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Recommended Citation

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ESTATE PLANNING FOR CLIENTS WITH AIDS

WILLIAM B. T. MOCK, JR.*
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INTRODUCTION

For the first time in more than a generation, young people are dying from a disease in epidemic proportions. The disease that is killing them is actually a complex of illnesses medically known as Acquired Immunodeficiency Syndrome (AIDS).¹ AIDS operates by so depressing the immune system of its host that the host is unable to fight off infections that would otherwise not be fatal.² Although the person with AIDS may fight off and recover from a particular infection or infections, his or her immune system is eventually weakened to the point that he or she succumbs to one or a combination of diseases.³ As of August 10, 1987, 40,051 cases of AIDS in the United States had been reported to the Centers for Disease Control in Atlanta⁴ and 23,165 persons have already died from the disease.⁵ There is currently no cure or vaccine for AIDS.⁶

Of course, the two most pressing concerns which society faces as it confronts the AIDS epidemic are to halt the spread of the disease and to find an effective treatment for it. In addition, AIDS has raised a significant number of legal issues. This Article addresses one of those

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1. AIDS is evidenced by the suppressed function of the immune system with no apparent reason for the dysfunction. Closen, Connor, Kaufman & Wojcik, *AIDS: Testing Democracy—Irrational Responses to the Public Health Crisis and the Need for Privacy in Serologic Testing*, 19 J. MARSHALL L. REV. 835, 850 (1986).

2. *Id.* at 859.

3. Langone, *AIDS: Special Report*, DISCOVER, June 1985, at 28, 31.

4. CDC, *Update: Acquired Immunodeficiency Syndrome—United States*, 36 MORBIDITY & MORTALITY WEEKLY REP. 522 (1987).

5. *Id.*

6. See generally Begley, *Moving Target: Search for a Vaccine and a Cure*, NEWSWEEK, Nov. 24, 1986, at 36 (finding a cure or a vaccine may require decades of further research).

issues: the problem of estate planning for the client with AIDS.⁷ AIDS poses special challenges for an attorney working in the estate planning area because: AIDS has typically struck relatively young⁸ people who may not previously have given thought to estate planning; many of these people have chosen an unconventional lifestyle⁹ which many members of society find difficult to accept; and, AIDS is now known to affect the brain and the nervous system in addition to other bodily systems.¹⁰ This Article is meant to provide guidance to estate planning attorneys as they meet those challenges.

The gay male client with AIDS has been selected as the focus of this Article. One reason for this is that gay males still account for nearly sixty-five percent of the persons diagnosed as having AIDS.¹¹ This statistical correlation is likely to continue into the future.¹² Thus, although much of the discussion in this article is also applicable to non-homosexual persons with AIDS, areas of particular concern to the gay client with AIDS are given special emphasis.

This Article will not focus on problems common to all estate planning, except to the extent that such problems are present in a special degree with gay clients who have AIDS. Thus, for example, issues of drafting, execution, safeguarding the testamentary documents, probate, and taxation will be ignored except as they present problems peculiar to the representation of gay clients with AIDS.

Among the most important estate planning problems facing gay

7. AIDS has raised many legal issues beyond the question of estate planning. See, e.g., Closen, *supra* note 1 (AIDS-related privacy questions); Herman, *AIDS: Malpractice and Transmission Liability*, 58 U. COLO. L. REV. 63 (1986-87) (medical-legal issues); Note, *AIDS Victims Have Standing to Sue Under the Rehabilitation Act and Section 1983 Even Before All State Remedies are Exhausted*, 16 STEYSON L. REV. 1098 (1987) (civil rights-related issues for AIDS patients).

8. Closen, *supra* note 1, at 850 (AIDS is now the leading cause of death in men between 30 and 39 in New York City).

9. For example, there are 1.5 million intravenous drug users in this country—mostly young men with limited educations and criminal histories. Begley, *supra* note 6, at 31. It has been estimated that sixty percent of the heroin addicts in New York State have been infected with the AIDS virus. *Id.*

10. Barnes, *AIDS-Related Brain Damage Unexplained*, 232 SCIENCE 1091 (1986). Although the evidence is still preliminary, it has been estimated that 60% of AIDS patients will develop dementia. Initially, AIDS-related dementia causes forgetfulness, a loss of concentration, and confusion. In time, the confusion grows and the patient becomes immobile and unable to speak.

11. See *supra* note 4, at 525. According to this report, 26,086 gay or bisexual men have been diagnosed as having AIDS. *Id.* This amounts to 65% of the total cases reported so far.

12. Official projections state that by 1991 there will have been 179,000 deaths from AIDS and 270,000 total cases. Begley, *supra* note 6, at 30. Throughout this projected period, 90% of AIDS infections will continue to occur in male homosexuals and intravenous drug users. *Id.* at 31. See also *Transmission of AIDS*, 314 NEW ENG. J. MED. 380 (1986).

clients with AIDS are potential challenges to their wills on the ground that they lacked the requisite mental capacity to execute the will. Because society in general, and the families of gays in particular, have often sought to explain the sexual orientation of a gay person as a "mental aberration," it is conceivable that many disappointed takers under the will of a gay person with AIDS might try to argue that the testator was not of sound mind when he executed the will. Such claims might be buttressed by recent medical evidence demonstrating that AIDS causes deterioration of the central nervous system, including the brain, in many persons with the disease.¹³ This Article therefore suggests several techniques that the estate planning lawyer might utilize to defuse potential will contests on the basis of alleged mental incapacity of the testator.

A somewhat related challenge which could be made against the will of a gay client with AIDS is that the testator was unduly influenced by those persons receiving gifts under the will. When the parents, brothers and sisters, or other family members of the testator have been excluded from the will in favor of the testator's gay lover and where the testator's family has never approved of or accepted his homosexuality, the family may try to contest the disposition of his assets on the ground that the testator's lover exerted undue influence over the testator when the testator prepared his will. Accordingly, this Article also explains how the estate planning lawyer can follow procedures which minimize the risk of such charges.

Another problem connected with estate planning for gay clients with AIDS involves the carrying out of the testator's wishes as to the disposal of his bodily remains after death. Gay clients and their lovers may have preferences for disposition of the testator's remains that either raise public fears or collide with the wishes of the testator's family. This Article points out the various options that are available to the client regarding the disposal of his bodily remains and how the estate planning attorney can insure that the choices made by his client will be effectuated.

To avoid the various problems associated with transferring property by a will, the gay client with AIDS may wish to avoid, to the greatest extent possible, a testamentary scheme of disposition. Such devices as gifts, inter vivos trusts, joint tenancy arrangements, and life insurance policies can be particularly useful in this respect. Thus, this Article also describes the uses and the relative advantages and disadvantages for the gay client with AIDS of these non-testamentary

13. See Barnes, *supra* note 10, for a discussion of AIDS-related dementia. A disappointed taker could argue that AIDS-related dementia prevented the testator from having the necessary ability to comprehend the will, thereby rendering the will invalid. See generally 1 W. BOWE & D. PARKER, PAGE ON THE LAW OF WILLS § 12.46 (1960 & Supp. 1986) [hereinafter PAGE ON WILLS].

means of property transfer.

The Article concludes by recognizing that many opportunistic infections arising in people with AIDS are mentally and physically debilitating, and as such, there is a serious risk of the client becoming incompetent or otherwise incapacitated during his lifetime. It is therefore essential that the estate planning attorney understand how to employ techniques such as durable powers of attorney and living wills to insure that the client's property is handled properly while he is still alive and that the client's wishes regarding his medical treatment are respected.

The authors do not by any means intend this Article to be an exhaustive discussion of the problems arising in the context of estate planning for gay clients with AIDS. Rather, the purpose of this Article is merely to point out some basic concerns which should be on the mind of an attorney as he or she prepares documents for clients with AIDS. Certainly, each gay client with AIDS has individual concerns which must be addressed by his attorney. Nevertheless, this Article deals with a variety of issues that are worth considering each time the attorney plans an estate for any gay client with AIDS.

I. MENTAL CAPACITY

Every testamentary act requires a certain minimal mental capacity on the part of the testator.¹⁴ If his heirs-at-law can demonstrate that this general mental capacity was lacking, they will be able to overturn the will and take everything, while the intended beneficiaries will take nothing.¹⁵ Thus, the plan the decedent made for his property would be defeated.

A lawyer planning a will for a client with AIDS must do everything possible to build up a record which shows that the testator had the requisite mental capacity at the time he executed his will. Normally, testamentary capacity is not difficult to establish.¹⁶ Generally speaking, the testator has the required mental capacity¹⁷ if he or she is aware of: (1) the nature of the property he is disposing of; (2) who the natural objects of his bounty are,¹⁸ and (3) the nature of the testamen-

14. Although a testator need not be completely sane when making a will, 1 PAGE ON WILLS, *supra* note 13, at § 12.17, he or she must meet a minimum standard of competence. In determining if a testator meets that minimum standard, a court will look at the testator's awareness of: (1) the nature and extent of the property to be disposed of; (2) the identity of the beneficiaries and their relationship to the testator; and (3) the nature of the making of a will. *Id.* See also *infra* notes 17-18 and accompanying text.

15. 1 PAGE ON WILLS, *supra* note 13, at § 12.46.

16. See *infra* note 18 and accompanying text.

17. 1 PAGE ON WILLS, *supra* note 13, at § 12.21.

18. T. ATKINSON, LAWS OF WILLS § 51 (1953). An alternative formulation of this test views capacity as relative to the testator's understanding of his or her relation-

tary act he or she is performing.

However, the testamentary capacity of a gay client with AIDS may be vulnerable to attack on at least two grounds. The first ground is simply the testator's homosexuality. Testamentary capacity standards are nebulous and often reflect the popular sentiments and prejudices of an era.¹⁹ Charges of lack of general testamentary capacity are, therefore, most likely to arise against individuals who are considered eccentric or who lead what are regarded as morally aberrant lifestyles.²⁰ Although challenges to a will on the basis of the testator's lifestyle are rarely successful,²¹ it is still conceivable that disappointed takers under a will may resort to such a challenge to obtain some portion of the estate. Given the fact that a majority of Americans believe that homosexuality is morally wrong,²² the attorney planning the estate of a gay client with AIDS would be wise to consider the prospect of such a challenge.

