Long-Term Plans for LGBT Floridians: Special Concerns and Suggestions to Avoid Legal and Family Interference

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LONG-TERM PLANS FOR LGBT FLORIDANS: SPECIAL CONCERNS AND SUGGESTIONS TO AVOID LEGAL AND FAMILY INTERFERENCE

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+ The author notes that this article is for informational purposes only and is not presented as legal advice. An individual wishing to implement the strategies discussed herein should consult legal counsel to tailor a long term plan appropriate to the individual’s particular circumstances and needs.

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I. INTRODUCTION

Perhaps because of its status as the “Sunshine State,” Florida is a growing population center for lesbian, gay, bi-sexual, and transgendered (LGBT) individuals and same-sex couples. In fact, the latest surveys show that Florida ranks second in overall LGBT population, and second in the number of same-sex households. Surprisingly, in per capita terms, Miami/Fort Lauderdale is not in the top ten of LGBT metropolitan areas, while Tampa/St. Petersburg ranks fifth nationally. Although it is often said that to go south in Florida you need to head north, it is clear that LGBT discrimination is not just a concern in “liberal” South Florida, but impacts households all over the state.

Despite Florida’s many attractions, thirty years after Anita Bryant made it the “Un-Shine State” in the emerging fight against gay and lesbian rights, Florida remains one of the most legally hostile places for LGBTs to live in the United States. The recent passage of an amendment to the Florida Constitution that limits marriage, or the equivalent of marriage, to “one man and one woman” demonstrates that neither legislative nor societal hostility in Florida is likely to end soon.


3. Id. at 7.

4. See id. The breakdown of LGBT population by congressional district shows remarkable parity and decentralization in Florida population figures. See id. app. 3.


6. See Fla. Const. art. I, § 27 (amended 2008). Article I, Section 27 of the Florida Constitution states: “Inasmuch as marriage is the legal union of only one man and one woman
While it remains vital to continue the fight for equality and basic human rights, there is a practical need to handle the present reality of living in Florida as an LGBT individual.\(^7\) And the word “individual” is used purposely, because even if you are in a long term, non-marital relationship, you are still an individual to the laws of Florida except under very limited circumstances.\(^8\) But by using the laws that allow any individual—gay or straight, married or unmarried—to make the personal choices we associate with the time-honored constitutional traditions of privacy and self-determination, an LGBT individual can create relationships that have legal meaning in Florida.\(^9\) Most of these “personal choice” laws are associated with disability and elder planning, are available in almost every state, and are often suggested to the LGBT community as important parts of a long term strategy.\(^10\) By comprehensively employing these statutory choices with the right guidance, LGBT individuals not only gain peace of mind for the future, but minimize the danger of becoming a legal stranger to loved ones in states, like Florida, where LGBT’s have few supportive laws.\(^11\)

This article takes the generalized suggestion of the importance of long-term planning and presents an in-depth examination and guide to the specific use and employment of Florida’s legislative scheme to provide protection to LGBT individuals. It illustrates the practical ways Florida laws can be used to avert real world stress. But it also proposes that even with the limitations of Florida law, there may be new solutions to giving these highly individualized choices even more legal strength, thereby creating a meaningful byproduct effect to Florida’s LGBT community as a whole.

Part II of this article looks at Florida’s “un-shine” laws and addresses the potential problems that can arise, and have arisen, when LGBTs face the challenges of aging or life’s unexpected disabilities. Part III focuses on three key areas of long-term planning under Florida law, which can create meaningful legal rights for LGBT’s health care, finances, and inheritance. Part IV proposes a number of strategies for insulating validly executed personal choices from legal challenges, and part V concludes the article.

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\(^8\) See Broward County, Fla., Code art. VIII, § 16 1/2-153 (2009); infra text accompanying notes 25–26.

\(^9\) See NCLR, Lifelines, supra note 7, at 2–4.

\(^10\) See id.

\(^11\) See id. at 16.
II. WHEN STATUTES ATTACK: THE DANGER OF NOT PLANNING

It is easy to say “you should plan for your future,” and easy to agree it is important. But whether it is called “elder planning” or “long-term planning,” it is simply too often left undone despite best intentions. When Mike and Sue leave it undone, there are a myriad of laws that step into the breach to create solutions. But if Mike and Steve leave it undone, it will create chaos if a surprise accident happens or the inevitabilities of aging ensue, because Florida law takes a dim view of homosexuality.

A. Florida’s Legislative Hostility and Amendment 2

Florida has the only state law in the country that bans adoption by homosexuals. Legislative bills that would remove the gay adoption ban face intense opposition. In 2004, the Eleventh Circuit upheld the gay adoption ban as constitutional. A recent state trial court victory finding the ban—once again—unconstitutional faces an uphill battle on appeal. In fighting to overturn the trial court victory, Florida’s deputy solicitor general’s position is that “[t]here is evidence that homosexuals have higher rates of mental disorders, suicide and domestic violence. . . . This is a plausible rationale.”

Florida embraced the Defense of Marriage Act (DOMA), restricting marriage to one man and one woman by legislative statute. Florida courts have previously endorsed that, too. Yet some gay rights opponents felt

14. See FLA. STAT. § 63.042(3) (2009); Charles Lane, Gay-Adoption Ban in Florida to Stand; Justices Decline to Hear Challenge, WASH. POST, Jan. 11, 2005, at A4.
17. In re Adoption of Doe, 2008 WL 5006172, at 29 (Fla. 11th Cir. Ct. Nov. 25, 2008); see also Carol Marbin Miller & Gabriela Gonzalez, Appeals Court Grapples with Gay Adoption, MIAMI HERALD, Aug. 27, 2009, at A1.
18. Miller & Gonzalez, supra note 17.
20. See, e.g., Kantaras v. Kantaras, 884 So. 2d 155, 155 (Fla. 2d Dist. Ct. App. 2004) (holding that a straight marriage where one spouse had had a sex change was invalid due to Florida’s position against same sex marriage).
even more was necessary to protect Florida from the LGBT community. Florida4marriage.org received enough signatures to place "Amendment 2" on the November 2008 general election ballot. Amendment 2 passed with sixty-two percent of the vote, and expands the statutory DOMA to a constitutional ban on any relationship, such as a civil union or domestic partnership, which approaches the legal equivalency of marriage. Amendment 2's passage only highlights the important premise of this article: LGBTs must take advantage of the Florida laws unaffected by Amendment 2 that actually can create effective legal relationships in key areas of anyone's life journey.

