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## ARTICLES

# YOUR HIV POSITIVE CLIENT: EASING THE BURDEN ON THE FAMILY THROUGH ESTATE PLANNING

EMILY BERENDT AND LAURA LYNN MICHAELS\*

### I. INTRODUCTION

You receive a call from a long-standing client whom you have counseled on a variety of matters. The client, married with two minor children and a partnership interest in a small business, wants to change his will. He says he has had a change of circumstances. As you flip through the appointment book you ask, "What change?" "Um," he hesitates, "I tested positive for HIV." As you hang up, your secretary announces that your next appointment, a new client, has arrived. She shows in a thin, tired looking man in his early fifties. He says he thinks he wants a living will and would like more information on the new durable power of attorney. "No," he replies to your question, "I really don't need a will; I don't have anything of value left. You see, I have AIDS. I just want my life partner to be able to take care of me."

These scenarios are growing increasingly plausible. The Centers for Disease Control in Atlanta ("CDC") has revealed that 161,073 cases of AIDS<sup>1</sup> have been reported through 1990, almost all among adults.<sup>2</sup> From 1989 through 1993, the CDC estimates that roughly 400,000 cases of AIDS will have been reported, with ap-

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1. AIDS is the acronym for Acquired Immune Deficiency Syndrome, a complex of diseases related to the presence of Human Immunodeficiency Virus, or HIV, in a person. See generally REPORT OF THE PRESIDENTIAL COMMISSION ON THE HUMAN IMMUNODEFICIENCY VIRUS EPIDEMIC xvii (June 1988) [hereinafter PRESIDENTIAL COMMISSION REPORT]. (an indepth discussion on AIDS and HIV).

2. Centers for Disease Control, HIV/AIDS Surveillance Year End Report 3 (March 1991). Of those 161,073 reported cases, 157,658 were in people over the age of 13. *Id.* at 3. Pediatric cases numbered 2,786. *Id.* Furthermore, AIDS now occurs far more frequently in people over the age of 50 — accounting for 10% of the cases reported to the Government. Brozan, *Less Visible But Heavier Burdens As AIDS Attacks People Over 50*, N.Y. Times, Nov. 26, 1990, at A1, col. 5.

proximately 300,000 resulting in death by the end of that period.<sup>3</sup> Unfortunately, these figures make it likely that estate planning attorneys will be confronted with a client who is HIV-positive or has AIDS.

This Article addresses the estate planning concerns of clients, and their loved ones and families who are affected by HIV.<sup>4</sup> It will first discuss the social and emotional concerns that are primary to the HIV-infected client. It will then introduce several estate planning techniques available under Illinois law to assist the HIV client in maintaining dignity, to empower the client to retain testamentary control, and to protect the integrity of both the family and the intended beneficiaries.<sup>5</sup>

## II. SOCIAL AND EMOTIONAL CONCERNS

Although estate planning for persons with HIV is, in some respects, similar to planning for any client diagnosed with a terminal disease, there is a poignant difference: rarely is HIV dealt with simply as a disease, rather, it is dealt with as a controversial sociopolitical issue. From the onset, AIDS has been intertwined with old religious, moral and cultural arguments regarding homosexuality.<sup>6</sup> With rare exception, "there has been no balanced, substantive public discussion of the issues involved in the AIDS epidemic, rather, what we have witnessed is a seizing upon a public health crisis by ideologues of virtually all persuasions as a means to advance an agenda that centers not upon issues of public health, but upon matters of 'lifestyle' or public morality."<sup>7</sup> Hence, AIDS has revived an

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3. Centers for Disease Control, 39 MORBIDITY AND MORTALITY WEEKLY REP. 110-119 (Feb. 23, 1990). The range of estimates were that 340-480,000 cases of AIDS will have occurred with 285-340,000 resulting in death. *Id.*

4. The term "HIV" or "HIV Disease" has come into general usage as defining the entire syndrome from infection with the HIV to diagnosis of AIDS. See PRESIDENTIAL COMMISSION REPORT, *supra* note 1, at xvii.

5. Family in this context can be composed of father, mother and children, or it can be a single parent, childless couple, unmarried couple, or extended family unit. It includes biological or chosen, and any of the members of these many and varied combinations of families can be heterosexual or homosexual.

6. Social notoriety arose because many homosexual men contracted the disease. Indeed, AIDS is known as the "gay pneumonia" and the "gay plague." Jarvis, *AIDS: A Global View*, 12 NOVA L. REV. 988, 990-91 (1988). However, while a large number of HIV infected persons are homosexual or bisexual men who engage in unprotected sexual relations, the demographics of AIDS has begun to shift within major cities, with the percentage of cases of homosexual men decreasing. AIDS AND THE LAW: A GUIDE FOR THE PUBLIC (H. Dalton & S. Burris, eds.) [hereinafter AIDS AND THE LAW]. Despite this trend, public perception has changed very little. *Id.* at 290.