A second possible challenge to the testamentary capacity of a gay client with AIDS, and one that has a better chance of prevailing in probate court, is based on recent medical evidence concerning the progression of the disease. It is now known that some of the opportunistic infections which strike a person with AIDS can cause measurable mental deterioration.²³ Many AIDS patients seem to develop a severe form of dementia that results in slurred speech, slower movement, memory loss, and even psychosis.²⁴ One medical expert has estimated that forty percent of all AIDS patients "now suffer from some kind of neurological affliction."²⁵ Obviously, medical evidence such as this provides fertile ground for persons seeking to claim that the testator did not have the proper mental capacity while executing the will. Indeed, in New York City, which has recorded more cases of AIDS than any

ship to the named beneficiaries. 1 PAGE ON WILLS, *supra* note 13, at § 12.21.

19. See generally 1 PAGE ON WILLS, *supra* note 13, at § 12.24 (the test of testamentary capacity will change as new theories of psychology, science, and medicine emerge and as shifting applications of legal standards and social values are developed).

20. Eccentricities are merely peculiarities of behavior which have no effect on testamentary capacity. *Id.* at § 12.37. Similarly, "moral insanity" may coexist with the legal capacity to make a will. *Id.*

21. See, e.g., *Daugherty v. State Savings Co.*, 126 N.E. 545 (Ill. 1920) (a will was upheld despite a capacity challenge based on the testator's alleged "sexual perversions"). The court concluded that "even if the testimony . . . as to the immoral acts were admitted to be true, that would not be conclusive in favor of the contestants on the question of the soundness of mind." *Id.* at 547.

22. Leishman, *Heterosexuals and AIDS*, ATLANTIC MONTHLY, Feb. 1987, at 39 (most Americans continue to believe that AIDS is God's response to an immoral lifestyle).

23. Barnes, *supra* note 10, at 1091.

24. Many AIDS patients will eventually become apathetic, withdrawn, agitated, or depressed. *Id.*

25. *Id.*

other city in the United States,²⁶ there has been a sharp increase in the number of suits challenging the wills of persons with AIDS, perhaps prompted by the new medical discoveries regarding the effect of AIDS on the brain.²⁷

The attorney planning the estate of a gay client with AIDS should therefore follow certain procedures and techniques which will help build a record to counter any later charges of mental incapacity. First, the attorney should make a concerted effort to have the testator execute the will at the earliest possible date, since any mental deterioration of the testator will become more pronounced as time passes. Of course, the lawyer and the witnesses should also pay close attention to the testator's demeanor throughout the execution of the will (and the lawyer, through the planning and drafting stages as well) to make sure that the testator satisfies all of the criteria necessary to establish testamentary capacity.²⁸ In this respect, the attorney may wish to put some specific questions to the testator at some time during the planning process to establish that the testator is aware of the nature of his property, of the natural objects of his bounty, and of the nature of the testamentary act he is performing. If these responses are then transcribed or tape recorded, such evidence will severely hamper the later efforts of would-be contestants to claim that the testator was not "of sound mind" while executing the will.

It might be wise for the attorney to go one step further and have the entire execution process recorded on videotape so that the court might see for itself that the testator had the requisite testamentary capacity. Finally, out of an abundance of caution, the lawyer may want to have his client examined at the time the will is executed or immediately before or after such date by a trained professional in the mental health field, who can then certify that the testator was aware of the various elements required for testamentary capacity.

Attorneys are sometimes warned that using such devices as described above can draw attention to a possible problem that might oth-

26. One half of all reported AIDS cases in the United States have come from New York City and San Francisco. Pascal, *Statutory Restrictions on Life Insurance Underwriting of AIDS Risk*, 54 DEF. COUNS. J. 319, 320 (1987). By 1991, New York City hospitals may have to reorganize their patient care system to meet the growing demand for AIDS-related medical treatment. Begley, *supra* note 6, at 33. In New York City, AIDS is now the leading cause of death among thirty to thirty-nine year old men. Closen, *supra* note 1, at 850.

27. Johnson, *Challenges Rise Sharply on AIDS Victims' Wills*, N.Y. Times, Feb. 19, 1987, § 1, at 16, col. 1 (experts state that AIDS-related challenges to wills were virtually unheard of three years ago but that new evidence of the effect of AIDS on the brain has prompted a steady growth in these suits).

28. See generally Jaworski, *The Will Contest*, 10 BAYLOR L. REV. 87 (1958). Many problems raised in a will contest can be prevented by careful planning during the predrafting stages. *Id.* at 89.

erwise be overlooked by a disappointed taker.²⁹ In this instance, however, little harm can be done by creating such precautionary evidence since hostility towards the testator's lifestyle and towards his choice of beneficiaries may make a will contest by his family likely anyway. Furthermore, such evidence need not be produced unless a will contest based on mental capacity grounds appears imminent, at which time such precautions will appear very sensible in light of this testator's family situation.

With regard to the drafting of the will itself, the lawyer can include a number of clauses that will give further evidence of the testator's sound mental state at the time of execution. Attestation clauses, always a good idea, are particularly warranted in the instance of a gay client with AIDS. Self-proving will devices, wherein normal attestation clauses are replaced by or supplemented with signed affidavits from each of the witnesses to the execution of the will, are also a wise precaution. The self-proving device to be used will depend upon the statute of the state in which the will was executed.

The attorney might also place in the will a clause in which the testator specifically acknowledges his mother, father, and other family members, thereby dispelling any claim that he was unaware of the natural objects of his bounty. Similar clauses might be inserted to show that the testator was aware of the nature of his property and was aware of the nature of the testamentary act he was performing.

A shrewd choice of witnesses to the execution of the will can also do much to defuse potential attacks on the testator's mental capacity. In particular, the lawyer may wish to obtain witnesses who enjoy high reputation and professional standing in the community, perhaps whose positions regularly require them to judge the mental capacities of others.³⁰ Business people, bankers, lawyers, judges, religious leaders, and doctors are all good candidates. A number of witnesses beyond those required by state law is also a good idea.³¹ Finally, it may be wise to have one or more of the witnesses be sympathetic members of heterosexual society. Acceptance by people not part of the testator's own lifestyle may carry added weight when a capacity challenge is based upon the argument that the testator leads a "morally repugnant" lifestyle.

If the measures suggested in the preceding paragraphs sound a bit extreme, it is worth remembering that if a testator is found not to have had testamentary capacity, the entire will will be struck³² and the most recent prior will, if not revoked or itself invalid, will control disposition

29. *Id.*

30. *Id.* at 91.

31. The legally required number of witnesses may serve as attesting witnesses and the remaining number can be used in the event of a will contest. *Id.* at 92.

32. 1 PAGE ON WILLS, *supra* note 13, at § 12.46.

of the testator's assets. If no prior will remains valid, the decedent will die intestate, and the decedent's heirs-at-law—typically, the immediate family—will take everything. The testator's lover, or any others for whom the testator had hoped to provide, will be excluded entirely from the testator's estate.³³

II. UNDUE INFLUENCE

Probably the strongest challenge which a disappointed taker under the will of a gay client with AIDS can make is that the testator was not acting in accordance with his own free will when he made the will—i.e., that the testator was subject to another person's undue influence. When such a challenge succeeds all bequests infected by the other person's over-influence are struck.³⁴ If enough of the will is struck such that no genuine testamentary plan remains, then the entire will is declared invalid. Even if the overall testamentary plan remains substantially viable, the bequests produced by the undue influence are omitted.³⁵

Four prerequisites are necessary to establish that the testator's will is the product of undue influence.³⁶ First, there must be a weak-willed testator—one who was susceptible to another's influence at the time he executed the will.³⁷ Second, there must be another person who had an opportunity to impose his or her will on the testator.³⁸ Third, there must have been a motive for that other person to impose his or her will on the testator.³⁹ Finally, the testamentary plan must reflect the undue influence of the other person.⁴⁰

Only a few cases have dealt with the issue of undue influence in the specific context of a an allegedly gay testator.⁴¹ Nevertheless, at

33. *Id.*

34. 1 PAGE ON WILLS, *supra* note 13, at § 15.11 (“Undue influence avoids such part of the will as is caused thereby”). If the entire will is the result of undue influence, the will is struck in its entirety. “[B]ut if only a part of the will was thus procured, that part may be rejected as void.” In *Re Estate of Molere*, 100 Cal. Rptr. 696, 701 (Cal. Ct. App. 1972).

35. 1 PAGE ON WILLS, *supra* note 13, at § 15.3. Under the doctrine of partial invalidity “that part of the will that is the product of undue influence is rejected at probate.” *Id.* See also § 15.12 for a discussion of the application of this doctrine.

36. 1 PAGE ON WILLS, *supra* note 13, at § 15.5. Page, however, notes that the existence of undue influence “is a question of fact and the law cannot lay down . . . tests which can determine its existence with mathematical accuracy.” *Id.* See *infra* notes 37-41 and accompanying text for the commonly recognized requirements or elements necessary to prove a case of undue influence.

37. 1 PAGE ON WILLS, *supra* note 13, at § 15.5.

38. *Id.*

39. *Id.*

40. *Id.*

41. See, e.g., In *re Spaulding Estate*, 197 P.2d 889 (Cal. Ct. App. 1947); In *re Anonymous*, 347 N.Y.S.2d 263 (N.Y. Sup. Ct. 1973); In *re Kaufmann's Will*, 247

least two of these cases⁴² suggest that a homosexual relationship between the testator and a beneficiary is a factor in determining whether the beneficiary unduly influenced the testator.

