court that the decedent did not intend for his or her estate to be received by the individuals set out in the will. The three common contentions asserted in will contests are: lack of testamentary capacity, improper execution of the will, and undue influence.

a. Lack of Testamentary Capacity

A common allegation utilized in will contests is that the testator or testatrix lacked testamentary capacity at the time of the execution of the will. In a self-proving will, inclusion of the attestation clause serves as prima facie evidence that a decedent possessed testamentary capacity. If the attestation clause is properly written and executed, testamentary capacity is presumed and the burden shifts to the contestant to prove invalidity.¹²⁰

The rule for testamentary capacity is well established and defined in Oklahoma case law:

[T]o have testamentary capacity a person must know in a general way the character and extent of his property and understand his relationship to the beneficiary of his gift as well as his relationship to those who 'ought to be in his mind,' and he must understand the nature and effect of his act.¹²¹

Courts may consider such "evidence of testator's mental status, together with his appearance, conduct, acts, habits, and conversation, both before and after execution of the will, as would tend to show his mental condition at the time of execution of the will"¹²² when determining testamentary capacity.

b. Improper Execution of a Will

All wills, other than holographic and nuncupative, are susceptible to challenges that they were not executed in substantial compliance with the law and hence, should not be admitted to probate. Typically, the allegation is either that the testatrix failed to announce to the witnesses at the time of execution that the document she is signing is in fact her will or that there were not two attesting

118. *Id.* at §§ 41, 61.

119. Okla. Stat. tit. 84, § 151 (2001).

120. *Brown v. Brown*, 287 P.2d 913, 916-17 (Okla. 1955).

121. *In re Est. of Carano*, 868 P.2d 699, 703 (Okla. 1994) (footnotes omitted).

122. *In re Est. of Samochee*, 542 P.2d 498, 501-02 (Okla. 1975) (citation omitted).

witnesses who signed their names to the document in the testatrix's presence and at her request.¹²³

The Oklahoma Supreme Court's interpretation of the statutory provisions in Oklahoma Statutes Title 84, Section 55 has been best summarized in two cases. First, the court stated:

Where, however, in the proceedings for the probate of an instrument as a will, it appears to have been duly executed as such, and the attestation is established by proof of the handwriting of the witnesses or otherwise, although their testimony is not available, or they do not remember the transaction, it will be presumed, in the absence of evidence to the contrary, that the will was executed in compliance with all the requirements of law, including those relating to publication, attestation in the presence of the testator, and the affixing of the testator's signature prior to those of the witnesses, and the performance by the witnesses of their duty to see that the instrument was signed and to satisfy themselves of the testator's competency, and hence the burden of adducing evidence to the contrary rests on one contesting or resisting the probate. This is especially true where the will contains a formal attestation clause, for such clause is presumptive evidence of the facts which it states.¹²⁴

Then, in 1959 the court stated:

Substantial compliance with [the statutory provisions] relating to the publication of a will and attesting by witnesses is all that is required, and no formal request that witnesses sign or express declaration that instrument is testator's will is required, but it is sufficient if the testator, by words or conduct, conveys to the witnesses that the instrument is his will and that he desires them to witness it.¹²⁵

While the foregoing is not an exhaustive list of the opinions delivered by the court on the issue of improper execution of a will, it provides a general notion that if a will is signed by the testator and by two witnesses in substantial compliance with the statutory provisions, then the will shall be upheld as being valid in its execution.

A recent example of a will contest in a case involving a same-sex couple and an allegation made by the decedent's family that the will was improperly executed can be found in the case of *Beaumont v. Castator*.¹²⁶ Beaumont and his partner of twenty-four years, Earl Meadows, lived with Beaumont's three sons on Meadows's property in Creek County, Oklahoma, farming and raising horses.¹²⁷ Upon the death of Meadows, Beaumont offered for probate Meadows's will.¹²⁸ Under the will, Beaumont was Meadows's sole beneficiary.¹²⁹ The trial court failed to admit

123. Okla. Stat. tit. 84, § 55(3)-(4) (2001).

124. *Goff v. Knight*, 206 P.2d 992, 995 (Okla. 1949) (quoting 68 C.J. Wills § 749 (1934)).

125. *Howard v. Est. of Smith*, 344 P.2d 260, 261 (Okla. 1959) (syllabus); see also *In re Estate of Mowdy*, 973 P.2d 345, 350 (Okla. Civ. App. 1999).

126. No. 98,379 (Okla. Civ. App. Feb. 13, 2004).

127. *Id.* at 2-3.

128. *Id.*

129. *Id.*

the will for probate because it was not properly notarized or witnessed.¹³⁰ Beaumont sued the estate claiming an oral contract existed between the parties to devise property, that an implied partnership existed, and that a constructive trust existed for the benefit of Beaumont.¹³¹ After hearing evidence on Beaumont's allegations, the trial court granted the defendants' demurrer.¹³²

The Oklahoma Civil Court of Appeals heard Beaumont's appeal of the trial court's decision and issued an unpublished opinion on February 13, 2004.¹³³ In its opinion, the court held that Beaumont did not contract to live with Meadows for the purpose of inheriting his property;¹³⁴ that Meadows was not unjustly enriched by the performance of Beaumont's work on Meadows's ranch or as a result of other services Beaumont performed for Meadows;¹³⁵ and that even if an implied partnership existed between the parties, Beaumont was not entitled to any damages since the ranch had always operated at a loss.¹³⁶ Beaumont appealed the Court of Appeals ruling to the U.S. Supreme Court. On November 1, 2004, the Supreme Court denied certiorari.¹³⁷ As a result, Meadows's cousins inherited the property on which Beaumont, Meadows, and their three sons had lived for nearly twenty-four years.¹³⁸

The battle waged by Beaumont for the legal right to inherit his partner's estate has been featured in a recent film documentary entitled *Tying the Knot*.¹³⁹ The film includes interviews with Beaumont and with the couple's children.¹⁴⁰ The film also highlights the family's ranch and the numerous hardships Beaumont endured following Meadows's death.¹⁴¹ *Tying the Knot* also features other same-sex surviving partners who have been denied the right to inherit from their partners, while highlighting the 1,049 federal rights denied to same-sex couples in comparison to those received by lawfully married couples.¹⁴²

Same-sex partners who intend to form family relationships and want their partners to inherit their estates, either in whole or in part, upon their death, should clearly set out the nature of their relationship in their estate planning documents. This not only includes the nature of the relationship existing between the parties, but also the terms of any of the parties' agreements regarding

130. *Id.* at 2.