B. Domestic Partnership Laws: Limited in Scope and Potentially Moot

Currently, Broward, Miami-Dade, Monroe, and Palm Beach Counties, as well as the Cities of Tampa, Miami Beach, and Gainesville, offer limited Domestic Partnership protections. While these ordinances are positive oases in Florida's statutory landscape, the scope of their protections is limited and, as the population studies suggest, they do not geographically encompass a large percentage of Florida's LGBT population. These Domestic Partnership ordinances are similarly written, and offer some limited protections to unmarried couples. Unmarried couples who meet a basic set of criteria to ensure they are in a committed relationship may register with the local government to legally establish their relationship. Only registered couples are protected. Once registered, unmarried couples in these municipalities generally enjoy: health care facility and jail visitation rights, assurance of nondiscrimination in guardianship and health care surrogate designations, and county/city employee spousal benefits. Broward County also gives preferences in contract bidding to vendors who offer domestic partnership benefits to employees.

25. *See* GATES, supra note 2, at app. 2.
27. *See* *supra* note 2, at § 16 1/2-153.
28. *Id.*
29. *See* *supra* note 2, at § 16 1/2-159–61.
30. *Id.* at § 16 1/2-157.
But the backers of Amendment 2 have mounted legal challenges to Florida Domestic Partner laws before, and believe that Amendment 2 will give them the legal framework to win a new round of legal challenges. At least one anti-LGBT activist and his "Florida Family Association" have vowed to use Amendment 2 in 2010 as a means for fighting same-sex benefits adopted by some Florida counties and municipalities, stating: "We're going to use the momentum from the marriage amendment to speak to the fact that most people in this state don't want a recognition of that type of relationship."

The domestic partnership laws have provided an extra layer of protection to unmarried couples fortunate enough to live in the few places that provide them. But Amendment 2 and the failure of a recent attempt to pass a statewide legislative protection for domestic partnerships reinforces the need to layer that protection as much as possible. Furthermore, the protections only extend to the county line. Broward's protections will not reach into an Orlando hospital when a partner suffers a catastrophic injury at Disney-World. Thankfully, almost all of the protections conferred by the present domestic partner laws can be created by statute, for the benefit of any Florida resident no matter where they live.


34. See Broward County, Fla., Code art. VIII, § 16 1/2–151 (2009).

35. See Cynthia L. Barrett, Same-Sex Couples in the Elder Law Office, ELDER L. REP., Nov. 2007, at 1–2. For example, Broward's protection for the right to make health care decisions for a partner is only effective if there already is a health care surrogate designation in place. Broward County, Fla., Code, art. VIII §§ 16 1/2–158–159. Originally a designation would not have been required, but this was found invalid under Florida law. Lowe v. Broward County, 766 So. 2d 1199, 1210 (Fla. 4th Dist. Ct. App. 2000). Therefore, even Broward County cannot supplant the default legal priority a spouse or family member would have in
An even more practical concern is that even if they were available statewide, the laws are not known as “Domestic Best Friends” laws. Approximately eighty-five percent of Florida’s LGBT population is single, and many single LGBT’s have created “family” relationships with their friends that transcend blood ties, but those would not qualify as domestic partnerships. The “personal choice” laws addressed in this article can provide legal benefits to any individual, whether they are in a domestic partnership or whether they would consider their best friend closer than a sister. The bonus is that legally executing these personal choices in turn makes same-sex relationships, and the LGBT community as a whole, a stronger part of the legal fabric of Florida.

C. When Families Attack: In re Guardianship of Atkins

A recent case in Indiana highlights the danger LGBT’s face in the absence of pre-planning. In re Guardianship of Atkins recently affirmed a religious family’s successful ousting of a twenty-five year life partner from their son’s life after he was disabled. Although Florida’s guardianship laws are analyzed later in this article, the case is here as an illustrative “nightmare scenario” for anyone in a long-term gay relationship who does not pre-plan for the vagaries of life.

Patrick Atkins and Brett Conrad were life partners for over twenty-five years who shared their home and finances as a married couple would, but they were not accepted as a couple by Patrick’s deeply religious family. Patrick was the CEO of his family’s business and earned more than four times as much as Brett did as a waiter, but unfortunately Brett was not titled on their “joint” bank accounts. In 2005, while on a business trip to Atlanta, an aneurism and subsequent stroke severely disabled Patrick. During his

the absence of a designated health care surrogate. See Fla. Stat. § 765.401(1) (2009). In the absence of a designated surrogate, a guardian would have first priority, followed second by a spouse and third by family; number seven on the list of priority is “a close friend.” See Fla. Stat. § 765.401(1)(a)-(g).

36. See Gates, supra note 2, at app. 1.
37. See, e.g., Broward County, Fla., Code art. VIII, § 16 1/2-153 (friends normally do not live together or pledge to provide the comfort and support of a spouse).
38. See NCLR, Lifelines, supra note 7, at 3.
40. Id. at 878.
41. Id. at 880.
42. In re Guardianship of Atkins, 868 N.E. 2d at 880–81.
43. Id. at 881.
44. Id.
hospitalization, Patrick’s mother said she would rather her son did “not recover at all” if recovery meant he would be reunited with Brett, and that she could not tolerate Brett’s “evil” presence. 45 Although hospital and nursing facility staff bent the rules over the family’s objections to allow Brett visitation after hours, the family was able to bar him once they took Patrick to their home. 46 When Brett petitioned for guardianship, the family counter-petitioned and the trial court sided with the family. 47 Although the opinion of the appellate court is quite sympathetic to Brett, it claimed it could not say that the trial judge had abused his discretion under Indiana law in appointing Patrick’s parents as his guardians over his obviously committed and loving partner. 48 The only concessions Brett received were limited visitation, part of the value of their home, partial attorney’s fees, and a small portion of the bank accounts. 49 This was still too much for the dissent, whose strongly worded opinion called the majority’s award of limited visitation to Brett—and application of “common sense”—simply wrong and argued the rules of parental custody should have applied and barred Brett completely. 50 Given the current laws of Florida, there is certainly no assurance that a judge here would express any more sympathy for someone in Brett’s position.