In *In re Kaufmann's Will*,⁴³ for example, the court struck down a bequest from the testator to a man who was presumably his lover, on the ground that this man had exerted undue influence over the testator. The decedent in that case, Robert Kaufmann, had already inherited a substantial amount of wealth from his family when he met Walter Weiss, an attorney who was not engaged in practice. Soon after they met, Kaufmann and Weiss entered into an agreement whereby Weiss was retained as Kaufmann's "financial advisor and business consultant" at a "retainer" of \$10,000 for a period of one year, with Weiss having the option to terminate the arrangement on one week's notice. Several months after entering into this agreement, Kaufmann and Weiss opened up a joint office in New York, and the next year Weiss moved into Kaufmann's apartment. During the same year that Weiss moved into Kaufmann's apartment, Kaufmann opened up checking accounts which gave Weiss the power to draw on all of Kaufmann's bank accounts.⁴⁴

Two years later, Weiss and Kaufmann extensively renovated a townhouse that Kaufmann owned. Once the renovation was completed, Weiss took "full charge" of the townhouse and made all the arrangements for its furnishings and for the employment of help to maintain the household. All mail and incoming telephone calls to the townhouse were also routed to Weiss. Weiss and Kaufmann lived together for ten years until Kaufmann's death, and during this time, they took several vacations together.⁴⁵

Three years after meeting Weiss, Kaufmann executed a will that left a significant portion of his estate to Weiss. To alleviate the concern of his family, who distrusted Weiss, Kaufmann sent a letter to them at the time he executed his will. Included in this letter was the following explanation of Kaufmann's devotion to Weiss:⁴⁶

N.Y.S.2d 664 (N.Y. App. Div. 1964). See *infra* notes 43-48 and accompanying text for discussion of these cases.

42. See *In re Anonymous*, 347 N.Y.S.2d 263 (N.Y. Sup. Ct. 1973); *In re Kaufmann's Will*, 247 N.Y.S.2d 664 (N.Y. App. Div. 1964).

43. 247 N.Y.S.2d 664 (N.Y. App. Div. 1964).

44. *Id.*

45. *Id.* at 667.

46. *Id.* at 671. Kaufmann had previously executed a will and the residue was divided into fourths—one-quarter each for his two brothers and two nephews. Under this will, Weiss would have received only some stock in a worthless company (which Weiss had convinced Kaufmann to invest in) and a cancellation of any indebtedness to Kaufmann. *Id.* at 667. The letter was sent to Kaufmann's brothers contemporaneously with the execution of the new will. Kaufmann acknowledged in the letter that because much of the estate was left to a man "not a member of my family," the will was unusual. *Id.* at 671.

Walter gave me the courage to start something which slowly but eventually permitted me to supply for myself everything my life had heretofore lacked: an outlet for my long-latent but strong creative ability in painting . . . a balanced, healthy sex life which before had been spotty, furtive and destructive; an ability to reorientate myself to actual life and to face it calmly and realistically. All of this adds up to Peace of Mind—and what a delight, what a relief after so many wasted, dark, groping, fumbling, immature years to be reborn and become adult!

I am eternally grateful to my dearest friend-best pal, Walter A. Weiss. What could be more wonderful than a fruitful, contented life and who more deserving of gratitude now, in the form of an inheritance, than the person who helped most in securing that life? I cannot believe my family could be anything else but glad and happy for my own comfortable self-determination and contentment and equally grateful to the friend who made it possible.⁴⁷

Kaufmann subsequently executed three other wills, each of which gave Weiss a major share of his estate. After Kaufmann died, his family challenged the last of these wills on the ground that Weiss had unduly influenced Kaufmann. Two juries agreed with Kaufmann's family.⁴⁸

In affirming that Kaufmann's will was the result of Weiss' undue influence, the appellate court never expressly referred to the obvious sexual relationship between Weiss and Kaufman. Indeed, the court stated: "The motives and vagaries or morality of the testator are not determinative provided the will is the free and voluntary disposition of the testator and is not the product of deceit."⁴⁹ Nevertheless, the court held that Weiss had "exploited" his arrangement with Kaufmann to advance his "own selfish interests" and had unduly influenced Kaufmann into making a will naming Weiss as a significant beneficiary.⁵⁰

Certainly there was substantial evidence in the *Kaufmann* case which indicated that Weiss had a large degree of control over Kaufmann's assets, that Weiss had a psychological power to control Kauf-

47. *Id.* at 671.

48. *Id.* at 665. A divided appellate court reversed the decision of the first jury and ordered a new trial. In re Kaufmann's Will, 221 N.Y.S.2d 601 (N.Y. App. Div. 1961).

49. *Id.* at 682.

50. *Id.* at 683-84. The court held that the evidence was sufficient to support the jury's finding that the challenged will was:

[T]he end result of an unnatural, insidious influence operating on a weak-willed, trusting, inexperienced Robert [Kaufmann] whose warm family attachment had been attenuated by false accusations against [brother] Joel, subtle flattery suggesting an independence he had not realized . . . and planting in Robert's mind the conviction that . . . members of the family were resentful of and obstructing his drive for independence.

Id. at 684.

mann, and that Weiss might have used this psychological power to cause Kaufmann to leave him a substantial bequest. Yet, there is also an underlying current in the *Kaufmann* opinion suggesting that the court disapproved of Kaufmann's relationship with Weiss and that this disapproval had an impact on the court's disposition of the case. For example, in discussing the letter which Kaufmann sent to his family, the court remarked that the letter was "not based on reality."⁵¹ Later, the court commented that "[t]he emotional base reflected in the letter . . . is gratitude utterly unreal, highly exaggerated, and pitched to a state of fervor and ecstasy."⁵² Thus, notwithstanding its statements to the contrary, the *Kaufmann* court seems to have extensively considered the couple's sexual relationship.

The court considering a charge of undue influence in *In re Anonymous*⁵³ was more explicit when it considered an alleged homosexual relationship between the testator and a major beneficiary. In *Anonymous*, the beneficiary who was alleged to have unduly influenced the testator refused to answer a question concerning his supposed sexual relationship with the testator on the ground that answering such a question would have violated his privilege against self-incrimination under the fifth amendment, since at the time of the suit certain homosexual acts constituted Class B misdemeanors under New York law. The court, however, granted the beneficiary immunity from prosecution⁵⁴ and ordered him to answer the question. Relying on *Kaufmann*, the court held that the possible sexual relationship between the beneficiary and the testator was relevant to the issue of undue influence in that the beneficiary might have taken advantage of such relationship "to unduly influence the decedent in making gifts and transfer of property."⁵⁵ *Kaufmann* and *Anonymous* thus indicate that a homosexual relationship between a testator and a beneficiary may furnish the basis for an undue influence claim.

The possibility that an undue influence challenge will be raised

51. *Id.* at 672. Specifically, the court noted that contrary to the statements on the letter, "Weiss had nothing to do with Robert's creative ability in painting." *Id.* In fact, Kaufmann's earlier will had included a \$2500 bequest to Leo Steppat, "my art teacher." *Id.* Yet, the court then went on to say that even if the letter's content is accepted at face value, it "fails to explain the extent of the testamentary gift to Weiss." *Id.* The court did not explain this statement.

52. *Id.* at 674.

53. 347 N.Y.S.2d 263 (N.Y. Sup. Ct. 1973).

54. *Id.* at 264. It is unclear by what authority the court granted the beneficiary immunity from prosecution. In any event, the court concluded that the offer of immunity sacrificed little or nothing, given that the respondent was more than likely the only living witness to any illegal homosexual acts and he had already indicated an intention to invoke his privileges under the fifth amendment: "[I]t is very unlikely there would be any proof to support a conviction for any acts that he [the respondent] may have committed with the decedent." *Id.*

55. *Id.*

may be even greater in the instance where the testator is not only gay, but also has AIDS. In such situations, the lover-beneficiary will often provide physical care and sustenance for the testator. In several cases,⁶⁶ courts have struck bequests to nurses who have cared for testators prior to their deaths on the ground that these nurses had unduly influenced the testators. It is not unlikely that disappointed takers will rely on such cases, in addition to cases such as *Kaufmann* and *Anonymous*, in arguing that the lover-beneficiary unduly influenced the testator.

Several estate planning techniques, however, can be used to defend the will against such a charge. The first of these is for the lawyer to make certain that all expressions of testamentary intent and all descriptions of the intended testamentary plan come from the testator himself and not from his lover. The best way to do this is to exclude the lover, if he is to be a beneficiary, from the entire estate planning process. All interviews with the client should take place outside the presence of the lover,⁶⁷ particularly if the testator is weak and bed-ridden.

Furthermore, all estate planning discussion should take place in as neutral a setting as possible. The lawyer's office provides an ideal setting for such discussions. In contrast, the home where the testator lives with the intended beneficiary is likely to be too strong a reminder of the influence of the other person if undue influence does exist. Conse-

56. See, e.g., *In re Holloway's Estate*, 235 P. 1012 (Cal. 1925) (confidential relationship of patient and nurse combined with the latter's active participation in the preparation of the will may create a presumption of undue influence by the nurse-beneficiary); *In Re Winslow's Estate*, 147 So.2d 613 (Fla. Dist. Ct. App. 1962) (acts of nurse designed to insulate 84 year-old patient from family members supported finding of undue influence where nurse also acquired complete control over woman's properties and was ultimately named sole beneficiary in her will); *Belcher v. Somerville*, 413 S.W.2d 620 (Ky. 1967) (undue influence established where physically and mentally impaired decedent left one-half of her estate to practical nurse who served testatrix for only 66 days and restricted others access to her).