131. *Beaumont*, slip op. at 3.

132. *Id.* at 4-5.

133. *Id.*

134. *Id.* at 5-8.

135. *Id.* at 8-10.

136. *Beaumont*, slip op. at 10-11.

137. *Beaumont v. Castator*, 125 S. Ct. 417 (2004) (memo.).

138. *Beaumont*, slip op. at 9.

139. *Tying the Knot* (1049 Films 2004) (motion picture) (information available at http://www.1049films.com/story_sam_earl.htm).

140. *See id.*

141. *Id.*

142. *Id.* at http://www.1049films.com/story_the_story.htm; Ltr. from Barry R. Bedrick, Assoc. Gen. Counsel, Govt. Acctg. Off., to Henry J. Hyde, Chairman, Comm. on the Jud. H. of Rep., *Categories of Laws Involving Marital Status 2* (Jan. 31, 1997) [hereinafter *Letter*] (available at http://www.hrc.org/Content/ContentGroups/WorkNet/Equal_Benefits_Ordinances1/GAO_Report.pdf).

inheritance. As seen in the case of *Beaumont v. Castator*, absent properly executed written documentation, a court may find the decedent's intentions fail and hence, the statutory distribution scheme will prevail.

c. Undue Influence

Another common reason cited for a will contest is undue influence. The burden of persuasion that a will has been tainted with undue influence rests upon the individual bringing the allegation.¹⁴³ Ordinarily, the individual alleging undue influence also bears the burden of producing evidence,¹⁴⁴ but upon a finding by the trial court that a confidential relationship existed between the testatrix and another, stronger party, and "the stronger party actively assisted in the preparation or procurement of the will, a *rebuttable presumption of undue influence will at once arise*,"¹⁴⁵ shifting the burden of producing evidence to the proponent of the will.

In determining whether a contestant's evidence establishes the basic facts that give rise to the presumption of undue influence, consideration will be given to the following non-exclusive list of factors:

1. Whether the person charged with undue influence was *not* a natural object of the maker's bounty;
2. Whether the stronger person was a trusted or confidential advisor or agent of the will's maker;
3. Whether he/she was present and/or active in the procurement or preparation of the will;
4. Whether the will's maker was of advanced age or impaired faculties;
5. Whether independent and disinterested advice regarding the testamentary disposition was given to its maker.¹⁴⁶

Whether the basic facts of the presumption of undue influence have been satisfactorily established is a preliminary question of fact to be decided by the trial court.¹⁴⁷

In order to wage a successful rebuttal of the appearance of undue influence two factors are admissible as evidence to meet this burden: the termination of the confidential relationship prior to the will's execution or the testatrix's receipt of independent and competent advice regarding the disposition of the estate.¹⁴⁸ One of these factors will generally suffice to rebut the presumption of undue influence, but their absence is not fatal to the presumption's rebuttal so long as other

143. *In re Est. of Maheras*, 897 P.2d 268, 271-72 (Okla. 1995).

144. See generally Leo H. Whinery, *Oklahoma Evidence: Commentary on the Law of Evidence* §§ 8.03-8.04 (2d ed., West 2000).

145. *Maheras*, 897 P.2d at 273 (emphasis in original).

146. *Id.* at 272-73.

147. Okla. Stat. tit. 12, § 2105(A) (Supp. 2004).

148. *Maheras*, 897 P.2d at 273.

probative evidence is offered. Oklahoma common law states that the presumption of undue influence may be overcome by the introduction of evidence which will allow the court to conclude that the bequest was made voluntarily and without the exertion of undue influence by the beneficiary upon the testatrix.¹⁴⁹ Should the will proponent fail to introduce the requisite evidence, the court must enter a finding that undue influence was exerted upon the testatrix.¹⁵⁰

In some instances the Oklahoma Supreme Court has recognized the relationships existing between an unrelated person and the testatrix as a "confidential relationship." The court in *Maheras* defined a confidential relationship as "the presence of a relationship which would induce a reasonably prudent person to repose confidence and trust in another"¹⁵¹ The court has used the concept of a confidential relationship to explain the desire of a decedent to bequeath his or her estate to an unrelated individual versus the natural objects of his or her bounty.

A relationship between same-sex partners may be an example of a confidential relationship. Without information regarding the personal nature of the relationship, the heirs-at-law may argue that the decedent had been coerced or tricked by the same-sex widow, as it seems illogical to some for a decedent to leave his or her entire estate to a roommate or friend. Similarly, some same-sex couples have an employment relationship with one another as either a business partner or an employee. A problem may arise if the decedent had identified the surviving partner only as a roommate, friend, employee or business partner in the will. Therefore, to avoid the implication that the same-sex widow unfairly influenced the decedent in the making of the will, the testatrix should offer some explanation of the relationship between the couple.

Same-sex widows battling the family of deceased partners that failed to reveal the true nature of their relationships, either during life or in the text of a will, face an emotional and financially daunting challenge if the decedent's family of origin raises an allegation of "undue influence." It is incumbent upon same-sex partners who intend to leave all or part of their estates to their same-sex widows, to identify the nature of their relationships with their roommates, friends, business partners or employees. Judy could have included in her will the following:

I leave the entirety of my estate to Suzanne, my life partner of more than ten years. We began our loving and committed relationship on January 1, 1995, by holding a commitment ceremony in our home among friends. We would have married, but the law in Oklahoma would not recognize our right to do so.

I leave my entire estate to her out of love and respect. She has been a source of joy, love, peace, and friendship to me and I expressly intend for her to be the beneficiary of my estate. I ask that my family recognize the

149. *In re Anderson's Est.*, 286 P. 17, 17-18 (Okla. 1929).