7. Brown, *AIDS: The Public Policy Imperative*, 7 ST. LOUIS U. PUB. L. REV. 11 (1988). Consider, for instance, the words of Senator Jack Kemp: "While AIDS is a public-health issue, it includes medical and moral problems which cannot be ignored. Moral relativism is the AIDS virus of a democracy: it suppresses society's normal immune response, so that a culture succumbs by

adamantly anti-gay position and has renewed heated debate over the acceptability of homosexuality.<sup>8</sup> Complaints of undisguised discrimination related to homosexuality have increased dramatically.<sup>9</sup> Indeed, certain political and religious groups contend that homosexuals are dangerous<sup>10</sup> and strongly advocate quarantine.<sup>11</sup>

In addition, early media reports fueled public hysteria.<sup>12</sup> Unwarranted fear and misunderstanding continue to thrive as campaigns to educate the public regarding the realities of the disease have failed. An alarming number of people either under-react or over-react to the possible risks of transmission. Consequently, many persons fail to take proper precautions against the disease,<sup>13</sup> while other persons maintain unfounded fears and bigotry against

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stages to the infections of self-destructive behavior." *Where the Candidates Stand on Aids*, *Playboy*, Oct. 1987, 50-51 & 54, reprinted in CLOSEN, AIDS: CASES AND MATERIALS 216 (1989) [hereinafter AIDS CASES].

8. AIDS CASES, *supra* note 7, at 216-19.

9. See generally SAN FRANCISCO HUMAN RIGHTS COMMISSION, REPORT ON SEXUAL ORIENTATION AND AIDS DISCRIMINATION, FY 1986-87, (Feb. 1988); NEW YORK CITY COMMISSION ON HUMAN RIGHTS, REPORT ON DISCRIMINATION AGAINST PEOPLE WITH AIDS (1986) (discussions on the epidemic fear of discrimination associated with AIDS). Consider, for instance, the recent actions of Cracker Barrel, a restaurant chain who fired their gay employees. "In announcing earlier this year that homosexual employees would be dismissed, a company memorandum said Cracker Barrel was founded on a 'concept of traditional American values.'" Smothers, *Company Ousts Gay Workers, Then Reconsiders*, N.Y. Times, Feb. 28, 1991, at A22, col. 3. Continued employment of those 'whose sexual preference fails to demonstrate normal heterosexual values which have been the foundation of families in our society' appears inconsistent with those values and the 'perceived values of our customer base' it said. *Id.* After talks with representatives of a gay rights group, Cracker Barrel rescinded its policy on February 22, 1991. *Id.* For additional examples of continuing discrimination see 4 AIDS LEGAL COUNCIL OF CHICAGO NEWSLETTER 3 (Nov.-Dec. 1990).

10. For instance, the Vatican has used AIDS to reinforce teachings on the immorality of homosexuality, invoking homosexuality as a synonym for AIDS. This dogma is illustrated in a document released by the Vatican in 1987, which states that "homosexuality may seriously threaten the lives and well-being of a large number of people." AIDS AND THE LAW, *supra* note 6, at 291.

11. For instance, Stephen C. Joseph, the former New York City Commissioner of Health, stated that "concern for the individual liberties of those currently infected must take second place to the protection of the uninfected and the larger community." Joseph, *Quarantine: Sometimes a Duty*, N.Y. Times, Feb. 10, 1990, at A25, col. 1. See generally Curran & Gostin, *The Limits of Compulsion in Controlling AIDS*, 16 HASTINGS CENT. REP. 24-9 (Supp. 1986) (for a complete discussion relating to quarantine); Curran & Gostin, *Legal Control Measures for AIDS: Reporting Requirements, Surveillance, Quarantine, and Regulation of Public Meeting Places*, 77 AM. J. PUB. HEALTH 214-8 (1987) (same).

12. For a collection of articles relating to early media coverage see AIDS CASES *supra* note 7, at 74-89.

13. Eckholm, *Cut Down As They Grow Up: AIDS Stalks Gay Teenagers*, N.Y. Times, Dec. 13, 1990, at A1, col. 1. Evidence suggests that despite public awareness campaigns, homosexual teenagers and intravenous drug users continue to engage in high risk behavior. *Id.*

those who have contacted HIV.<sup>14</sup> This pernicious ignorance perpetuates the myths surrounding HIV and feeds the invidious discrimination that both the HIV client and the family must endure. Thus, a person diagnosed with AIDS suffers from devastating physical deterioration and from equally devastating social rejection.