57. See, e.g., *In re Spaulding's Estate*, 187 P.2d 889 (Cal. Ct. App. 1947). In *Spaulding*, the decedent's adopted son and sole heir at law contested a will that left nearly the entire estate to a man with whom decedent had allegedly had illicit relations for a three-month period. Decedent introduced his attorney to the ultimate beneficiary on the day the decedent made his new will. However, during the actual preparation of the will, the beneficiary sat on an office bench so far away from the decedent and his attorney that "he could not hear what was spoken." The will was executed a couple of days later with only the decedent, the attorney, and a secretary present. The California Appellate Court held there was insufficient evidence of undue influence to send the case to the jury because the beneficiary's role did not indicate any actual pressure that overpowered the volition of the decedent and operated directly on the testamentary act. *Id.* at 892. Further, the court noted that a presumption of undue influence due to the confidential relationship between a beneficiary and a testator arises only when the beneficiary is involved in the making of a will. *Id.* at 890. "Not all connection, however slight, of the person accused of undue pressure with the making of the will is sufficient" to raise the presumption. Here, "[i]n the circumstances of the visit to the attorney's office there is nothing to indicate that [the] testator did not act entirely in accord with his own desires." *Id.* at 893.

quently, if at all possible, discussions between the lawyer and testator should not occur in the testator's home.

The more active the testator's role in the estate planning process, the less likely it is that a charge of undue influence will succeed. Thus, the client should be instructed to *handwrite* all instructions to his lawyer. Doing this will establish that the testator was not forced to sign a prewritten set of instructions, but took an active role in planning his own estate. Even more importantly, having the client write out his instructions in longhand will provide evidence of the testator's intended distribution scheme in the testator's own words. The lawyer should then keep these written instructions on file.

In general, the lawyer should seize every opportunity to demonstrate that the plan embodied in the will is the product of the testator's own thinking. Naturally, the lover-beneficiary should not be present during the execution ceremony. Moreover, at the execution ceremony the lawyer should ask the testator, in the presence of the witnesses, to read the will, either aloud or to himself. The lawyer should then make a point of asking the testator whether the will reflects the testator's own desires. The lawyer should also ask the testator whether anybody has pressured him into disposing of his property in this fashion. If the testator, through his answers to these questions, demonstrates that the will indeed corresponds to his wishes, then disappointed takers will later have a difficult time arguing that the will was the product of undue influence.

III. DISPOSITION OF THE CLIENT'S REMAINS

Certain problems may arise where the gay client with AIDS seeks to plan for the disposition of his bodily remains after death. Some courts have stated that a person has the right to determine what is to be done with his body after he dies.⁵⁸ A person may wish to provide for matters such as whether he is to be buried or cremated, whether his organs are to be donated for use in transplants, or whether his entire body is to be donated to a medical institution. For the gay client with AIDS, however, both legal and practical considerations may prevent his choices on these matters from being effectuated.

As noted in the previous section, some courts may regard homosexual relationships as less than socially acceptable. In at least one

58. See, e.g., *O'Dea v. Mitchell*, 213 N.E.2d 870 (Mass. 1966) (rights of next-of-kin or surviving spouse to possession of decedent's body vest only when decedent makes no contrary provision for disposition of his own remains); *Dummouchelle v. Duke University*, 317 S.E.2d 100, 103 (N.C. Ct. App. 1984) (testamentary provision concerning burial should override contrary wishes of decedent's next-of-kin); *Whitehair v. Highland Memory Gardens, Inc.*, 427 S.E.2d 438, 440 (W. Va. 1985) (decedent's desires regarding disposition of his remains is a "significant, if not controlling" factor, even when contrary to the wishes of a surviving spouse).

case, *Shipley Estate*,⁵⁹ a court refused to give effect to a decedent's designation of a burial spot when the burial spot was connected with an illicit relationship that the decedent had engaged in. In *Shipley*, the decedent had requested an out-of-state burial site near the home of a woman with whom he had been carrying on a long-term, but previously undisclosed, affair. Although acknowledging that the decedent's burial wishes were entitled to great weight, the court allowed the decedent's widow to choose an alternative burial location.⁶⁰ A court sharing the attitudes of the *Kaufmann* and *Anonymous* courts might follow the reasoning of the *Shipley* court with respect to a gay client's selection of a burial site or other disposition plans which conflict with the desires of his immediate family.

Even if the client's family has no objections regarding his choice of disposition of his remains, other circumstances may defeat his choice. Obviously, to be effective, the client's instructions as to his remains must be left someplace where they will be quickly accessible after death. Yet, if placed in the client's will, such instructions may not be discovered in time to be useful.⁶¹ Moreover, even if the instructions are easily accessible at death, they might still be useless if the disposition chosen by the client requires advance notice to other persons or entities. For example, if the client wishes to donate his body to a certain medical establishment but this establishment is not notified of the client's desires until after the client dies, it may be too late for the establishment to garner the personnel or resources needed to transport the client's body.

To avoid such legal and practical problems, the attorney should understand that the earlier the client makes choices as to the disposition of his remains, the more likely those choices will be realized. Accordingly, the attorney should broach this sensitive subject with the client once the attorney feels that the client is psychologically prepared to discuss it. Thus, if the client wishes to be embalmed or to be buried at a particular cemetery, the attorney may wish to contact the funeral parlor at the earliest possible date, since some morticians may be reluctant to deal with persons who have died from AIDS. Likewise, if the client wishes to donate his body to a specific medical school, that school should be notified as soon as possible so that it can arrange to pick up the client's body after he dies.

Whatever the client decides should be done with his body after he

59. 49 Pa. D. & C.2d 331 (Orph. Ct. 1970).

60. *Id.* at 335. The court's disapproval of the decedent's duplicitous behavior was apparent from its refusal to honor his burial request: "[B]y his own deceitfulness and activities, both prior to and subsequent to the execution of his will, [the decedent] has forfeited any right to have consideration given to his desires as to a final resting place." *Id.* at 335-36.

61. 1 A. CASNER, *ESTATE PLANNING* 219 (5th ed. 1984).

dies, those desires should be clearly set forth in a signed, written, and witnessed document other than the client's will. Not only should this document express the client's wishes as to what is to be done with his bodily remains, it should also provide someone with the authority to carry out those wishes. The designated person should then be given a copy of the document, which should be put in a place that is easily accessible regardless of the time of day the client dies. Besides ensuring that the client's wishes will be carried out quickly and correctly, the written document will protect the designated person should someone later object to the manner in which the remains were disposed.⁶² In addition, the document can demonstrate that the client's decision as to the disposal of his remains was not influenced solely by a past sexual relationship, thus shielding his decision from the type of attack which was successful in *Shipley*.

IV. NON-TESTAMENTARY METHODS OF PROPERTY TRANSFER

Because of the type of difficulties mentioned in previous sections, the gay client with AIDS may wish to consider distributing at least some of his property through means other than a will. Some particularly useful non-testamentary methods of property transfer include joint tenancy arrangements, inter vivos trusts, life insurance policies, and gifts. The relative advantages and disadvantages of each of these devices for the gay client with AIDS will now be examined.

A. Joint Tenancy Arrangements

One of the simplest methods of transferring property by non-testamentary means is by use of a joint tenancy arrangement. Joint tenancy is a form of property ownership whereby two or more persons hold equal interests in property during their concurrent lifetimes.⁶³ The chief feature of joint tenancy ownership is the "right of survivorship," i.e., the right of the last surviving joint tenant to own the entire property exclusively upon the deaths of the other tenants.⁶⁴

62. In some cases, courts have allowed an action for damages for the wrongful handling or retention of a decedent's body or ashes. *See, e.g.,* *Schmidt v. Schmidt*, 267 N.Y.S.2d 645 (N.Y. Sup. Ct. 1966) (widow awarded \$1,000 for brother-in-law's wrongful retention of decedent's ashes); *Levite Undertakers Co. v. Griggs*, 495 So.2d 63 (Ala. 1986) (surviving spouse awarded damages for wrongful detention of husband's body where undertaker refused to release the remains until payment for his services was received); *Von Seggren v. Smith*, 503 N.E.2d 573 (Ill. App. Ct. 1987) (daughter awarded \$50,000 when funeral home erroneously returned the cremated remains of someone other than her mother); *Hendriksen v. Roosevelt Hospital*, 297 F. Supp. 1142 (S.D.N.Y. 1969) (next-of-kin could recover damages for wrongful retention of brain and body organs even where autopsy performed with consent of family).

63. R. CUNNINGHAM & W. STOEBCUK, *THE LAW OF PROPERTY* 202 (1984).

64. *Id.* at 202, 207-08.

Under the common law, the four unities of "time, title, interest, and possession" have to be present in order for a joint tenancy to be created.⁶⁵ This means that the joint tenants have to acquire, simultaneously and through the same instrument, equal interests and equal rights of possession and enjoyment to the property.⁶⁶ Any property, real or personal, is capable of being held in joint tenancy.⁶⁷ Although joint tenancy arrangements were favored under the common law, many states now presume that concurrent ownership interests in property represent tenancies in common rather than joint tenancies unless the document creating the interests expressly indicates that a joint tenancy is desired.⁶⁸

Joint tenancy arrangements can be particularly useful for the gay client with AIDS. Because of the inherent right of survivorship, property held in joint tenancy will not pass through probate, but will pass automatically to the other joint tenants upon the client's death. Consequently, the survivors will be able to obtain full title to the property much more quickly than if the property had been distributed to them through the client's will. More importantly, it will be far more difficult to challenge a private, lifetime transfer than it would be to challenge a will.

However, there is one serious disadvantage for the client in putting his property in joint tenancy: Once the joint tenancy is created, the client relinquishes control over the interests conveyed to the other joint tenants.⁶⁹ Thus, if a falling out occurs between the client and the persons designated as joint tenants, the client will not be able to demand the return of the conveyed interests. The client will be without recourse if the joint tenants decide, for whatever reason, to sell their interests to third parties.⁷⁰

65. *Id.* at 202.

66. *Id.* at 202-03. Thus, for example, separate simultaneous conveyances of an equal and undivided interest in property would not produce title in joint tenancy because each tenant has acquired his interest individually and not through the same legal instrument as a single tenant. *Id.*

67. *Id.* at 195.