150. Whinery, *supra* n. 150, at § 9.21.

151. *Maheras*, 897 P.2d at 272.

commitment that Suzanne and I share, and that they accept my wishes as set out in this will.

Clearly, no will is guaranteed to withstand judicial challenge. However, an individual creating a will should concisely state his or her desires. Additionally, within the text of the will the individual should identify the nature of his or her relationship with the same-sex partner while explaining that the testatrix's desire is for the partner to inherit instead of the family of origin. It is wise to remember that the written will speaks in place of the decedent after death. All same-sex couples' wills should be written as "self proving" and executed in accordance with the statutory formalities. Witnesses to the will can attest to the testator's competence, if such a need arises.

C. *Alternatives to Probate*

There are numerous alternatives to a last will and testament. Because of the public nature of the probate process and the potential for a will contest, many same-sex couples opt for alternative estate planning tools. Often same-sex grantors opt for these alternative tools in order to protect themselves from being "outed" to the community-at-large after death, to protect their partners from being "outed" to the community-at-large during life, and finally, to protect their property after death by preventing family members from contesting the will.

1. *Revocable Trusts*

Revocable trusts, also known as "living trusts" or "grantor trusts," can be used for much the same purpose as a will in that they delineate who should receive property from a decedent. However, revocable trusts do not require court supervision or administration upon the death of the grantor.¹⁵² A revocable trust is one that by definition may be rescinded, cancelled, or modified at any time during a grantor's life.¹⁵³ A revocable trust is a separate legal entity created by the grantor(s). The trust declaration is a legal document wherein the grantor not only transfers ownership of certain assets to the trust, but also provides for the management and disposition of the trust's assets at the time of the grantor's death.¹⁵⁴ During the life of the grantor, the grantor usually names himself or herself as trustee or administrator of the trust. The transfer of ownership of the grantor's assets from the grantor to the trust is essential if the trust is to be an effective estate planning tool.¹⁵⁵

A revocable trust can be formed by a couple that has chosen to merge all of their individual and joint assets. By naming themselves as trustees, they can continue to make all of the decisions regarding purchases, sales, expenditures, or charitable donations that they would have made had a trust not been formed. The

152. See Okla. Stat. tit. 60, § 175.6 (2001) (dealing with trust formation).

153. *Id.* at § 175.41.

154. *Id.* at §§ 175.4, 175.24.

155. *Id.* at § 175.6a.

real benefit comes at the death or disability of either grantor. Because each individual trustee has the authority to continue to administer the trust, the trust will continue uninterrupted following the death of one grantor. In addition, the trust may contain specific provisions regarding the disposition of the trust property at the death of the second partner, effectively removing the need for the estate to be probated.¹⁵⁶

It is vital that the grantor transfer ownership of all intended assets to the trust. To maximize the effect of a revocable trust, the grantor(s) must re-title each bank account, investment account, stock account, life insurance policy, and other real and personal property into the name of the trust. Therefore, at death the decedent-grantor will own nothing and the decedent's estate will not need to be administered in probate.

Transitioning from a joint trust to an individual trust following the death of the first grantor is relatively easy. The surviving grantor-trustee will be required to file an estate tax return on behalf of the deceased and to file a tax release in the county where any real property owned by the trust is located. The failure to file the appropriate release may cause the surviving trustee problems if she elects to sell, transfer, or use the land as collateral for a loan. Title attorneys often require that a release from the Oklahoma Tax Commission be on file at the local courthouse before issuing a clear title opinion. Because postmortem administration of trusts requires no judicial participation, disputing the content or the disposition of assets is a much more difficult process.

It is imperative for anyone who is considering the formation of a trust to understand the advantages and disadvantages inherent in the tool itself. The most obvious benefit to a trust is that the administration of the trust will take place following the death of the first grantor without the aid of the court. Hence, privacy of one's relationship and financial worth are maintained and the surviving grantor has peace of mind knowing that she has financial security by virtue of the fact that trust provisions cannot be contested. However, in some instances, a grantor may believe that his or her partner is ill-equipped to manage finances in a responsible manner. The grantor may set aside money in the trust for distribution to the surviving grantor at regular intervals or as investments produce income. In this way, the trust corpus can continually generate income for the surviving trustee.

Another benefit of a trust is that any provision within the trust may be amended or revoked during the life of the grantors. Therefore, following the death of the first grantor, the surviving grantor is authorized to change the terms of any provisions of the trust, including the disposition scheme.

The authority of a surviving grantor to amend a trust after the death of the first grantor is considered a disadvantage to some. If the surviving grantor is able to change the disposition of the trust's property, then the deceased grantor's wishes could effectively be defeated. Such possibilities necessitate that grantors

156. *Id.* at § 175.56.

consider including a provision in the original trust declaration which makes the trust irrevocable upon the death of the first grantor. However, by directing that the trust convert from revocable to irrevocable upon the death of the first grantor, the surviving grantor/trustee may be severely limited in the decisions he or she can make in the future. Thus, an irrevocability provision may effectively lock the surviving grantor/trustee into a situation that neither of the grantors had anticipated at the time of the creation of the trust. For example, suppose a trust mandated that upon the death of the first to die the surviving grantor would receive an annual sum of \$30,000 in income from the trust assets because it was determined at the time of the trust's creation that this amount would satisfy the annual household maintenance of the surviving grantor. Now, years have passed and the surviving grantor suffers a serious accident and needs additional monies to pay for her medical treatment. Since the trust contained an irrevocability provision, the surviving grantor will be unable to invade the corpus of the trust to pay for her medical treatment. Surely, this result was not the intent of either party at the time of the trust's creation, and it is the type of unforeseen hardship that can result from an irrevocability provision.

Finally, should a relationship terminate following the formation of a joint trust, the trust may provide additional benefits or detriments. A trust may be revoked during the lives of the grantors. The ability to revoke the trust is a considerable benefit. However, absent an alternate agreement, the trust corpus will likely be partitioned into equal portions and distributed one-half to each grantor. In this way, a trust could be financially detrimental to one grantor because the distribution would be made one-half to each grantor regardless of the amount originally contributed by each. Therefore, if the partners are contributing disparate amounts to fund the trust, the grantors should discuss whether they wish to include a provision which specifically sets forth the percentage of assets received by each grantor in the event the trust is revoked.