D. Legal Stranger Danger

In a 1999 lesbian parental custody proceeding, Florida’s Fourth District Court of Appeal affirmed a lower court ruling that a woman was a legal stranger to the minor child she had raised with her ex-domestic partner, the biological mother. 51 A “legal stranger” is someone with no standing to bring suit, so she was barred from fighting for visitation rights and barred by the court from arguing it was in the “best interests of the child” to see her “other” mother. 52 Since blood and marital ties carry more legal weight over other relationships in Florida, a court could easily analogize this ruling to a “custody” fight over a disabled individual and rule against the life-long domestic partner in favor of a parent or other close family member.

To avoid being considered a “legal stranger” to the partner she has shared her life with, an LGBT Floridian must take action to protect her wish-
es and interests.\textsuperscript{53} No one likes to think that today is the day she will have an aneurism and/or stroke, but today is the day it could happen. No one likes to think about getting old and infirm, but it is a fact of life. Outlined below are the key personal choices LGBT Floridians can make to create an effective defense against legal stranger danger.

III. THE THREE KEY AREAS OF LONG TERM PLANNING FOR LGBT FLORIDIANS

Florida's elder and long-term planning statutes contemplate a number of ways that any adult individual can designate another person to act for that individual when she cannot act for herself. These laws work the same whether that adult individual is gay or straight, married or unmarried. Among other strategies, Florida law allows LGBT's to designate "proxy\textsuperscript{54} health care decision-makers, pre-need guardians, and durable attorneys-in-fact for financial matters, and to designate the recipients of their estates.\textsuperscript{55} These designations come under the broader sections outlined below: health and long-term medical care, financial affairs, and inheritance. "Incapacity" in the context of this article means that an adult has lost the ability to competently make his own decisions because of physical and/or mental impairment.\textsuperscript{56} Incapacitation tends to trigger a number of legal consequences for the individual.\textsuperscript{57} For the sake of simplicity, this article will use a fictional long-term same-sex couple, "Mike and Steve," where Mike's mom refuses to accept the relationship. However, the situations described could just as easily apply to "Susan and Jane," lesbian best friends living far from their families who consider each other closer than sisters.\textsuperscript{58}

A. Health and Long-Term Medical Care

Health care is probably the most important area of planning, and the one with the most strategic options. Whether an individual is temporarily or

\textsuperscript{53} See NCLR, LIFELINES, supra note 7, at 3.
\textsuperscript{54} "Proxy" is used here for its general definition of selecting someone to act on your behalf. DICTIONARY.COM. http://dictionary.reference.com/browse/proxy (last visited Nov. 7, 2009).
\textsuperscript{56} BLACK'S LAW DICTIONARY 828 (9th ed. 2009).
\textsuperscript{57} See FLA. STAT. § 765.102 (2009).
\textsuperscript{58} The author does not mean to imply that all LGBTs have conflicted blood-family relationships. However, it is the opinion and twenty five year gay adult experience of the author that LGBTs will often choose someone other than family to be life decision-makers even when they have close, supportive family relationships.
permanently incapacitated by accident or disease, or is simply disabled by advancing age, in the absence of a valid designation otherwise an individual’s family members will take precedence over a domestic partner. As explained below, without a “HIPAA” form and advance directive for healthcare, if Mike is seriously injured in a car accident tomorrow resulting in a coma, Mike’s mother can legally keep Steve out of Mike’s hospital room, bar his access to pertinent medical updates, and can take over medical decision-making for Mike. Without a living will, if Mike is in a persistent vegetative state, his mother can keep him alive even if Mike had told Steve over and over again that he would not want to be kept alive in that condition. Only a spouse would have a fighting chance of overruling the mother in Florida courts. The following forms can alter these outcomes.

1. HIPAA Forms

Hospitals can and do forbid non-family members from accessing their loved ones. Miami’s Jackson Memorial Hospital was sued for refusing to allow a Seattle woman and her three children access to the woman’s life partner of eighteen years, Lisa Pond, when Ms. Pond was brought in after experiencing an aneurism at the start of a 2007 cruise vacation and declared brain dead. The hospital refused to speak to the woman or give her updates, and denied visitation “until nearly eight hours after their arrival.” Lambda Legal calls this unethical and discriminatory, but there is no legal mandate that required Jackson Memorial to act otherwise. In fact, a federal judge recently dismissed the case.

59. See Fla. Stat. § 765.401(1).
60. See id.
61. See id.
64. Id.
65. Id.
66. Id.
A HIPAA form may create the legal mandate. 68 The Federal Health Insurance Portability and Accountability Act of 1996 brought the HIPAA acronym into the medical lexicon. 69 A HIPAA form allows an individual to designate who may or may not access his pertinent private medical information. 70 Under HIPAA regulations, every medical provider now requires a patient to fill out a HIPAA compliance form. 71 If a patient is competent and conscious, medical providers are forbidden to divulge a patient’s pertinent medical information to anyone not designated. 72 Such designation can be written or can be inferred from the circumstances if the patient does not object to the presence of someone hearing information. 73 But if a patient is incapacitated and there is no designation, medical providers may use their professional judgment to decide whether to disclose or not to disclose, with family members taking precedence in the wording of the regulations. 74 However, since the regulations allow an individual to create their own HIPAA form, as long as it complies with the regulatory conditions, it should be accepted by any medical provider. 75

In Mike’s situation, where he enters the hospital in a coma, unable to fill out a HIPAA form, the hospital’s doctors may exercise their professional judgment to choose his mother over Steve, and subsequently respect her wishes to keep Steve away. If Mike has not previously filled out a form authorizing Steve’s access to his medical information, Steve has no substantive recourse against the hospital or Mike’s mother. All Mike and Steve needed to do before the accident was properly fill out their own HIPAA forms. Their personal physician should be able to provide them with one, which could be kept on file and faxed to the hospital in an emergency.