68. *Id.* at 203-04. *See, e.g.*, ARK. STAT. ANN. § 50-411 (1971) (transferees become tenants in common unless "expressly declared to be joint tenants"); DEL. CODE ANN. tit. 25, § 701 (1975) (instrument must indicate transferees are to take "as joint tenants and not tenants in common"); MD. REAL PROP. CODE ANN. § 2-117 (1981) (instrument must indicate that "property is to be held in joint tenancy" or "jointly with survivorship").

69. H. CURRY & D. CLIFFORD, A LEGAL GUIDE FOR LESBIAN & GAY COUPLES 232-33 (2d ed. 1984). Another disadvantage to a joint tenancy arrangement is that joint tenants must hold an equal interest in the property. *Id.* If the client wishes to retain control over the property during his lifetime, a revocable trust may be more desirable. *See infra* notes 74-86 and accompanying text for a discussion of revocable inter vivos trusts.

70. H. CURRY & D. CLIFFORD, *supra* note 69, at 232. "If a joint tenancy is ended by sale, the new owner is called a 'tenant-in-common' with the other original

With respect to bank accounts, however, the client may be able to obtain all the advantages of joint tenancy without the attendant loss of control over the property.⁷¹ This is because many states permit individuals to establish so-called "Totten trusts,"⁷² wherein one person maintains a savings account nominally for the benefit of another. During his or her lifetime, the trustee alone has access to the account, and he or she can utilize the funds in the account for any purpose; however, once the trustee dies, the funds in the account automatically pass to the beneficiary.⁷³ Thus, by utilizing a Totten trust, the gay client with AIDS can ensure that he will have sole control over his bank account during his lifetime, but upon his death the account will automatically pass to the designated beneficiary.

B. Revocable Inter Vivos Trust

Although it essentially represents a "paper transaction,"⁷⁴ a revocable inter vivos trust can be another useful non-testamentary device for the gay client with AIDS. A revocable inter vivos trust is created in one of two ways.⁷⁵ First, a settlor may transfer property to one or more trustees, who hold the property for the settlor's benefit during his lifetime and for the benefit of other designated individuals after the settlor's death. Alternatively, the settlor can make a declaration stating that he holds the property for his own benefit during his lifetime, and that after he dies the property is to be held for the benefit of the persons named as beneficiaries. Both real and personal property may form the corpus of a revocable inter vivos trust.⁷⁶

The distinguishing characteristic of a revocable inter vivos trust is its revocability. At any time, the settlor has the right to terminate the trust and to recover full title to the property.⁷⁷ The settlor also retains the ability to alter the terms of the trust.⁷⁸ Despite the settlor's retention of such broad powers over the trust, courts rarely find that a revo-

owner. Tenants-in-common do not have rights of survivorship." *Id.* at 232-33.

71. *Id.* at 233.

72. Forty-three states and the District of Columbia have statutes that authorize banks to pay trust deposits (those made by one person in trust for another) to the beneficiary on the death of the depositor-trustee even if the bank has received no formal notice of the trust. A. W. SCOTT, *THE LAW OF TRUSTS* § 58.3, at 207-08. (4th ed. 1987).

73. H. CURRY & D. CLIFFORD, *supra* note 69, at 233.

74. *Id.* Also commonly known as a "living trust," a revocable inter vivos trust is normally created merely to avoid probate. *Id.*

75. G. BOGERT, *THE LAW OF TRUSTS AND TRUSTEES* § 233, at 15 (rev. 2d ed. 1984).

76. *Id.* at § 1.

77. H. CURRY & D. CLIFFORD, *supra* note 69, at 233.

78. G. BOGERT, *supra* note 75, § 233, at 16.

cable inter vivos trust is "illusory" or testamentary in nature.⁷⁹

Unlike most joint tenancy arrangements, a revocable inter vivos trust affords the gay client with AIDS a great deal of flexibility over the transferred property. As just noted, by placing his property in a revocable inter vivos trust, the client is able to retain absolute control over the property. Consequently, should the client decide that he would like the property used for different purposes or that he would like to name different persons as future beneficiaries, the client can easily amend the provisions of the trust. Moreover, the client's control over the property continues even after he dies, since the client determines how the property is to be used by future beneficiaries and how it is to be allocated among them.

The client can also use a revocable inter vivos trust to relieve himself of the burden of managing his property and investments during his illness.⁸⁰ If the client names someone other than himself as trustee, this trustee will have full or substantial responsibility for investing, administering, and distributing trust assets.⁸¹ Should the client eventually become incapacitated or incompetent as a result of his illness, the trustee will insure that the client's property continues to be managed wisely.⁸² Also, the trustee may have the power to make certain that future beneficiaries do not waste the property.⁸³

Placing property in a revocable inter vivos trust carries a few disadvantages for the gay client with AIDS. Because property put in trust is not probated at the time of the settlor's death, it is not subject to the protection against creditors which is given to property passing through a will.⁸⁴ Typically, creditors have only a short time to make claims against probated assets while under most state statutes, creditors may file claims against trust assets for several years after the settlor's death.⁸⁵ Another disadvantage is that the creation of a revocable inter

79. *Id. See, e.g.,* Exchange National Bank of Colorado Springs v. Sparkman, 554 P.2d 1090 (Colo. 1976) (settlor's retention of the powers to revoke or modify the trust and to veto substantial investments made by the trustee "did not eliminate the substantial duties of the trustee with respect to the trust corpus" and therefore did not make the trust agreement invalid as an attempted testamentary disposition).

80. *See* G. BOGERT, *supra* note 75, § 231, at 4.

81. *Id.* The settlor can, however, insert specific provisions in the trust instrument to retain control over trust investments. *Id.*

82. *Id.* at 5.

83. *Id.* at 6. For example, the discretionary powers of the trustee under a "sprinkle trust" allow income and principal distribution to be changed as the needs of the beneficiaries change. *Id.* at 7.

84. Statutes in several states declare that a settlor who retains the power to revoke the trust during his lifetime is considered the sole owner of the trust corpus; accordingly, creditors of the settlor may reach the trust assets to satisfy their claims. *Id.* at 20. *See, e.g.,* KAN. STAT. ANN. § 58-2414 (1983); MICH. STAT. ANN. § 26.155 (Callaghan 1984); S.D. CODIFIED LAWS ANN. § 43-11-17 (1983).

85. G. BOGERT, *supra* note 75, § 231, at 7.

vivos trust can generate significant paperwork for the client or trustee. Either the client or the trustee will need to obtain a federal taxpayer number for the trust, file annual tax returns, and keep accurate and detailed records concerning the trust's administration.⁸⁶

Overall, the placement of some or all of his property in a revocable inter vivos trust can be a desirable option for the gay client with AIDS. Indeed, a revocable inter vivos trust may be the best method of property transfer for him when any will of his is likely to be challenged, when he wishes to retain control over his property either during or after his lifetime, or when he wants to be relieved of the burden of managing his property.

C. Life Insurance Policies

If available to the client, a life insurance policy can be another effective method of transferring property to his loved ones at the time of his death. A life insurance policy is a contract between the insured person and the entity issuing the policy whereby the insured agrees to pay a certain sum of money, commonly called a premium, to the issuer, and in return, the issuer agrees to pay some amount of money when the insured dies.⁸⁷ The person or institution designated by the insured to receive the money after his death is called the beneficiary. Life insurance policies generally fall into two categories: term life insurance and whole life insurance. Term life insurance is insurance for a limited period only, with the policy and premium being re-negotiable after the term expires, while whole life insurance is insurance which lasts—unless otherwise cancelled by the insured—until the insured's death.⁸⁸ Variations on these two basic types of policies include "general," "ordinary," "universal," "old line," "paid-up," "tontine," "assignment," and "endowment" policies.⁸⁹ Life insurance policies can also be convertible to and from other financial investments such as annuities.⁹⁰

Because every person has an insurable interest in his own life, every person is legally capable of procuring a life insurance policy on himself.⁹¹ Once a person has obtained life insurance on himself, he may, in most states,⁹² designate whomever he chooses as the beneficiary

86. H. CURRY & D. CLIFFORD, *supra* note 69, at 233.

87. 1 G. COUCH, *CYCLOPEDIA OF INSURANCE LAW* § 1:73 (2d ed. 1984 & Supp. 1986).

88. Traditionally, life insurance policies have fallen into the whole life category. *Id.* Term life insurance is a form of the life insurance contract that does not follow the traditional model of requiring the contract to remain in force until it is terminated or until the insured dies. *Id.* at n.2.

89. *Id.* at § 1:73.

90. An annuity eliminates the element of risk to the insurer. *Id.* at § 2:7.

91. 3 G. COUCH, *supra* note 87, at § 24:116.

92. States which follow the minority rule require that the beneficiary have a rec-

even if this beneficiary is not capable of having an insurable interest in the insured's life.⁹³ Thus, there is no legal barrier under the existing law to prevent a gay client with AIDS from naming his lover as the beneficiary under his life insurance policy. Whether the client may later substitute one beneficiary for another is governed by the policy itself.⁹⁴ If the policy permits a change of beneficiaries and if, under the applicable law, beneficiaries need not have an insurable interest, the client is free to substitute any beneficiary he chooses.

Generally speaking, a client who has already been diagnosed as having AIDS or AIDS-Related Complex (ARC) will not be able to acquire new life insurance coverage. This is because insurance companies are permitted to, and uniformly do, require that the person to be insured meet certain minimum standards of health and life expectancy.⁹⁵ Even if the person manifests no symptoms of AIDS or ARC but has simply tested positive for the AIDS antibody, the insurance company will probably decline coverage,⁹⁶ although some states now limit the ability of insurers to test would-be policyholders for the AIDS antibody.⁹⁷ In any event, an established diagnosis of AIDS will almost certainly cause the insurer to deny coverage or to limit coverage to

ognized insurable interest in the life of the insured. *Id.* at § 24:117. The minority rule is said to eliminate the possibility that a third party would have an interest in the early death of the insured. *Id.*

93. 5 G. COUCH, *supra* note 87, at § 28:1 (2d ed. 1984 & Supp. 1986). The law is not concerned with either the desirability or the propriety of the choice of beneficiary. *Id.* This fact may be of great importance to disappointed relatives of a deceased AIDS victim who claim to be the "proper" beneficiaries of the insurance policy.