The creation of a trust is more costly in terms of time and effort than the creation of a self-proving will. Additionally, couples creating a trust must be attentive to the duty of re-titling all applicable assets into the trust in order to maximize the benefits of the trust. Grantors must also remain aware that life changes can occur which may necessitate amendment of one or more provisions of the trust.

For same-sex couples, the advantages of creating a revocable trust can largely outweigh the cost associated with its creation. If all of the decedent's assets are correctly re-titled in the name of the trust, the need for probate is eliminated. Hence, the surviving partner is able to continue the business of the trust, free of any potential challenges by the decedent's family of origin, without the arduous work that probate would entail.

Many same-sex couples choose not to merge their assets since they do not have the legal rights to property division upon dissolution of the relationship that are enjoyed by their married heterosexual counterparts. Nonetheless, upon their deaths, they want to leave their property to their partners. These individuals

should consider establishing separate trusts. In doing so, they can name themselves as the original trustees and beneficiaries and their same-sex partners as the successor trustees and beneficiaries. The appropriate choice of an instrument to distribute assets after death will vary with each couple and their unique sets of needs and desires.

2. Charitable Remainder Trusts

If a couple wishes to designate a charitable organization as the ultimate beneficiary of their estates, the couple may opt to create a charitable remainder trust ("CRT"). A CRT may provide income for the life of the surviving partner with the remainder going to the charity or charities of their choice.¹⁵⁷ The income received by the surviving partner is derived from the proceeds of the underlying investments based on a pre-determined formula. At the death of the surviving partner-grantor, the remaining corpus is transferred to the designated charity.

Along with the security of income for the surviving partner-grantor and eventual gift to the charity of one's choice, notable tax advantages can be realized if the trust is appropriately created and funded. Depending on the provisions written into the CRT one or more tax deductions may be taken by the grantor upon the creation of the CRT. Also, after all of the expenses associated with the final administration of the trust have been paid, the remaining trust estate will pass to the designated charity without estate taxation because of the charity's 501(c)(3) tax status with the Internal Revenue Service.

Many charities now have "planned giving" departments which assist donors in creating CRTs. Often times same-sex couples want to name a charity as the ultimate beneficiary of their trusts. These couples may be childless, disowned by their families of origin, and/or hopeful that their donations to a charity supporting gay and lesbian movements or projects will benefit the next generation of gay and lesbian children from the discrimination that prevailed during their lifetimes.

It is incumbent upon grantors to educate themselves to determine the best trust alternative to meet their needs. Paramount is the need for both grantors to understand the trust, its benefits, downfalls, and contingencies and to ultimately feel comfortable with the end result. If life situations change for either the grantors or their beneficiaries, the trust can easily be amended to accommodate the new situation. Regardless of the specific type of trust a couple establishes, the trust should be unequivocal in its terms and it should also clearly elaborate the powers of the trustees and benefits to the beneficiaries in the text of the trust declaration.

3. Family Limited Partnerships

Individuals with large estates who intend to pass property at death may consider other alternatives to wills and trusts. One potential alternative is known as a Family Limited Partnership ("FLP"). Classified as a business entity, an FLP

157. Pub. L. No. 91-172, 83 Stat. 488 (1969).

can be a flexible and effective estate planning tool for transferring assets from one individual to another while minimizing the burden of estate taxation. This sophisticated tool transfers the grantor's assets to another during the life of the grantor, but the grantor will still maintain control over the property. In this aspect, the FLP can be analogized to a revocable trust.

Limited partnerships, created for the purpose of transferring assets to a person or entity at a discounted value, became a popular estate planning tool in the 1990s for families faced with the potential of large estate tax bills. Such limited partnerships were formed in family-owned businesses where a parent wished to transfer ownership interests to his or her legal spouse and/or children, but not forfeit control over an entity. These limited partnerships became known as "family" limited partnerships. Because the underlying purpose of FLPs and limited partnerships is the same, the biological or non-biological relationship between the transferor and the transferee is not relevant.

The major benefit to establishing an FLP is the ability of the general partner to transfer ownership in the property to a partner (or anyone) free of tax. Because the underlying property owned by the FLP is a privately held business, no ready market exists for the sale of its shares. Anyone purchasing a minority share in a closely held entity would essentially be purchasing a share of the business but would have no authority to make decisions and no control over the company. Most investors would not choose to enter into a business in which they had no control over the day-to-day affairs and no return on their investments. Therefore, because of the disadvantages of being a minority partner, the Internal Revenue Service allows for the "discounting" of the shares of ownership.¹⁵⁸

Two discounting factors are commonly recognized: a discount for lack of marketability and a discount for a minority interest.¹⁵⁹ If a business is not publicly traded on a recognized exchange, then the stock may not be easily transferable due to either securities restrictions or because no apparent market exists for the security. In addition, if the shares being transferred comprise a minority interest in the business, the purchaser will have no control over the day-to-day affairs of the business, and the ownership of the stock is less desirable. If either or both of these factors are at play in the transfer of a closely held business, the Internal Revenue Service has ruled that the value of the business interest can be appropriately discounted from its liquidation value.¹⁶⁰

Since a married individual may transfer any amount of money to his or her spouse during his or her lifetime without any estate or gift tax liability,¹⁶¹ the creation of a FLP may be an unnecessary estate planning tool for such individuals. (Estate and gift taxes will be fully discussed in the following section of this article.) However, same-sex couples do not enjoy this luxury, and hence face challenges

158. Rev. Rul. 59-60, 1959-1 C.B. 237.

159. *Id.*

160. *Id.*

161. 26 U.S.C. §§ 2056, 2523 (2000).

when they attempt to equalize their estates in an effort to minimize the estate tax liability for the widowed partner.