Therefore, planning for the client with AIDS is intense. "Suicide, funerals, dying, discrimination, harassment, and abandonment continuing every day, unending and relentless, make every interaction intense."<sup>15</sup> It requires abilities beyond recognizing legal issues and drafting documents. The attorney must pay special attention to the client's state of mind, his chosen lifestyle, his family and his intended beneficiaries as they relate to the client's testamentary desires. In order to create an estate plan that is both tailored to and sensitive to the special considerations of the HIV client, the lawyer must: accept alternative, non-traditional life styles; be aware of the various forms of discrimination that the client may be subjected to; be familiar with the progression of HIV disease;<sup>16</sup> recognize the social and emotional effects upon both the client and the client's "family;" and, play dual roles—legal advisor and psychologist.

#### A. The "Family"

Not unlike any other client, the HIV client is primarily concerned with preserving assets to leave certain, identifiable beneficiaries. Traditionally, the beneficiaries were persons related through a legally recognized relationship. Recently, however, the concept of family has expanded to include "non-traditional" family units consisting of monogamous relationships between unrelated persons, such as homosexual life partners.<sup>17</sup>

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14. 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, 838 (1986).

15. Rivera, *Lawyers, Clients, and AIDS: Some Notes From the Trenches*, 49 OHIO ST. L.J. 883, 927 (1989).

16. *Id.* at 886. The medical progression is outside the scope of this article. For a thorough discussion of the medical aspects of HIV see AIDS CASES, *supra* note 7, at 111-176; PRESIDENTIAL COMMISSION REPORT, *supra* note 1, at xvii.

17. See, e.g., *In re M.D.*, California Unemployment Insurance Appeals Board, No. SF24774 (Sept. 13, 1985) reprinted in AIDS CASES, *supra* note 7, at 528 (Appeals Board held that unemployment insurance benefits' claimant established a meaningful relationship, even though it was not a legal relationship, which entitled him to leave employment with good cause in order to assume responsibility for the 24 hour a day nursing care of life partner who was suffering from AIDS); *Donovan v. County of Los Angeles and State Compensation Insurance Fund*, 73 LA 385-107 (Nov. 3, 1983) reprinted in AIDS CASES, *supra* note 7, at 530 (in an action to collect worker's compensation benefits, Board held that a homosexual relationship can satisfy the "good faith membership of the household" requirement for establishing dependency).

If the HIV client is gay, he/she may intend to leave all or the majority of assets to a "family" member who is neither blood-related nor who maintains a legally recognized relationship, to the exclusion of traditional family members. Therefore, in order to design an effective estate plan, the lawyer must understand the dynamics of the client's family. Additionally, effective estate planning for the family affected by HIV requires that the lawyer evaluate the client's risk behaviors in order to ascertain whether or not non-client family members are at risk.<sup>18</sup> Any estate plan should then be responsive to these relationships.

The attorney who represents a gay client with HIV must attempt to ascertain whether or not the client's biological family knows of the client's life style and medical condition and the impact this knowledge has had upon them.<sup>19</sup> As the second scenario suggests, clients in a gay family may face concerns of hostility between their biological family and their partner, or of personal rejection and lack of support. This may be particularly true where the client has not previously revealed his or her sexual orientation. The biological family must suddenly accept two facts — their close relative is gay and has a terminal illness. The combination of grief, anger, fear, guilt, and misunderstanding can result in a biological family that is unpredictable at best, and vindictive at worst. Further complications exist where the life partner, who is also the primary beneficiary, is also HIV seropositive. The lawyer's most difficult task may be to protect the interests of the life partner against the biological family.

While the majority of HIV cases are due to male homosexual/bisexual relations (60%), the number of persons infected with HIV through heterosexual sex is increasing. From October 1989 through September 1990, 6% of reported AIDS cases were transmitted through heterosexual sex.<sup>20</sup> Therefore, as the first scenario suggests, the lawyer should also be prepared to plan the estate for a client who has formed a traditional family unit, but nevertheless seeks special estate planning due to HIV.

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18. Surgeon General C. Everett Koop stresses that it is no longer appropriate to speak of high risk "groups" for HIV, but of high risk "behaviors." Risk of infection with the virus is not determined by membership in a particular population but by individual activities. UNDERSTANDING AIDS: A MESSAGE FROM THE SURGEON GENERAL, HHS Pub. No. (CDC) HHS-88-8404 (materials available from U.S. Dept. of Health and Human Services, Public Health Service, Centers for Disease Control, P.O. Box 6003, Rockville, Md. 20850).