94. *See generally* 5 G. COUCH, *supra* note 87, at § 28:36. The right to change beneficiaries may be limited by the policy itself, the terms of a divorce decree, the ineligibility of the intended beneficiary, or state law. *Id.*

95. *See generally* 1 G. COUCH, *supra* note 87, at § 4:39 (2d ed. 1984).

96. *See generally* Christensen, *The Life Insurance Industry Requests the Right to Use the AIDS Antibody Test as an Underwriting Factor*, TR. & EST., Aug. 1987, at 58 (refusing insurers this right unfairly burdens the rest of the insured population through increased premiums).

97. Four states and the District of Columbia have enacted legislation restricting an insurer's access to a policy applicant's AIDS-related medical history. *See generally* Pascal, *Statutory Restriction on Life Insurance Underwriting of AIDS Risk*, 54 DEF. COUNS. J. 319, 322-25 (1987). California law prohibits the use of an AIDS antibody blood test in determinations as to insurability. CAL. HEALTH & SAFETY CODE § 199.21(f) (West Supp. 1987). Florida law prohibits insurers making decisions on insurability, from using AIDS antibody test results compiled by state health agencies. FLA. STAT. ANN. § 381.606 (West 1986). Maine has instituted a stricter policy, which prohibits insurers from inquiring if an applicant has had an AIDS antibody test and also prohibits insurers from requesting such a test. ME. REV. STAT. ANN. tit. 5, § 17004 (1986). The District of Columbia passed a highly restrictive law which may prohibit all inquiry into the status of an insurance applicant's immunological status. D.C. CODE ANN. §§ 35-221 -229 (1986). A Wisconsin law which prohibited inquiry into whether an applicant had taken an AIDS antibody test, WIS. STAT. ANN. § 631.90 (1985), has now been effectively repealed.

death from causes other than AIDS.⁹⁸

If the client had already obtained a life insurance policy before being diagnosed as having AIDS or if the client already owns property which is convertible into a life insurance policy, the client might use the policy to transfer money to the beneficiary. The primary advantage of transferring assets through a life insurance policy rather than a will is that probate is avoided if the designated beneficiary is any person or entity other than the client's own estate.⁹⁹ Consequently, substantial probate costs may be avoided,¹⁰⁰ and the beneficiary will receive his or her money much more quickly than had the money been left to him or her in a will. In addition, significant estate tax savings may result.¹⁰¹

The primary problem with transferring property through a life insurance policy is that the transfer is subject to the same sorts of challenges that can be made against property which is transferred through a will.¹⁰² For example, the insurer or persons excluded as beneficiaries may contest the client's choice of beneficiary on the ground that the client was not "mentally competent" at the time he made his choice of beneficiary or that the beneficiary "unduly influenced" the client.¹⁰³ A change of beneficiary by the client is particularly vulnerable to attack by either the original beneficiary or the insurer.¹⁰⁴ Indeed, some courts have held that when the substitute beneficiary was involved in an "illicit relationship" with the insured—which under the *Kaufman* and *Anonymous* view¹⁰⁵ would include a homosexual relationship—a presumption arises that the substitute beneficiary unduly influenced the

98. Christensen, *supra* note 96, at 59. This follows from the fact that AIDS is generally fatal in a relatively short time thereby making it impossible for the insurer to charge a reasonable premium to other insured parties. *Id.*

99. See generally T. ATKINSON, LAW OF WILLS § 39 (1953) ("life insurance presents perhaps the most satisfactory method of limiting the estate which is subject to probate and administration").

100. *Id.*

101. The amount of estate tax paid to the federal government is based, in part, on the amount of the taxable estate. 26 U.S.C. § 2001 (1979 & Supp. 1987). By paying insurance premiums, the client can reduce the overall value of his estate without reducing the amount the beneficiaries will receive.

102. See *supra* notes 14-57 and accompanying text.

103. If, at the time of changing beneficiaries, the insured was mentally incompetent, the change may be voided and the original beneficiary will recover under the policy. 3 G. COUCH, *supra* note 87, at § 28:100. Similarly, if the original beneficiary can show that the substitute beneficiary exercised undue influence at the time of the change, the substitution will be ineffective. *Id.* at § 28:103. The degree of mental competency required is generally the same as that needed to make a will. *Id.* at § 28:101.

104. Generally, only the insurer may challenge a change in beneficiaries on the basis of technical noncompliance with the policy's required procedures. *Id.* at § 28:97. This rule, however, has been modified or rejected in some jurisdictions. See generally 3 G. COUCH, *supra* note 87, at § 28:98. Challenges based on incapacity or undue influence appear to be available to either the insurer or a previously named beneficiary. *Id.*

105. See *supra* notes 41-55 and accompanying text.

insured.¹⁰⁶

In short, a life insurance policy can be a quick and cost-effective way for a gay client with AIDS to dispose of valuable assets. A life insurance policy cannot, however, be a means of avoiding the challenges which are likely to be made against a will.

D. Gifts

One of the easiest methods for the gay client with AIDS to dispose of his personal property is for him simply to give it away. There are two basic types of gifts—gifts inter vivos and gifts causa mortis.¹⁰⁷ A gift inter vivos is an absolute transfer from the donor to the donee which occurs during the donor's lifetime.¹⁰⁸ A gift causa mortis is a gift made by a donor who believes he or she is about to die and who intends to transfer the property only if he or she does die.¹⁰⁹ Both gifts inter vivos and gifts causa mortis may be transferred outright or in trust and both may be subject to the claims of creditors.¹¹⁰ The prevailing view is that any or all of the donor's personal property may be transferred by gift.¹¹¹

The requirements for effecting gifts inter vivos and gifts causa mortis are essentially the same. First, the donor must intend to make a present transfer of property, and not simply a promise to transfer the property in the future.¹¹² In addition, the donor must "deliver" the property to the donee.¹¹³ When the nature and location of the item is such that the donor can physically give the property to the donee, the donor must do so; but if the property is bulky or inaccessible to the donor, "constructive" or "symbolic" delivery will suffice.¹¹⁴ Finally, the

106. 5 G. COUCH, *supra* note 87, at § 28:105.

107. R. BROWN, *THE LAW OF PERSONAL PROPERTY* § 7.1 (3d ed. 1975).

108. *Id.* In general, a gift inter vivos is immediately effective and completely irrevocable. *Id.*

109. *Id.* A gift causa mortis is revocable until the death of the giver and is automatically revoked if the expectation of death is unrealized. *Id.*

110. 1 PAGE ON WILLS, *supra* note 13, at § 7.5. If the donor's estate is insufficient to pay his debts, the executor or administrator will be able to rescind the gift in order to pay the donor's creditors. *Id.* at § 7.5.

111. *Id.* at § 7.19. The extent of a gift is, however, limited by the ability of the donor's estate to cover his debts. *Id.*

112. R. BROWN, *supra* note 107, at § 7.12. In order for the gift to be valid, the donor must intend to give title to the donee. A reviewing court will look to the relationship between the parties and the size of the gift relative to the donor's property. *Id.*

113. *See generally* R. BROWN, *supra* note 107, at § 7.2. It is now "universally accepted" that when a chattel can be manually transferred, the gift will only be valid when manual transfer has been made. *Id.* The requirement of delivery appears to serve three purposes: (1) to protect the donor against his own rash decisions; (2) to create evidence of the donor's intention; and (3) to give the donee evidence of the donor's intention to transfer title. *Id.*

114. A symbolic delivery occurs when delivery is of some object related to the

donee must accept the gift. An acceptance will be presumed if the donee has not expressly rejected it.¹¹⁵

There is one crucial distinction, however, between a gift *inter vivos* and a gift *causa mortis*. Once the donor makes a gift *inter vivos*, the donor is unable to revoke it unless a power of revocation was explicitly reserved at the time of delivery.¹¹⁶ In contrast, a donor may revoke a gift *causa mortis* at any time; indeed, such gifts are revoked as a matter of law if the donor's imminent death does not occur or if the donee predeceases the donor.¹¹⁷

For the gay client with AIDS, the transfer of personal property through a gift—whether it is a gift *inter vivos* or a gift *causa mortis*—can offer several advantages. One of the obvious advantages is that the client acquires some peace of mind by seeing the intended recipients of his property receive that property during his lifetime. Moreover, at least one commentator has stated that the amount of mental capacity required for a donor to make a gift is less than that required for a testator to make a will.¹¹⁸ In addition, the private nature of most gifts, the possible reliance on the gift's validity by third parties (such as banks), and the potential re-affirmation of the gift by the client during his lifetime might enable the client to give away property which he would otherwise be unable to dispose of through a will. Additionally, making a gift is an extremely uncomplicated and informal transaction; all the client need do is demonstrate, preferably through a writing,¹¹⁹ a clear intention to transfer the property and then physically hand the property to the donee or perform some simple act constituting delivery. If the gift is made more than three years prior to the client's death, the client's estate may be saved substantial death taxes, for under the Internal Revenue Code, gifts made prior to this time are deemed true gifts and not estate property.¹²⁰ Donors are allowed to claim an annual

gift, this representing transfer of title. *Id.* at § 7.5. An example of a symbolic delivery might be the delivery of a single book when the actual gift is of an entire set of encyclopedias. A constructive delivery occurs when delivery is of some object that gives the donee the means of gaining actual possession and control of the gift. *Id.* An example of constructive delivery would be the delivery of a vehicle registration form to represent the gift of a car. *See id.* at § 7.6 for a discussion of constructive delivery by means of a key.