Assume that Judy owned the *Fish Ranch Bait & Tackle Shop* as a sole proprietor prior to her death. If she had chosen to create a simple FLP, and in doing so, she noted that the *Fish Ranch* partnership had 1,000 units outstanding, each worth \$100 on the date of transfer, then Judy could transfer or “gift” a number of units each year to Suzanne. These units would be transferred to Suzanne at a discounted value for gift tax purposes.

Thus, if Judy gifted Suzanne \$15,000 worth of the business’s stock, the actual value of the stock may only be 65% to 70% of that amount, or \$10,500. This is an estate planning technique which would allow Judy to gift more ownership units to Suzanne on an annual basis than would otherwise be tax free. Any annual gift in excess of \$11,000 would trigger the requirement that Judy file a gift tax return in the amount of the transfer. Below that amount, this is a tax-free transfer. Judy could continue this annual gifting pattern until she has transferred the desired portion of the *Fish Ranch*’s ownership to Suzanne. While the transfers are occurring, Judy, as the general partner, would retain all decisionmaking authority and would control the day-to-day operation of the business.

Because estate tax continues to be an oppressive burden for same-sex couples, strategies such as FLPs have become increasingly attractive as estate planning mechanisms. The most beneficial entity for any particular couple will depend upon a myriad of factors. However, when business ownership is sought to be transferred or equalized between two partners, a FLP is one of the most tax effective ways to complete this transaction.

D. Conclusion

Clearly, each couple’s estate is different and thus, the opportunities, the limitations, and the strategies will vary from couple to couple depending on a number of factors. Each partner’s comfort level is a major consideration in determining the best approach to constructing a comprehensive estate plan. Equally important to an estate planning attorney is a thorough knowledge of a couple’s complete financial situation, their goals and objectives, their financial history, and their income levels in order to make appropriate recommendations for a plan.

Couples who are intent upon protecting each other in the event of incapacitation or death are often forced to honestly evaluate their wishes and have to compare goals when preparing an estate plan. A single document is rarely sufficient to meet all of a couple’s needs regarding their ability to insulate same-sex partners and to efficiently distribute assets appropriately at death. To compound the complexities of an already daunting estate planning task, the couple must also become knowledgeable about, and realistically prepare for, the complications of a potential estate tax liability which is likely to affect every same-sex couple to some degree.

IV. FOR RICHER, FOR POORER: TAXES AND THE TREATMENT OF "COLLATERAL" HEIRS

A. *Determining the Value of the Decedent's Estate.*

Estate taxation is a largely misunderstood and intimidating concept. Estate taxation in Oklahoma is an inheritance tax assessed on the fair market value of the decedent's estate, or all the assets owned by the decedent on the date of death.¹⁶² These assets may be owned in whole or in part by the decedent. This seemingly straightforward concept can quickly become muddled as one begins to consider the total value of one's estate and its fair market value. Fair market value is the value that a ready, willing, and able buyer would pay for property.¹⁶³ It is this valuation of one's estate that will ultimately determine the amount of estate tax due.

Estate tax is due nine months after the decedent's death.¹⁶⁴ Instead of utilizing the fair market value of the estate as of the date of the decedent's death, many times an inheriting survivor may opt to choose an alternate valuation date of six months after the date of death.¹⁶⁵ This election is usually made in the case of a rapidly decreasing market or in the instance of a marked decline in the value of the decedent's assets. If the taxes on a decedent's estate cannot be paid within nine months after a decedent's death, a filing extension may be sought from the Oklahoma Tax Commission.¹⁶⁶ However, even with an extension, interest will begin to accrue on the unpaid balance.¹⁶⁷

Often, a decedent's home is one of the largest assets in the estate. If the home is co-owned, the precise share of the decedent's ownership must be ascertained to determine the decedent's estate tax. Earlier in our hypothetical Judy and Suzanne had purchased their home together and each of the two women had written a personal check for one-half of the cost of the home. Under such a scenario, Judy's estate would be taxed on one-half of the fair market value of the home as of the date of Judy's death.

Contrast that with our second scenario in which Judy and Suzanne devised a remodeling/monthly payment agreement so that both women could be equal equity owners in the home that Judy had owned two years prior to cohabitating with Suzanne. Regardless of how the remodeling/monthly payment agreement was structured or the nature of the agreement between Judy and Suzanne, if the property was never deeded into the names of both women, the Oklahoma Tax Commission will treat the house as Judy's property. Hence, Judy's estate will bear the estate tax on one hundred percent of the fair market value of the property.

162. Okla. Stat. tit. 68, § 802 (2001).

163. *Id.* at § 816(A).

164. *Id.* at § 815(A)(1) (Supp. 2005).

165. *Id.* at § 816(B)(1)(b).

166. *Id.* at § 815(A)(2) (Supp. 2005).

167. Okla. Stat. tit. 68, § 806(A).

Under either scenario, the Oklahoma Tax Commission will require Suzanne to document the pro rata share of the home owned by each of the women on the date of Judy's death.¹⁶⁸ The same taxing method will be applied to all other assets comprising Judy's estate. It is important to note that this exercise is mandatory even if the assets are titled in both partners' names. The greater the share Judy owned, the greater the amount of estate tax due.

While documenting each same-sex partner's ownership ratio in any asset is cumbersome, it is nonetheless imperative. Not only will it help the same-sex widow receive equitable treatment regarding estate taxes, but it will also prevent the same-sex widow from being deprived of property that is rightly hers.

B. Distinguishing Legal Spouses, Lineal Heirs, and Collateral Heirs

Oklahoma defines heirs for estate tax purposes only as legal spouses, lineal heirs, or collateral heirs. All property that passes to a surviving spouse is exempt from Oklahoma estate tax.¹⁶⁹ Lineal heirs are the fathers, mothers, children, children of husbands or wives, adopted children, or any lineal descendants of decedent or of adopted children of the decedent.¹⁷⁰ Collateral heirs are those who are not considered lineal by statute, such as brothers, sisters, nieces, nephews, other relatives, and friends—such as same-sex partners.¹⁷¹ An examination of estate tax comparisons reveals a tremendous disparity in the tax computation for widowed spouses as compared to the rate for same-sex widows. For purposes of this article, lineal heir taxation will not be considered.