2. Advance Directives for Health Care—Surrogate Decision Maker

A HIPAA form allows access to information, but in order to make medical decisions for Mike, Steve needs to be Mike’s designated health care sur-

69. See generally id. The act mandated that new regulations be promulgated to safeguard access to health care information. Id. Under the regulations, an individual, to ensure privacy, must designate who is allowed access to information related to his or her medical care. See 45 C.F.R. §§ 164.502, .508 (2008).
70. See 45 C.F.R. § 164.510.
71. See id. § 164.508(a)(1).
72. See id. § 164.510(b)(2).
73. Id.
74. Id. § 164.510(b)(3) (emphasis added).
75. See 45 C.F.R. § 164.508(b).
rogate. Florida law governing this designation is found in the Civil Rights section of the Florida Statutes, since such designations are linked to the traditional common law and constitutional right to autonomy in medical decision-making. As Justice Cardozo once famously remarked, "'[e]very human being of adult years and sound mind has a right to determine what shall be done with his own body.'" That right is extended under Florida law to Steve if Mike is incapacitated and has validly designated Steve to act on his behalf. In the absence of this designation, a court must follow the legislative scheme for choosing a proxy in a prioritized order. In that scheme, Mike's mom is well ahead of "a close friend" like Steve in priority.

To foreclose that outcome, Mike, as principal, must execute a written document that designates Steve as his health care surrogate. The legislature has provided a valid blank form, but, as with any of the documents described in this article, expert legal advice is the best way to create a designation that is tailored to Mike's specific needs and current law. The surrogate designation document must be witnessed by two adults, and the surrogate shall not serve as a witness. The surrogate must get a copy of the document, and it remains in effect until it is revoked by the principal. The surrogate's ability to make decisions for the principal is triggered by the principal's incapacity, and the surrogate's role ends when, and if, capacity is regained by the principal. Incapacity is initially determined and noted by the attending physician, and if there is any doubt about capacity, a second physician will also evaluate the principal's capacity. When a person has been declared incapacitated by a medical provider, the provider has a duty to inform the surrogate. It should be noted, a determination of incapacity under the surrogate designation statute, without more, has no legal effect

77. Cruzan, 497 U.S. at 269 (quoting Schloendorff v. Soc'y of N.Y. Hosp., 105 N.E. 92, 93 (N.Y. 1914)).
78. See Fla. Stat. § 765.102(2).
79. See Fla. Stat. § 765.401(1).
80. See Fla. Stat. § 765.401(1)(d), (g).
85. Fla. Stat. § 765.204(1), (3).
86. Fla. Stat. § 765.204(2).
87. Id.
beyond health care decision-making. This is one reason that LGBTs must take a comprehensive approach to executing all of the legal documents available to them for long term planning.

Unless limited by the surrogacy document, a surrogate has the right to act on the patient's behalf as if he were the patient himself. The surrogate's decision making is guided by his knowledge of what the principal would want, or by considering the principal's best interests.

Where Mike enters the hospital in a coma, he is both physically and mentally impaired, and his incapacity will easily be judged by the attending physician. At that point, Steve, by producing the valid surrogate form, supersedes Mike's mom and can make the necessary medical decisions for his partner without any need to consult the mom. Since the statute specifically says a surrogate controls access to medical information, Steve could even restrict the mother's access if he knows Mike was estranged from his mother and believes that is what Mike would want. However, because of Florida's state interest in preserving life, there are some specific and important limitations on the scope of the surrogate's decision-making, which may require a valid living will to overcome.

3. Advance Directives for Health Care—Living Wills

If Mike comes out of his coma and recovers from his accident, hopefully the scare will convince him and Steve that as they continue to age they may be faced with another life-threatening situation or terminal disease that requires an end-of-life decision. End-of-life decision-making is contemplated by another form of advance directive under the Florida Statutes—the “living will.” Living wills allow someone to express his wishes about refusing life-prolonging medical care if he cannot make those decisions for himself.

88. FLA. STAT. § 765.204(4).
89. See FLA. STAT. § 765.205(1)(a).
90. FLA. STAT. § 765.205(1)(b).
91. See FLA. STAT. § 765.205(1)(a).
92. FLA. STAT. § 765.205(1)(d), (2).
93. See FLA. STAT. § 765.102(1).
94. See FLA. STAT. § 765.113.
95. See FLA. STAT. § 765.101(11).
96. Id. A living will or declaration should not be confused with a "Do Not Resuscitate" Order, which may only be executed by a doctor on a special yellow form, and is designed to keep emergency medical personnel from reviving someone dying. See FLA. ADMIN. CODE R. 64J-2.018 (2009).
A living will is created and executed in the same way a health care surrogate is designated, and the Florida Legislature has provided a statutory blank form that may be used as a template. Once again, it is strongly suggested that individuals have experts draft documents tailored to specific needs. Living wills are triggered if “[t]he principal has a terminal condition, has an end-stage condition, or is in a persistent vegetative state” (PVS). End-stage conditions and terminal illnesses are irreversible conditions where there is severe physical deterioration and/or an expectation of resulting death. A PVS is an irreversible and permanent state of unconsciousness marked by no cognitive or communicative ability. 

Many people joke about “pulling the plug,” but if Mike has not explicitly given Steve the power to make end-of-life decisions and has not executed a living will, Steve’s ability to make the most vital decisions could be curtailed. Although she might not be his surrogate, Mike’s mom can more easily convince a judge to keep her son on life support if there is any ambiguity about whether Mike would “pull the plug.” A well drafted surrogate form and living will can ensure Mike’s wishes are honored by Steve. If Mike’s coma had resulted in a PVS, once two doctors had independently confirmed the PVS, Mike’s living will expressing his wish to refuse life-prolonging medical treatment would be triggered. As Mike’s surrogate, Steve would be authorized to carry out those wishes. Mike could execute a valid living will without designating Steve as the surrogate decision maker; but by designating Steve, Mike is making a stronger, unambiguous statement of his overall wish to have Mike act on his behalf at such life-altering times.