115. The doctrine of implied acceptance is most often applied to cases where the donee is either unaware that the gift has been made or is incapable of expressing acceptance. *Id.* § 7.14. Such situations may arise, for example, where the intended recipient is an infant or where the gift is made through a third party and the donor dies prior to the recipient's acceptance. *Id.*

116. 1 PAGE ON WILLS, *supra* note 13, at § 7.5.

117. *See generally* 1 PAGE ON WILLS, *supra* note 13, at §§ 7.34-7.39.

118. *Id.* at § 7.8. The required level of mental capacity is simply that the donor understand the nature of the transaction involved. *Id.*

119. A. CASNER, *ESTATE PLANNING* 286 (3d ed. 1961).

120. 26 U.S.C. § 2035(a) (1982 & Supp. 1987).

exclusion from gift taxation of \$10,000 per donee.¹²¹

In some instances, however, transferring property by gift may afford no benefits to the client and may be detrimental. Because the majority of persons with AIDS die within two years of being diagnosed with the disease,¹²² in most circumstances no tax benefits will be realized by the client's estate. Also, like life insurance policies, gifts are vulnerable to the same challenges which can be made against property passed through wills. For example, a frustrated would-be taker might claim that the client lacked the mental capacity to make a gift¹²³ or that the donee unduly influenced the client to make the gift.¹²⁴ In addition, there are several other challenges which can be raised uniquely against gifts; for example, the would-be taker might allege that the client only promised to transfer property in the future or that the client never delivered the property to the donee. In the specific instance where the client gives away property while fighting off a particular opportunistic infection and then recovers from the infection, the would-be taker will almost undoubtedly claim that the transfer represented a gift *causa mortis*, which was revoked by operation of law when the client recovered.

Thus, it is clear that transferring property by gift will not necessarily avoid the challenges associated with transferring property by will, and may invite further challenges. Nevertheless, if the risk of such challenges being raised is minimal and the attorney makes certain that the requirements for making a gift are carefully followed, a gift may be a quick, simple, and emotionally satisfying way for the client to dispose of his property.

V. SUPERVISION OVER THE CLIENT AND HIS ASSETS DURING HIS LIFETIME

Because many of the opportunistic infections which occur among people with AIDS can be mentally and physically debilitating,¹²⁵ there is a substantial risk that the client may become incompetent or otherwise incapacitated before he dies. In addition, there is a great chance that he will eventually need to be sustained by artificial life-support systems. Consequently, the client may wish to provide for someone to manage his assets in the event he becomes incompetent and for someone to authorize the termination of life-support systems. Two devices which serve these functions are durable powers of attorney and living wills.

121. *Id.* at § 2503(b). This exclusion, however, does not cover the transfer of future interests in property. *Id.*

122. See Christensen, *supra* note 96, at 58.

123. See generally 1 PAGE ON WILLS, *supra* note 13, at § 7.7.

124. See generally 1 PAGE ON WILLS, *supra* note 13, at § 7.8.

125. See *supra* notes 13, 23-27 and accompanying text.

A. Durable Power of Attorney

A power of attorney is a grant of authority from a principal to an agent whereby the agent is empowered to make various decisions on behalf of the principal.¹²⁶ Typically, powers of attorney give the agent authority to act in matters concerning the principal's property.¹²⁷ However, no cases or statutes appear to restrict the scope of powers of attorney to such matters.¹²⁸ Accordingly, a grant of authority under a power of attorney can extend to any matter concerning the principal so long as that grant of authority is not somehow contrary to statute or public policy.¹²⁹

Subject to statutory or policy limitations, a power of attorney can be drafted as broadly or narrowly as the client desires. In giving the agent authority over his property, the client might permit the agent to make deposits to and withdrawals from the client's bank accounts, to sell the client's assets, to file bankruptcy on the client's behalf, to lease or mortgage the client's property, and to trade securities on the client's behalf.¹³⁰ The client might also empower the agent to make decisions regarding: transfer of the client to hospitals or nursing homes; storage and disposition of the client's clothing, furniture, and other personal effects; and transportation, recreation, and religious arrangements for the client.¹³¹ In addition, the client might provide that the agent have power to direct his medical treatment.¹³² To give the agent the broadest authority possible, the power of attorney might contain a clause stating that the agent's authority is not limited to the specific powers described

126. F. COLLIN, JR., J. LOMBARD, JR., A. MOSES & H. SPITLER, DRAFTING THE DURABLE POWER OF ATTORNEY: A SYSTEMS APPROACH 21 (1984) [hereinafter COLLIN & LOMBARD]. Because the principal-agent relationship is a creature of the law of agency, its rules will necessarily vary according to the substantive law of each state. *Id.*

127. The most common use of a power of attorney is to authorize the agent to handle routine personal business (bank deposits and bill payments, for example) while the principal is out of town. *Id.*

128. *Id.* The principal can delegate to an agent by the power of attorney virtually absolute control over the principal's property.

129. *Id.* For example, most states have statutory prohibitions against both marriage and voting in public elections by proxy. In addition, certain acts are generally held to be inherently personal in nature and therefore incapable of delegation by the principal. Performance by a renowned artist or musician, for example, may not be delegated to another because it involves the use of highly individualized skills and the person who contracted for performance was likely bargaining precisely for *that* artist's work. *Id.* at 22.

130. *Id.* at 22-23 for a comprehensive list of property management functions a principal may wish to delegate through a power of attorney.

131. *Id.* at 23-24. Provisions for custody and management of the person are of great importance when, as in the case of AIDS patients, eventual incompetency of the client can be foreseen.

132. The Model Health Care Consent Act, approved by the National Conference of Commissions on Uniform State Laws in 1982, permits an individual to appoint another as his or her "health-care representative." *Id.* at 24.

in the document but extends to all powers reasonably necessary to ensure the well-being of the client and his property. Nevertheless, to insure that third parties acknowledge the agent's authority, the powers set forth in the document should be delineated as specifically as possible.¹³³

An ordinary power of attorney lasts only as long as the principal remains competent.¹³⁴ For the gay client with AIDS, then, it is more sensible to utilize a durable power of attorney. Under a durable power of attorney, an agent can be cloaked with exactly the same authority as could be given under an ordinary power of attorney; the only difference is that under the durable power of attorney the agent's authority will continue during the principal's incompetency.¹³⁵ In fact, in some states,¹³⁶ durable powers of attorney may even survive the principal's death in certain circumstances. Although durable powers of attorney are entirely a creation of statute, all states now permit their use.¹³⁷

The client is free to select any person he chooses as his agent under the power of attorney. As a precaution in the event that the person selected becomes unable or unwilling to serve, the client may wish to designate alternate or successor agents. The client can also name several persons to act simultaneously as his agents, by giving limited powers of attorney to each.¹³⁸ Because persons selected as agents will be held to a fiduciary duty toward the principal, they would be wise to maintain detailed records regarding actions they have taken on the cli-

133. The goal in drafting a power of attorney is, after all, to create a document that will persuade third parties to do business with the agent. "Third parties will not be eager to assume risks by implying powers that are not specifically expressed." *Id.* at 22.

134. *Id.* at 1. Curiously, a common law power of attorney became inoperative "at a time when it was needed most." *Id.* This feature could also make the device less effective when the principal was, in fact, fully competent; third parties might, for example, reasonably refuse to deal with the agent if not sufficiently assured that the principal was indeed competent. *Id.*

135. *Id.*

136. For example, many states provide that the death of the principal does not revoke the powers of the agent until the agent has received actual or constructive notice of the death. See KAN. STAT. ANN. § 58-613 (1983); MD. EST. & TRUSTS CODE ANN. § 13-602 (1974); MO. ANN. STAT. § 486.580 (Vernon 1987).

137. COLLIN & LOMBARD, *supra* note 126, at 11. See, e.g., CAL. CIV. CODE § 2400 (West Supp. 1987); N.Y. GEN. OBLIG. LAW § 5-1601 (McKinney 1978); TEX. PROB. CODE ANN. § 36A (Vernon 1980); VA. CODE ANN. § 11-9.1 (1985). The statutes of most states adopt the language of the UNIFORM PROBATE CODE § 5-501 (1982): "[T]his power of attorney shall not be affected by subsequent disability or capacity of the principal," or words to that general effect.

138. The client may, for example, wish to have one person responsible for the management of his financial affairs and a different person handling questions of health care and personal custody. COLLIN & LOMBARD, *supra* note 126, at 52. A related concern is that the client also provide for agent succession, especially where one person has been given the general power of attorney over the client's affairs. *Id.*

ent's behalf.¹³⁹ These persons might feel more comfortable performing their roles if the document granting them authority waives any requirement that they post bond, expressly states that their liability is limited to instances of "gross misconduct or fraud," and gives them clear direction on such issues as managing the client's investments and taking care of the client's person.¹⁴⁰

As a protection against the possibility that the agent will act irresponsibly, the client might want to include a clause in the power of attorney which designates who should serve as his guardian in the event a court decides to appoint one. Several states¹⁴¹ and the Uniform Probate Code¹⁴² expressly permit the insertion of such a clause in documents creating durable powers of attorney. A court will appoint a guardian if it adjudicates the client incompetent to manage his affairs, and courts will normally respect the principal's designation of a preferred guardian.¹⁴³ The effect of appointing a guardian is to give the guardian control over the client's entire property.¹⁴⁴ Thus, the guardian would have the discretion to terminate an irresponsible agent's authority under the power of attorney. In any event, the agent would then become responsible to the guardian as well as to the principal.¹⁴⁵

B. Living Wills

In recent years, several states¹⁴⁶ have enacted statutes which allow

139. *Id.* at 49. "As a fiduciary, an agent is liable to the principal for the agent's failure to act prudently or the agent's failure or refusal to act." Beneficiaries of the principal's estate, as well as the principal himself, are potential plaintiffs in an action for breach of the agent's fiduciary duty. *Id.*

140. *Id.*

141. *See, e.g.,* N.C. GEN. STAT. § 32A-10 (1984); PA. STAT. ANN. tit. 20, § 5604(c) (Purdon Supp. 1987) WIS. STAT. ANN. § 243.07(3)(b) (1987).