Income tax in the form of capital gains tax is assessed on property that is sold at a profit. The original amount of investment is called the cost basis. For tax purposes, the cost basis combines the original purchase price together with any costs incurred in acquiring the asset (such as a sales commission paid). If the sales price of the asset is above the cost basis, the profit is the amount taxed.¹⁷²

Ordinarily, if a donor transfers an asset to a donee, the donor's cost basis is also transferred to the donee. If the donee later chooses to sell the asset, the donor's cost basis becomes the donee's cost basis. However, at death, heirs realize a "step up" in the cost basis of the asset. All of a decedent's property is valued as of its current fair market value on the date of death, and the cost basis of each item in the estate becomes "stepped up" to the current value.

Suppose that Bob and Judy each had purchased 100 shares of Chrysler Corporation stock at \$10 per share, and each paid \$50 in brokerage commissions to purchase it. The cost basis in the stock for each of them would be \$1,050. If each sold the stock at \$20 per share and again incurred a brokerage commission of \$50 for the trade (reducing the amount realized to \$1,950), the net taxable profit to both of them would be \$900.

168. *Id.* at § 807(A)(1), (4) (Supp. 2005).

169. *Id.* at § 815(D).

170. Okla. Stat. tit. 84, § 218 (2001).

171. *Id.*

172. 26 U.S.C. § 1001(a) (2000).

Amount Realized	\$ 1,950
Cost Basis	\$ 1,050
Taxable Gain	\$ 900

If Judy died and left the Chrysler stock to Suzanne, then upon inheriting the stock Suzanne would experience a step up in basis to \$2,000 (the value of the stock the day Judy died). If Suzanne later chose to sell the stock, then her cost basis would be \$2,000 and she would incur tax on any gain over \$2,000, or take a capital loss on sales proceeds under \$2,000. In large estates, tax complications may arise because the capital gains tax rate may be lower than the estate tax rate. Tax planning is often advisable for same-sex couples in order to determine the most efficient method of transferring property during life and at death.

Alternatively, if Lucy inherits Bob's Chrysler stock, then no taxable event has occurred. Should Lucy choose to sell the Chrysler stock following Bob's death, she would pay capital gain tax on the profit from the sale using the stepped-up basis. As previously stated, legal spouses are not required to pay any estate taxes under Oklahoma law upon the death of their husbands or wives.¹⁷³ In fact, if a decedent's entire estate is left to a surviving spouse, then an estate tax return is not required to be filed with the Oklahoma Tax Commission.¹⁷⁴ By contrast, a same-sex widow will be taxed as a collateral heir. Hence, the first dollar of a taxable estate inherited by the same-sex widow is taxed at one percent and the tax increases incrementally to a maximum rate of fifteen percent.

Because same-sex couples may be unaware of the potential tax consequences at death, same-sex widows could be unprepared for the monetary fallout. Exacerbating the economic burden on same-sex widows at the death of a same-sex partner is that a second source of income has been eliminated. The following hypothetical estate illustrates the tremendous disparity in tax liability between a legally recognized married couple in which one spouse dies and a same-sex couple in which a partner dies.

The following table illustrates a hypothetical estate of \$390,000. Assume that Lucy, Bob's wife, and Suzanne, Judy's partner, will receive the entirety of identical estates. The following table shows the disparity in estate tax treatment between Lucy and Suzanne under the current law in Oklahoma:

<u>ASSETS</u>	<u>VALUE</u>
Life Insurance (employer provided)	\$ 5,000
Home	\$ 220,000
Automobile	\$ 25,000
Bank Account	\$ 10,000
Household Goods	\$ 70,000

173. Okla. Stat. tit. 68, § 807(B) (Supp. 2004).

174. *Id.* at 815(D).

401K/IRA	\$ 60,000
Total	\$ 390,000
<i>Oklahoma Estate Taxes Due from Suzanne</i>	<i>\$ 30,900</i>
<i>Oklahoma Estate Taxes Due from Lucy</i>	<i>\$ 0</i>

No tax is due from the legal spouse in the above example of a typical estate. Suzanne, as beneficiary of Judy's estate, will be taxed at an effective rate of 7.9%. The tax computation for collateral heirs in Oklahoma is based upon a graduated scale.¹⁷⁵ The first dollar of the estate is taxed at 1% and the rate continues to increase with the size of the taxable estate to a maximum of 15%.¹⁷⁶ Hence, an estate tax liability of \$30,900 is assessed against Judy's estate. It should be noted that no federal estate tax would be due.

A widowed partner who has inherited a deceased partner's estate must find a way to pay the estate tax bill within nine months after the death.¹⁷⁷ Because an estate is valued based on the fair market value of its assets, most of which may not be in cash, same-sex widows must often decide which asset(s) they will sell in order to pay the tax bill. One option same-sex couples may consider as a means of preparing for the inevitable estate tax bill is life insurance.

C. Remedies for Discriminatory Taxation

Life insurance has been commonly thought of as a contractual agreement between an insured person and his or her insurance company to pay a third person a stated amount after the decedent's death. Today, life insurance has become a sophisticated estate planning tool, especially for same-sex couples.

Many types of life insurance policies have surfaced in recent years to accomplish a number of business and personal arrangements, most of which are outside the scope of this paper. However, in terms of estate tax liability, the owner of a life insurance policy owns the taxable asset whether or not he or she has access to any cash from the policy. Therefore, if the decedent held an employer-provided term life insurance, the face amount (the amount paid to the beneficiary as a result of the insured's death) is taxable as part of his or her estate at death.

One strategy that same-sex couples should employ is for each partner to own a life insurance policy on the other's life. Why? Because it is the ownership of the policy, not the beneficiary's interest, that is considered the taxable asset. If each same-sex partner owns life insurance insuring the partner's life and the owner is also the beneficiary, then the face value of the insurance is not a part of the decedent's estate. Therefore, the face amount of the policy is not taxed as part of the decedent's estate.

175. *Id.* at § 803(2).

176. *Id.*

177. *Id.* at § 806 (2001).