104. See Fla. Stat. § 765.102(2).
4. Preneed Guardians

Incapacity does not always mean a person is in an end stage condition thereby triggering a living will.\textsuperscript{109} Incapacity in a person with a long life expectancy may lead to guardianship.\textsuperscript{110} Florida’s guardianship statutes are very extensive, and while the legislature acknowledges its seriousness, anyone—perhaps an opportunistic nephew—can petition a court to be someone’s guardian and strip a person of his civil rights and autonomy.\textsuperscript{111} A guardian is a court appointee who makes personal and/or financial decisions on an incapacitated person’s behalf.\textsuperscript{112} Designating a preneed guardian is a way to tell the court who you think your guardian should be.\textsuperscript{113}

The designation is made through a written declaration, witnessed by two adults, where the principal identifies the person he chooses to be his guardian in the event of incapacity.\textsuperscript{114} A person may also designate an alternative choice in case his first choice refuses or is unavailable or is unqualified.\textsuperscript{115} The declaration may be filed with a court for later use during a guardianship proceeding.\textsuperscript{116} Although the preneed guardian assumes his duties as soon as the adjudication of incapacity takes effect, he must petition the court to affirm the choice within twenty days.\textsuperscript{117} The court is free to decide if the choice for preneed guardian is not the right choice and not honor the declaration.\textsuperscript{118} Therefore, it is important to choose the right person and be aware that if, for example, the guardian chosen has a prior felony conviction, the court will invalidate the choice.\textsuperscript{119}

Mike could simply develop Alzheimer’s disease, remaining physically vital for years while being lost mentally. Assuming Steve still has capacity, and is otherwise qualified, he could be Mike’s guardian if they have preplanned and executed the valid declaration of preneed guardianship. Without it, even if Mike designated Steve as his surrogate medical decision maker, the surrogate statute allows a court to appoint someone other than Steve as

\begin{thebibliography}{9}
\bibitem{109} See \textit{Fla. Stat.} §§ 765.101(8), .204(4).
\bibitem{110} See \textit{Fla. Stat.} § 744.3215(1)(c) (2009).
\bibitem{111} See \textit{Fla. Stat.} §§ 744.1012, .3201. A full review of the guardianship statutes is beyond the scope of this article. Moreover, the legislative scheme for guardianship is complicated and expert counsel is advised.
\bibitem{112} \textit{Fla. Stat.} § 744.102(9).
\bibitem{113} See \textit{Fla. Stat.} § 744.3045(4).
\bibitem{114} \textit{Fla. Stat.} § 744.3045(1), (2).
\bibitem{115} \textit{Fla. Stat.} § 744.3045(6).
\bibitem{116} See \textit{Fla. Stat.} § 744.3045(3).
\bibitem{117} \textit{Fla. Stat.} § 744.3045(5), (7).
\bibitem{118} See \textit{Fla. Stat.} § 744.3045(7).
\bibitem{119} \textit{Fla. Stat.} § 744.309(3).
\end{thebibliography}
Mike’s guardian. Steve could end up making medical decisions for Mike while a complete stranger or unfriendly family member takes over Steve’s personal and financial affairs. Designating Steve as his preneed guardian will give Mike a reasonable assurance that someone he knows and trusts will be his guardian if it is ever needed.

B. Financial Affairs

The second key area of long term planning for LGBTs is in their financial affairs. Unless a married couple takes steps to separate individual assets from their marital estate, Florida law tends to regard all of their assets as assets of the marriage no matter whose name is listed as owner. Mike and Steve, on the other hand, must be very careful about structuring their financial lives to avoid both personal and tax pitfalls. The full range of considerations in long term financial planning for LGBTs is beyond the scope of this article, but there are basic tools at Mike and Steve’s disposal to protect their most important assets.

1. The Basics: Financial Accounts and Homes

Florida law presumes that two people who jointly title themselves on a deposit account, in the absence of language or contract to the contrary, expect the ownership of that account to be as joint tenants with the rights of survivorship (JTWROS). That means that if Mike and Steve open up a joint checking account, and one of them passes away, the surviving partner then automatically has title to the entire account without going through probate. This presumption only applies to deposit accounts, such as standard checking and savings accounts. Investment accounts usually require a specific designation that the owners want it titled as JTWROS. If Mike and Steve pooled their finances in an account titled solely in Mike’s name

120. See FLA. STAT. § 765.205(3) (2009).
121. See FLA. STAT. § 61.075(6) (2009).
122. Please note that nothing written in this section should be construed as tax advice, nor is it intended to be any form of tax advice or tax strategy. A tax professional must be consulted to address the specific needs of the taxpayer.
124. See FLA. STAT. § 655.79(1).
125. See id.
126. Overview of Types of Accounts, supra note 123.
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and Mike passed away, those funds would pass into Mike’s probate estate. Depending on Mike’s estate planning, Steve might have to fight to regain any of the assets he put in Mike’s account.

Therefore, Mike and Steve need to plan the structure of their financial accounts, and no money should be pooled into a solely titled account unless it accomplishes another goal, as suggested by an expert. Seeking expert advice is crucial since certain deposits into joint accounts by one person could trigger the Federal Gift Tax for the other person.