142. UNIFORM PROBATE CODE § 5-503(b) (1982). The comments indicate that the purpose of this subsection is to permit the principal to ensure that future guardian appointees will be congenial to the principal's plans. *Id.*

143. R. MACKAY, THE LAW OF GUARDIANSHIP 65 (3d ed. 1980). The guardian or conservator is appointed under a statutory procedure generally referred to as an inquisition. In most states any "person having the interest of the alleged incompetent is sufficiently qualified for appointment as guardian." *Id.* at 65-66.

144. *Id.* at 68. The guardian takes control of the property at the time the court declares the client incompetent. However, the court may at its discretion appoint a temporary guardian during the incompetency proceedings if necessary for "the welfare of the individual." *Id.*

145. *Id.* at 56. Eleven states even provide for automatic termination of the durable power of attorney when the court appoints a guardian. *Id. See, e.g.,* ILL. REV. STAT. ch. 110½, para. 11a-23 (West Supp. 1987) (power of attorney ceases at time conservator is appointed and thereafter agent "shall account to the conservator rather than the principal"); TEX. PROB. CODE ANN. § 36A (Vernon 1980) (powers of attorney terminate upon the appointment of the guardian as if "the principal himself [had] terminated [the agent's] powers"); UNIFORM PROBATE CODE § 5-503(b) (1982).

146. To date, 35 states and the District of Columbia have enacted statutes spe-

individuals to refuse medical treatment which merely prolongs their lives. These statutes permit the creation of what are known as "living wills." In essence, a living will is a formally executed document stating that in the event the declarant is diagnosed as having a terminal illness, he or she does not wish to receive medical treatment that merely prolongs his or her life. Such life-prolonging medical treatment might include being placed on a respirator or being fed through nasal-gastric tubes. Whether to have such a document is a personal decision deeply rooted in philosophical and religious considerations. As such, the decision must be left to the individual client. If the client decides he wants a living will, there are several matters of which his attorney must be aware.

Generally, states require that a living will be drafted using language identical or nearly identical to that set forth in the applicable statute.¹⁴⁷ The language of the living will authorized by the Illinois Living Will Statute is typical among state statutes. That statute provides, in pertinent part:

The legislature finds that persons have the fundamental right to control the decisions relating to the rendering of their own medical care, including the decision to have life-sustaining procedures withheld or withdrawn in instances of a terminal condition.

In order that the rights of patients may be respected even after they are no longer able to participate actively in decisions about themselves, the legislature hereby declares that the laws of this State shall recognize the right of a person to make a written declaration instructing his or her physician to withhold or withdraw life-sustaining procedures in the event of a terminal condition.¹⁴⁸

A recent New York case, *Evans v. Bellevue Hospital*,¹⁴⁹ illustrates the importance of drafting living wills with precision. In *Evans*, the petitioner sought a court order compelling the respondents to cease all medical treatment to Tom Wirth, a patient with ARC who, at the time of the suit, was suffering from toxoplasmosis. As a result of the toxo-

cifically authorizing living wills. Comment, *Maine's Living Will Act and the Termination of Life-Sustaining Medical Procedures*, 39 MAINE L. REV. 83 (1987).

147. The Illinois statute, for example, requires that the living will be written in "substantially" the same form as that described in the act. ILL. ANN. STAT. ch. 110½, para. 703(e) (Smith-Hurd Supp. 1987). Additional provisions are allowed, but if for some reason they are held invalid, their invalidity does not affect the other provisions of the document. *Id.* See also ARIZ. REV. STAT. ANN. § 36-3202 (Supp. 1987); COLO. REV. STAT. § 15-18-104 (Supp. 1986); ME. REV. STAT. ANN. tit. 22, § 2922(4) (Supp. 1986-1987); MO. ANN. STAT. § 459.015(3) (Vernon Supp. 1986); NEV. REV. STAT. ANN. § 449.610 (Michie 1986); TEX. REV. CIV. STAT. ANN. art. 4590h § 3(d) (Vernon Supp. 1987).

148. ILL. ANN. STAT. ch. 110½, para. 701 (Smith-Hurd Supp. 1987).

149. *Evans v. Bellevue Hospital*, N.Y.L.J., July 28, 1987, at 11, col. 1 (N.Y. Sup. Ct. July 27, 1987).

plasmosis, Wirth had been in a stupor and had been unable to communicate with anyone. Before this time, Wirth executed a "living will," which stated:

I direct that life-sustaining procedures should be withheld or withdrawn if I have illness, disease or injury or experience extreme mental deterioration, such that there is no reasonable expectation of recovering or regaining a meaningful quality of life.

These life-sustaining procedures that may be withheld or withdrawn include, but are not limited to: surgery; antibiotics; cardiac resuscitation; respiratory support; artificially administered feeding and fluid.¹⁵⁰

The petitioner claimed that in accordance with the terms of Wirth's living will, Wirth's medical treatment should have been terminated. The hospital, however, refused to halt Wirth's treatment.

The court held that Wirth's medical care was to continue.¹⁵¹ In support of this ruling, the court noted that Wirth's physicians had testified that the treatment presently being administered to Wirth would likely cause him to recover from toxoplasmosis within two weeks. With respect to the provisions contained in Wirth's living will, the court commented that although New York had not specifically enacted a living will statute, the common and statutory law in New York clearly recognized the right of competent adults to refuse medical treatment. Yet, the court explained that the phrase "meaningful quality of life" in Wirth's living will was too ambiguous to give the hospital any guidance in determining when Wirth's treatment should be discontinued; the court declined to "resolve the meaning of such an amorphous expression by resorting to speculation or conjuncture."¹⁵¹ The court concluded with the suggestion that "[u]ntil such time as this matter is resolved by the legislature . . . great pains [should] be taken by the drafters of 'living wills' to dispel the ambiguities which necessitated this proceeding."¹⁵³ A logical extension of the reasoning in *Evans* is that if the applicable jurisdiction has no statute authorizing precise language for living wills, the standard language from a nearby state's statute should be utilized rather than risk the vagaries of private phrasing.

If drafted carefully and in accordance with the relevant statute or analogous statute of a nearby state, a living will can be a useful tool for the gay client with AIDS. Because a living will states that the client shall not receive medical treatment which merely prolongs his existence, the client can feel that he is being permitted to "die with dignity." Moreover, by providing that no measures will be taken to extend the client's life, the living will helps to protect the client's assets against

150. *Id.*

151. *Id.*

152. *Id.*

153. *Id.*

depletion through medical costs. Accordingly, a living will ensures that more of the client's property is available for disposition after his death.

A living will also removes the risk to those who decide to deny the client medical treatment will later be held liable for murder, manslaughter, or wrongful death in a civil action. Thus, living wills protect medical personnel who order life support services to be withdrawn from the client. Similarly, living wills protect the relatives, friends, or lover of the client who request the withdrawal of such services.

However, if the lover of the client is a beneficiary under the client's will and if the lover is the one who seeks to discontinue the client's medical treatment, it is conceivable that a disappointed taker under the will might argue that the lover exerted undue influence to terminate the client's life.¹⁵⁴ To avoid such a charge, a lover who is a beneficiary under the client's will should be insulated from the decision to withdraw medical treatment from the client.

This insulation should begin at the planning phase and not merely at the time the treatment is actually withdrawn. Living wills have formal execution requirements which parallel those for the execution of wills.¹⁵⁵ Typically, two witnesses are required to be present to sign the living will when the declarant signs it.¹⁵⁶ No case has arisen yet in which a witness to a living will was challenged as an interested beneficiary in the declarant's will, but it is not difficult to imagine such a case. This appearance of conflict could result in the striking of the bequest to that beneficiary so as to make him or her a truly disinterested witness to the living will. To avoid this possibility, the client's lover and any other beneficiary under the client's will should be excluded from witnessing the living will.

Further, once the living will is executed, a copy of it should be retained by the attorney or a close friend of the client who is not going to receive a bequest under the client's will. The client's lover will not have the burden of coming forward to request the termination of medical treatment; the person retaining the copy of the document will be able to make such request. Accordingly, any appearance of conflict or impropriety will be avoided.

With the isolation of the lover and any other beneficiary under the will from the creation, bringing forward, and carrying out of the living

154. A problem might also arise if the life support services are terminated shortly after the client has executed his will. Disappointed takers under the will might question how the testator could be mentally capable at the time of execution and yet not be worthy. This potential problem demonstrates once again the importance of executing a will at the earliest possible date. *See supra* text accompanying note 28.

155. *See, e.g.*, ILL. ANN. STAT. ch. 110½, para. 703(b) (Smith-Hurd Supp. 1987) (the living will is invalid "unless it has been executed with the same formalities as required of a valid will").

156. *See, e.g.*, ME. REV. STAT. ANN. tit. 22, § 2922(1) (Supp. 1986-1987); COLO. REV. STAT. § 15-18-104 (Supp. 1985); ARIZ. REV. STAT. ANN. § 36-3202 (1986).

will, no challenges should be raised against these beneficiaries during the process of probating the client's estate. In addition, the living will itself should insure that there are more assets to be probated, and more importantly, that the client was not sustained in an undignified manner before he died.

CONCLUSION

When a person is diagnosed as having AIDS, one of the last things on his mind is probably estate planning. At some point during his illness, however, the gay client with AIDS will need to decide how he is going to distribute his property and how he is going to be cared for if he becomes incompetent. By following the guidelines set forth in this Article, the lawyer for such a client can better insure that: the intended recipients of the client's property actually receive the property; the property is disposed of by the most efficient method possible; the client's remains are disposed of according to his wishes; the client's property and person are managed properly in the event he becomes incompetent; and the client is permitted to die in a manner he deems appropriate. The lawyer cannot eliminate much of the anguish his client is likely to feel over having AIDS, but the lawyer can make sure that such anguish does not extend to estate planning matters.