Same-sex partners should attempt to estimate the probable estate tax liability in the event of the death of one partner and purchase the respective life insurance amount on his or her partner's life. The couple should review their life insurance policies on an annual basis to ensure that the face amount is sufficient to meet their estate tax needs. The proceeds of the life insurance may then be used by the surviving partner to pay the decedent's estate tax bill. Utilizing this tactic may eliminate the necessity of a same-sex widow being forced to sell property in order to pay her partner's estate taxes.

V. CONCLUSION

Because same-sex couples face legal obstacles not encountered by their heterosexual counterparts, estate planning is an essential process to ensure the recognition of their constitutionally unrecognized love. Estate planning attorneys must educate themselves in a myriad of legal fields, as new law is being made daily across the nation—in areas as diverse as family law, estate planning, probate, and tax law—and has an immediate impact upon the recognition and treatment of same-sex couples. The continually changing political climate in Oklahoma can serve to provide regular doses of legal concerns to its same-sex citizens. Therefore, estate planning attorneys who choose to represent same-sex couples theoretically incur more potential liability because the law in Oklahoma will not protect the same-sex widow as it will the widows of heterosexual couples.

To that end, this article has attempted to bring to light the most basic estate planning needs for same-sex couples with respect to health care issues, alternatives to probate, and estate and gift taxation. Utilizing the instruments discussed herein will assist same-sex couples to protect their partnerships during life and upon death. Couples would do well to remember that virtually every document described in the text of this article may be revoked at any time so long as the person revoking the document is legally competent at the time of the revocation. Consequently, careful attention to detail is required in order to capitalize on the benefits of available estate planning tools in order to minimize the detriments that could befall the ill-prepared estate planning attorney.

This article does not begin to touch upon the 1,049 federal rights¹⁷⁸ which are denied to same-sex couples as a result of their inability to lawfully wed. Furthermore, this article does not address the issues which surround same-sex couples involved in child rearing. Although these issues undoubtedly affect the daily lives of same-sex couples, the vast majority of the heterosexual segment of our society is oblivious to them. Hopefully this article has illuminated the essential nature of estate planning for same-sex couples. May this article encourage more voices to join together in the march for same-sex equality.

178. *Letter, supra* n. 148, at 2.

APPENDIX A

DESIGNATION OF AGENT

I, _____, designate my partner, _____, to be my agent empowered with the following authority.

1. VISITATION AUTHORITY: To give notice that, if I am admitted to a medical facility of any type, a nursing home, hospice, or similar health care, skilled nursing, or custodial facility, my agent, _____, shall be designated as “family” as that term is defined by the Joint Commission on Accreditation of Healthcare Organizations. JCAHO defines “family” as “The person(s) who plays a significant role in the individual’s [patient’s] life. This may include a person(s) not legally related to the individual.” (Joint Commission Resources, JCR, *2001 Hospital Accreditation Standards*, p. 322).

My agent shall have priority in being admitted to visit me in such facility. My partner, as my agent, is designated as the person to be consulted by medical or health care personnel concerning my care and treatment. This is in keeping with the Health Care Power of Attorney I executed. My agent shall also have the authority to determine who will be permitted to visit me while in the facility and during any recovery at home.

This authorization supersedes any preference given to parties related to me by blood or by law or other parties desiring to visit me. These instructions shall remain in full force and effect unless and until I freely give contrary written instructions to competent medical personnel on the premises involved. My subsequent disability or incapacity shall not affect these instructions.

2. RECEIPT OF PERSONAL PROPERTY: My agent shall also have the right to receive any and all items of personal property and effects that may be recovered from or about my person by any hospital, nursing home, other health care facility, police agency, or any other person or public/private entity at the time of my illness, disability, or death. This specifically includes cash or other liquid asset(s).

3. DISPOSITION OF REMAINS/AUTOPSY AUTHORIZATION/FUNERAL ARRANGEMENTS: My agent shall have the authority to authorize an autopsy if it is deemed necessary or is required by law. In matters concerning the disposition of my remains and funeral arrangements, I provide that my agent/partner, or any other person directed to dispose my remains, shall follow my instructions for any funeral services. Any limitations on this authority are specified in this document.

My agent is to direct the disposition of my remains by the following method:
burial _____ cremation _____. The specific instructions are found in _____.

In this regard, my agent has the authority to make all decisions necessary for my obituary notice, funeral, any mortician’s role therein, burial services, interment or cremation of my body, including, but not limited to the selection of a casket or

urn, selection, care and tending of a grave site, and selection of a gravestone including the inscription thereon.

4. SPECIFIC INSTRUCTIONS CONCERNING MY AGENT'S AUTHORITY OR LIMITATIONS THEREON: My agent shall have access to all medical records and information pertaining to me and concerning treatments, procedures, treatment plans, etc. This includes the right to disclose this information to other people. I explicitly authorize any medical or health care provider to release information requested by my agent to him/her and consider my agent an authorized person to receive such information under the Health Information Portability and Accessibility Act (HIPAA).

My agent has the authority to admit or discharge me from any hospital, nursing home, residential care, assisted living or similar facility, or service entity. My agent also has the authority to hire and fire medical, social service, and other support personnel. My agent is primarily responsible for my medical and health care.

_____ Date _____ Principal

State of _____)
) ss.
County of _____)

Before me, a Notary Public in and for said County and State, personally appeared the above named, _____, who acknowledged that he/she did sign the foregoing two-page instrument, and that the same is his/her free act and deed.

Subscribed and sworn to before me this ____ day of _____, 20__.