Another basic financial asset is a shared home, and Florida homeowners who are unmarried and have no minor children are free to title their homes as JTWROS with an unrelated individual as a co-owner. As with a bank account, the titling of the property as JTWROS allows the surviving owner to take title to the entire property without it passing through probate. If the home is titled solely in Mike’s name and Mike dies without a will, the home will pass into his estate and probably go to his family. However, as with financial accounts, not seeking expert advice may have consequences. For example, if Mike had owned his home alone prior to their relationship and had substantial equity in the home, and then added Steve to the title without Steve paying for his share, there can be major tax implications for Steve.

a. Cohabitation Agreements

Of special note to same sex couples who share a home is the creation of a “cohabitation agreement.” It can be especially effective if one person is unable to have title in the home. Such an agreement may spell out the ownership interests of real and personal property, apportionment of tax benefits and liabilities, and dissolution of the agreement and division of the property in the event of a break-up. Surprisingly, a Florida court upheld such a

128. See In re Guardianship of Atkins, 868 N.E.2d 878, 880-83 (Ind. Ct. App. 2007) (finding that where a partner’s solely titled bank account came under parents’ control as guardians, other partner had to go to court to prove some funds were his).
131. Lambda Legal, Tax Considerations, supra note 129, at 3.
133. See Lambda Legal, Tax Considerations, supra note 129, at 1 n.2.
134. See id. at 3.
136. See BLACK’S LAW DICTIONARY 296 (9th ed. 2009).
contract between two lesbians that even called for support payments. The court recognized that Floridians are guaranteed the ability to contract away their property rights as long as the basis of the contract is not sexual services. Although the court went to great pains to distinguish the contract from a marital contract, it is another way to solidify property rights in Florida that has survived judicial scrutiny.

2. Durable Powers of Attorney

Another basic tool of value to LGBTs in Florida is the creation of a durable power of attorney (DPOA). A DPOA is created when someone executes a written document naming a competent adult as his “attorney-in-fact,” with the power to act on the principal’s behalf in financial and property matters as specified in the document. The document must be “executed with the same formalities required” to transfer real estate, and to survive incapacity of the principal, must include the words: “This durable power of attorney is not affected by subsequent incapacity of the principal except as provided in [section] 709.08, Florida Statutes.” A DPOA remains in effect until death or revocation by the principal, or the incapacity of the designated attorney-in-fact. Although a standard DPOA allows the designated attorney-in-fact to act on the principal’s behalf before incapacity, its true value comes after incapacity.

If Mike is ever incapacitated by accident or illness, Steve would be able to act on Mike’s behalf and handle his financial and property affairs as if he were Mike. If the incapacity is only temporary, Steve can pay Mike’s bills and manage his accounts to guard against deterioration of Mike’s credit. If the incapacity is permanent, recent Florida case law has held that a principal’s competent granting of a DPOA may negate the need or requirement to

137. Posik, 695 So. 2d at 760.
138. Id. at 762.
139. Id. at 763 (Peterson, C.J., concurring).
140. 2 FLA. JUR. 2D Agency and Employment § 32 (2005).
141. FLA. STAT. § 709.08(1) (2009). The formalities to transfer real estate generally means the document must be notarized and witnessed to be valid. FLA. STAT. § 695.03 (2009).
142. FLA. STAT. § 709.08(3)(b).
143. See FLA. STAT. § 709.08(1). A DPOA may be set up to “spring” into effect only upon incapacitation of the principal, but it would then require a physician’s determination of incapacity which might create a burdensome delay. FLA. STAT. § 709.08(1), (4)(d).
144. See FLA. STAT. § 709.08(1).
145. See id.
later appoint a guardian due to later incapacity.\textsuperscript{146} Therefore, a DPOA, when executed in concert with the other documents discussed herein, would act to support an argument by Steve that Mike meant for him to manage his affairs, if Mike’s mother challenged Steve’s authority.\textsuperscript{147} A DPOA is one more example of a legally valid individual choice that may strengthen the legal standing of Mike and Steve as a couple.

C. Inheritance

The final area in which Florida’s statutes allow the LGBT individual to give legal effect to his non-family relationships is in the area of inheritance.\textsuperscript{148} When a person dies without a will he is said to have died “intestate.”\textsuperscript{149} In intestacy, the person’s assets—with the exception of assets like insurance policies with named beneficiaries—become part of the intestate estate and will be distributed according to Florida statutes.\textsuperscript{150} The legislative scheme for distributing the estate only includes family members related by blood, marriage, or adoption.\textsuperscript{151} If there are no family members, the estate goes to the State of Florida.\textsuperscript{152} If an individual wants to distribute his or her estate in another manner, it simply must be specified with valid legal documents.

1. Wills and Other Traditional Beneficiary Documents

A validly executed will is the easiest way for any person to designate the recipients of his estate. To be valid, a will must be in writing and adhere to the “formalities” of execution in the Florida Statutes.\textsuperscript{153} Oral wills and wills that are not witnessed, as prescribed by statute, have no legal effect in Florida.\textsuperscript{154} An unmarried person with no minor children has the right, under Florida’s Constitution, to devise his estate as he prefers.\textsuperscript{155} A will is one area

\begin{itemize}
  \item[146.] Smith v. Lynch, 821 So. 2d 1197, 1197, 1199 (Fla. 4th Dist. Ct. App. 2002).
  \item[147.] See id. at 1997.
  \item[148.] See FLA. STAT. § 732.501 (2009).
  \item[149.] See FLA. STAT. § 732.101.
  \item[150.] FLA. STAT. §§ 732.2035(6)-(7), .2045(1)(e).
  \item[151.] See FLA. STAT. §§ 732.102, .103, .108.
  \item[152.] FLA. STAT. § 732.107(1).
  \item[153.] Id.
  \item[154.] See id.
  \item[155.] See FLA. STAT. § 732.501. A spouse left out of a will, absent another agreement, has a statutory right to claim a percentage of the estate, no matter how it was devised. FLA. STAT. § 732.201. But see Shriners Hosps. for Crippled Children v. Zrillic, 563 So. 2d 64, 69 (Fla. 1990) (holding that a decedent’s decision to exclude his children from inheritance in favor of a charitable bequest is the decedent’s right).
\end{itemize}
where courts almost never overrule the clear intent of the decedent. If Mike validly makes Steve the recipient of his estate by will, Mike's family will have very little chance of legal recourse.