Notary Public

My Commission Expires:
My Commission No.:

APPENDIX B

ADVANCE DIRECTIVE FOR HEALTH CARE

I, **Judy**, being of sound mind and eighteen (18) years of age or older, willfully and voluntarily make known my desire, by my instructions to others through my living will, or by my appointment of a health care proxy, or both, that my life shall not be artificially prolonged under the circumstances set forth below. I thus do hereby declare:

I. Living Will

a. If my attending physician and another physician determine that I am no longer able to make decisions regarding my medical treatment, I direct my attending physician and other health care providers, pursuant to the Oklahoma Rights of the Terminally Ill or Persistently Unconscious Act, to withhold or withdraw treatment from me under the circumstances I have indicated below by my initials. I understand that I will be given treatment that is necessary for my comfort or to alleviate my pain.

b. If I have a terminal condition or am persistently unconscious:

(1) I direct that life-sustaining treatment shall be withheld or withdrawn if such treatment would only prolong my process of dying, and if my attending physician and another physician determine that I:

(a) have an incurable and irreversible condition that even with the administration of life-sustaining treatment will cause my death within six (6) months, or
 (Initial one box only)

YES

NO

(b) am in an irreversible condition in which thought and awareness of self and environment are absent.
 (Initial one box only)

YES

NO

(2) I understand that the subject of the artificial administration of nutrition and hydration (food and water) that will only prolong the process of dying from an incurable and irreversible condition or for individuals who have become persistently unconscious is of particular importance. I understand that if I do not initial the “yes” boxes below, artificially administered nutrition and hydration will be administered to me. I further understand that if I initial the “yes” boxes below, I am authorizing the withholding or withdrawal of artificially administered nutrition (food) and hydration (water):

(a) if I have an incurable and irreversible condition that even with the administration of life-sustaining treatment will cause my death within six (6) months, or

(Initial one box only)

YES

NO

(b) if I am in an irreversible condition in which thought and awareness of self and environment are absent.

(Initial one box only)

YES

NO

(3) I direct that (add other medical directives, if any)

(Initial one box only)

YES

NO

II. My Appointment of My Health Care Proxy

If my attending physician and another physician determine that I am no longer able to make decisions regarding my medical treatment, I direct my attending physician and other health care providers pursuant to the Oklahoma Rights of the

Terminally Ill or Persistently Unconscious Act to follow the instructions of **Suzanne**, whom I appoint as my health care proxy. If my health care proxy is unable or unwilling to serve, I appoint **my friend, Lucy** as my alternate health care proxy with the same authority. My health care proxy is authorized to make whatever medical treatment decisions I could make if I were able, except that decisions regarding life-sustaining treatment can be made by my health care proxy or alternate health care proxy only as I have indicated in the foregoing sections.

(Initial one box only)

YES

NO

III. Anatomical Gifts

I direct that at the time of my death my entire body or designated body organs or body parts be donated for purposes of transplantation, therapy, advancement of medical or dental science or research or education pursuant to the provisions of the Uniform Anatomical Gift Act. Death means either irreversible cessation of circulatory and respiratory functions or irreversible cessation of all functions of the entire brain, including the brain stem. If I initial the “yes” box below, I specifically donate:

YES

My Entire Body

or

YES

The following body organs or parts:

- Lungs
- Pancreas
- Kidneys
- Skin
- Blood/Fluids
- Arteries

- Liver
- Heart
- Brain
- Bones/Marrow
- Tissue
- Eyes/Cornea/Lens

IV. General Provisions

a. In the absence of my ability to give directions regarding the use of life-sustaining procedures, it is my intention that this advance directive shall be honored by my family and physicians as the final expression of my legal right to refuse medical or surgical treatment including, but not limited to, the administration of life-sustaining procedures, and I accept the consequences of such refusal.

b. This advance directive shall be in effect until it is revoked.

c. I understand that I may revoke this advance directive at any time.

d. I understand and agree that if I have any prior directives, and if I sign this advance directive, my prior directives are revoked.

e. I understand the full importance of this advance directive and I am emotionally and mentally competent to make this advance directive.

Signed this ____ day of _____, 2005.

Judy (Signature)

Tulsa, Tulsa County, Oklahoma

Date of birth: _____

(Optional for identification purposes)

This advance directive was signed in my presence.

Witness (Signature)
_____, Oklahoma

Residence (Street address)

Witness (Signature)
_____, Oklahoma

Residence (Street address)

APPENDIX C

DURABLE POWER OF ATTORNEY

(HEALTH CARE POWERS ONLY)

I, JUDY appoint SUZANNE as my agent (attorney-in-fact) to act for me in any lawful way with respect to the following initialed subjects.

Once effective pursuant to section III on the back of this form, this power of attorney will continue to be effective even though I become disabled, incapacitated, or incompetent, and shall not be affected by lapse of time.

I. Grant of Health Care Powers

To grant all of the following powers, initial the line in front of (f) and ignore the lines in front of the other powers.

The following selected powers are deemed granted by the Principal if initialed in the designated.

1. If I am unable to decide or speak for myself, my agent has the power to:

Initials

- _____ a. Make health and medical care decisions for me, including serving as my representative under the Oklahoma Do-Not-Resuscitate Act, but excluding signing an advance directive, making decisions reserved to a health care proxy under an advance directive, or other life-sustaining treatment decisions.
- _____ b. Choose my health care providers.
- _____ c. Choose where I live and receive care and support when these choices relate to my health care needs.
- _____ d. Review my medical records and have the same rights that I would have to give my medical records to other people.
- _____ e. Elect hospice treatment.
- _____ f. All of the powers listed above.

You need not initial any other lines if you initial line f.

2. It is my intention that my agent's acts on my behalf are to be honored by my family members and health care providers as an expression of my legal right to manage my health care. The directions and decisions of my agent are superior to and shall take precedence over any decision made by any member of my family. To the extent appropriate, my agent may discuss health care decisions with my family and others to the extent they are available.

II. Additional Guidance and Information

NOTE: This section, while very helpful to your agent, is optional and choices may be left blank.

a. My goals for my health care: _____

b. My fears about my health care: _____

c. My spiritual or religious beliefs and traditions: _____

d. My thoughts about how my medical condition might affect my family: _____

e. My thoughts about living and receiving health care at home versus in a nursing home or other institution: _____

Special Instructions: On the following lines you may give special instructions limiting or extending the powers granted to your agent.

III. When Power Becomes Effective

Please initial one statement below regarding the effective date of this power of attorney.

Initial

_____ This power of attorney is effective immediately and shall continue until it is revoked.

_____ This power of attorney shall be effective when my attending physician determines that I am no longer able to manage my person. This determination shall be provided in writing and attached to this form.