Another easy way for any individual to make his inheritance wishes known is to designate someone as the beneficiary of insurance policies or other benefits that are paid on death, such as retirement plans. Surprisingly, Congress recently changed federal retirement plan law under the Pension Protection Act of 2006 to provide important tax benefits to non-spouse beneficiaries of employee benefit plans such as 401(k)s. Previously, only spouses were allowed to "rollover" the funds in the decedent's retirement account into another account and avoid the severe tax penalties of early withdrawal. And before death, only the medical and financial emergency needs of a spousal beneficiary qualified for an early "hardship distribution" of retirement plan assets without severe penalties. The Pension Protection Act of 2006 extended both of these tax saving benefits to anyone designated as a retirement plan beneficiary. Mike should check the status of all of his policies and employee benefits to ensure that Steve is his designated beneficiary, especially if those policies and benefits were commenced prior to his relationship with Steve. Again, Mike's family will have little legal recourse to interfere with Mike's wishes.

2. Revocable Living Trusts

The inheritance devices mentioned above are relatively simple, but as with all the long-term planning tools mentioned in this article, it is advisable to seek help from elder and long-term planning experts. This is especially true if an individual has an array of assets and wishes to bypass the probate process every will must go through. The tool for this probate bypass requires a bit more planning and is known as a "revocable living trust" (RLT). Where wills are public documents, RLTs are private and avoid scrutiny from

156. See Shriner's Hosps. for Crippled Children, 563 So. 2d at 66.
157. See id.
159. See Barrett, supra note 35, at 2.
160. See id.
162. Id.
unhappy relatives. 164 While wills must go through probate, and can become subject to lawsuits that can tie up and deplete the estate, the assets of the RLT pass immediately to the beneficiaries upon death. 165 The ability to contest an RLT is much more limited. 166 Almost any asset that can be devised by will can be transferred upon death via an RLT. 167 The creation and execution of valid RLT documents follows the same rules governing the execution of a will. 168

As Mike ages, he may acquire substantial assets. Although his mother may have passed on, siblings, nieces and nephews might be eyeing a portion of his estate. If they could successfully contest and invalidate his will, Mike would be deemed to have died intestate, and Florida law would give them his estate. 169 By creating an RLT, his family does not have that statutory scheme to rely on, and he stands a far better chance of preserving his inheritance plans. If Mike and Steve are meeting with long-term planning experts to create a comprehensive plan for cementing their wishes and creating some legal status in their relationship, an RLT may be an appropriate tool to add to the mix at the same time.

IV. STRATEGIES FOR SECURING PERSONAL CHOICE

Nowhere in the United States Constitution does it expressly say that a person has a right to privacy and autonomy in making the decisions that affect the intimate ordering of her life. 170 But a long line of United States Supreme Court decisions, starting in the 1960s, has affirmed these rights for every competent adult. 171 Yet, the Court has stopped short of holding that these rights extend by default to someone acting as that person’s proxy when she becomes incapacitated. 172

165. Spiegelman, supra note 164.
166. 12 MCAVOY ET AL., supra note 164, § 7:11.
167. See Spiegelman, supra note 164.
171. See, e.g., Roe v. Wade, 410 U.S. 113, 166 (1973) (establishing a woman’s right to control her choice to reproduce); Griswold v. Connecticut, 381 U.S. 479, 485 (1965) (establishing the concept of the penumbra of rights inferred from various parts of the Constitution).
Florida's Constitution expressly does guarantee its competent citizens a right to privacy, and that right has served as the foundation for cases affirming personal intimate choices. But when that competent Floridian becomes incapacitated, her validly executed personal choices of who she wanted to handle her affairs is transformed by Florida's statutes into "rebuttable presumptions" that can be legally challenged. A rebuttable presumption means that a challenger can try to prove that the personal choices expressed in the documents are defective or not contemporary enough to reflect the choice the incapacitated person would now make. Therefore, even when LGBT's validly create legal relationships and status with those they are closest to, other parties have a statutory basis to challenge and invalidate those legal relationships. And, as noted throughout this article, Florida law tends to prioritize family ties over personal ones.

But LGBT's who create a comprehensive plan that encompasses most or all of the documents described here lay a stronger foundation for defending that presumption when they can no longer defend it themselves. The cumulative effect of those individual choices, designating that one special person in someone's life as her proxy, counters arguments that her choices were ambiguous or defective. Until the law catches up with today's reality of complex relationships, there are a number of strategies for creating the best possible chance that personal choices will be effective and respected.

A. Practical Steps

When executing his or her planning documents, any individual can take some simple, practical steps to erase doubt about "what she really wanted." For example, she might consider:

- Not only designating the person chosen to act on her behalf, but also designating in the documents who she does not want to act on her behalf.

173. FLA. CONST. art. I, § 23.
176. See 1 CHARLES W. EHRRHARDT, FLORIDA EVIDENCE, § 301.1, at 96 (2009 ed., West).
177. See id.
178. See supra notes 34 & 161 and accompanying text.
179. See Spiegelman, supra note 164.
181. See infra Part IV.A–C.
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- Having every document notarized, even if the statutes do not require it.

- Memorializing overall agreements and long-term planning strategies (see below).

- Involving family members in the decision process to avoid surprise (see below).

- Videotaping her statement of her personal wishes and choices. It should be done in one unedited stream, correcting and clarifying any thoughts as the camera keeps running, so that no one can later say the “true thoughts” were edited out. She could make a new recording every few years to rebut an argument that her choices became “stale” over time.

B. If the Doors Are Open: Communicate and Mediate

Private mediation is one way to bring interested parties together to reach an understanding. Acting as a friendly and impartial legal referee, a mediator suggests, encourages and facilitates a non-adversarial process where parties reach a voluntary mutual agreement. “Mediation is based on concepts of communication, negotiation, facilitation, and problem-solving that emphasize . . . self determination . . .” Although mediation is often thought of as a court-ordered strategy to resolve existing legal disputes after lawsuits have been filed, people are free to consult a mediator outside the judicial process before a dispute arises.

In addition to expert elder law and long-term planning advice, committed couples could benefit from voluntary mediation to facilitate the decision-making related to executing the necessary documents. They could also benefit from mediation to facilitate what might be the thorny details of a cohabitation agreement. But couples and single LGBT’s could all benefit from mediation that includes blood relatives if that door to such discussion is open.

184. Id. at 10.230 (emphasis added).
185. See Florida State Courts, Alternative Dispute Resolution, supra note 182.
The infamous and tragic case of Terry Schiavo and the legal battle between her husband and her parents over removal of life support later sparked some health law experts to suggest hospital based “bioethics consultations.”\textsuperscript{187} Specially trained hospital staff would bring family members facing a medical crisis together to discuss the tough subjects that often go unarticulated between loved ones.\textsuperscript{188} Participants would not only learn about all the medical options and outcomes, but would get a chance to be emotionally heard.\textsuperscript{189} By reaching consensus before hand, Schiavo-type disputes may be foreclosed later because family members, perhaps even including the patient if she is still competent, developed an agreement ahead of time.\textsuperscript{190}

Like discussions of mortality, discomfort over sexuality can lead to silent misplaced assumptions. Even the most supportive families may never really discuss their son/brother/uncle’s “homosexual lifestyle”\textsuperscript{191} and the very different life experience that has shaped his choices. Therefore, the idea for open discussion of end-of-life decisions translates to LGBT personal choice decisions. A traumatized mother may be even more hurt and distressed if the first time she discovers her son gave decision-making power to his partner is when that severely injured son goes wheeling by on a hospital gurney. At such painful times, otherwise reasonable people might misdirect their hurt into legal recourse.\textsuperscript{192} But if a same-sex couple invited family to participate in a pre-need mediation process related to the personal choices advocated here, hurt feelings and misunderstandings could be addressed and resolved.\textsuperscript{193} And while the Schiavo proposal remains a proposal, private mediation is an established process available now to LGBTs.\textsuperscript{194}

\begin{itemize}
\item \textsuperscript{187} See Coombs, supra note 62, at 566.
\item \textsuperscript{188} See id. at 555, 568.
\item \textsuperscript{189} See id. at 557.
\item \textsuperscript{190} See id. at 569.
\item \textsuperscript{191} The author uses this term purposely since the heterosexual community is not always aware that the LGBT community does not agree with the word “lifestyle,” since it implies they made a choice to be LGBT. University of Tennessee Knoxville, LGBT Glossary, http://lgbt.utk.edu/glossary.html (last visited Nov. 7, 2009) (“[T]he phrase ‘homosexual lifestyle’ is often used by anti-gay groups to imply that sexual orientation is a matter of choice rather than of identity.”).
\item \textsuperscript{192} See Coombs, supra note 62, at 584.
\item \textsuperscript{193} See id. at 569.
\item \textsuperscript{194} Florida State Courts, Alternative Dispute Resolution, supra note 182.
\end{itemize}
C. If the Doors Are Closed: A Proposal for Official Recognition

Of course, not all LGBT's enjoy close family relationships. Whether it is a happenstance of geography or estrangement over their daughter's "choice," it may simply be impractical or futile to engage family in a mediation process. I propose an alternative judicial or quasi-judicial process, administered by the state. This process would allow anyone to petition for an "official stamp of approval" for her overall comprehensive long-term plan and support her constitutionally protected rights to privacy and autonomy. The petitioner would pay a fee to appear before a local court or administrative judge, along with the person(s) she is designating to act on her behalf if she is ever incapacitated, and any witnesses. The comprehensive plan would include validly executed copies of all the long-term planning documents and include a sworn affidavit attesting to the choices made. The judge could use a pattern set of questions to develop testimony from the parties that elicits their understanding of the choices, so that the judge could reach a conclusive opinion that those choices were sound. Notice could even be given to all pertinent family members so that they could have an opportunity to be heard. In this way, the judge might actually see and understand why someone has specifically excluded family from her proxy decisions. Or, alternatively, in "friendly family" situations, the mediation agreement discussed in the previous section could be submitted as evidence of mutual understanding of the petitioner's choices. The judge's resulting official opinion would then be kept on file and be statutorily allowed as evidence of a person's wishes in a later dispute over those wishes. Another helpful option would be to create an opportunity for easy amendment or renewal through witnessed and notarized forms so that the petitioner could re-validate her choices over time or when necessary by changes in relationships.

"Rebuttable presumptions" serve a purpose in the law: they allow the asserted truth to be tested to ensure that the "real truth" has not been covered up. But by creating and using this proposed process, an official opinion

196. See Coombs, supra note 62, at 561.
197. This process could be beneficial to anyone—gay, straight, married, single—who is making health care surrogate, power of attorney, or pre-need guardian choices that divert from "expected" or traditional choices.
198. With state budgets strained, the ideal solution would be to piggyback onto an existing adjudicative facility where the fees would be calculated to collectively pay for the extra labor and administrative requirements.
199. See 1 EHRHARDT, supra note 176, § 301.1, at 96.
could create a threshold of presumption that would be extremely difficult to overcome.

V. CONCLUSION

The 2008 passage of Amendment 2 demonstrates that the state is a long way from embracing legislation that normalizes the legal status of same-sex relationships. Such normalization, even if only through meaningful domestic partnership laws, or civil unions, might inspire more of Florida’s single LGBTs to enter into and stay in long-term, protected relationships. But until then, Floridian LGBTs have a number of statutory legal options to give some meaning to their intimate relationships.

The options are definitely imperfect. Anyone intent on executing a comprehensive plan to memorialize and give legal effect to his or her personal choices has to spend some money on competent, professional advice, and do a little more leg work than simply saying “I do.” Anyone intent on disrupting those personal choices can institute costly and time consuming litigation under Florida law. But by executing these highly personal and autonomous documents in spite of their limitations, Florida’s LGBTs can send a message: we will not have our loved ones become “legal strangers.” By using mediation techniques to involve family members, and advocating for legal solutions to cement the validity of autonomous choices, perhaps Florida could shed its Anita Bryant past and serve as a role model for coping with practical LGBT realities.

200. See FLA. CONST. art. I, § 27.