19. A popular "perception about the impact of AIDS among gay men is that it is restricted to the sick and dying. In fact, its impact may be just as powerful among the well and the living." Sullivan, *Gay Life; Gay Death: Social Impact of AIDS*, 203 THE NEW REPUBLIC 19, 22 (Dec. 17, 1990).

20. Centers for Disease Control, HIV/AIDS SURVEILLANCE YEAR END REPORT (March 1991).

The heterosexual client who is infected with HIV may be faced not only with a life-threatening illness, but also an emotional and financial crisis due to charges of homosexuality, bisexuality or illicit drug use. The family may now suffer from the social ignominy that is attached to the gay and intravenous drug user communities. Even if no such accusations are made, the community may isolate the client and his/her family due to fears of transmission.<sup>21</sup>

Additionally, evaluation of the client's behavior may reveal that the spouse is at risk. The lawyer faced with this scenario should be aware that the stigma, the resulting rejection by society in general, and the possible risk to other family members complicates estate planning matters for the traditional family.<sup>22</sup>

The stigma and disenfranchisement that exists in the white community for People Living With AIDS ("PLWA's") is exacerbated in the minority communities by nearly impenetrable cultural taboos against homosexuality.<sup>23</sup> The network of care that has been organized around PLWA's in the gay white community does not exist in the African-American and Hispanic communities.<sup>24</sup> An African-American or Hispanic male with HIV would rather admit to being an intravenous drug user than being gay.<sup>25</sup> Consequently, the client will be isolated from support systems within and outside his or her family. This same void exists for women living with HIV.<sup>26</sup> Protecting the minority client's family, therefore, requires

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21. The well-publicized case of Ryan White, an Indiana boy who contracted AIDS through a blood transfusion and who was denied admission to school, is a painful illustration of the inhumane response to AIDS. The White family were eventually forced to move to another city. In Florida, a family was burned out of their home amidst threats of violence because their child was infected with HIV. During Presidential Commission hearings, a mother from Tennessee testified that her family received death threats because her young son was infected with HIV. AIDS CASES, *supra* note 7, at 339.

22. Regardless of sexual orientation, the hemophiliac client and his/her family have special concerns. Although, due to recent medical advances, the hemophiliac may control his condition and live a normal life, many hemophiliacs were exposed to HIV through intravenous blood transfusions before screening precautions were taken. Consequently, people who once learned to cope with hemophilia are now challenged to learn to cope with HIV. "This population definitely has a unique reaction to the HIV epidemic, both because of their past experience with health difficulties and because of the mode of infection." Letter by Vicki L. Miller, M.A., Hemophilia Foundation of Illinois (Nov. 13 1990).

23. See Nickens, *AIDS, Race and the Law: The Social Construction of the Disease*, 12 NOVA L. REV. 1179 (1988).

24. See Smith, *Legal Issues Confronting Families Affected By HIV*, 24 J. MARSHALL L. REV. 545-547 (1991).

25. In 1986, in New York, "thirty-seven percent of black and Hispanic AIDS cases [were] due to gay transmission, and experts believe this is an underestimate, since many black and Hispanic men would sooner admit to being a junkie than to being gay." Sullivan, *supra* note 19, at 22.

26. Clements, *Women and AIDS: Questions of Health Care, Social Services and the Legal System*, 4 AIDS LEGAL COUNCIL OF CHICAGO NEWSLETTER 6

discretion and sensitivity to cultural issues.

### B. *Mental Health and Mental Impairment*

The lawyer who serves a HIV infected person must be cognizant of the mental health issues facing the client. In the majority of cases, the HIV client will be overwhelmed by the implications of a diagnosis of HIV seropositive or AIDS. "Health, social life and expectations for the future are altered. Some must also adjust to the loss of their jobs, their independence, their homes, to reduced personal finances, to lengthy hospital stays, and to tiring treatment programs. They must confront feelings of isolation from friends, loss of independence, and fear of dying."<sup>27</sup> The client may respond to these feelings by adamantly denying that there is an illness or that his/her life will be altered. Thus, where time is of the essence,<sup>28</sup> denial may prolong the time in which the client seeks estate planning. The attorney must respond by "replacing denial with incentive."<sup>29</sup> As discussed below, failure to plan the estate in the earlier phases of HIV disease may give cause for challenging the client's testamentary dispositions after the client has died.

The client who overcomes denial and seeks estate planning may also seek an attorney who will relieve the client from making further decisions. The client may appear uncooperative and may make gathering relevant information difficult. However, the attorney must remember that "the majority of persons with AIDS or HIV infection are competent and can plan for the possibility of fu-

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(Nov.-Dec. 1990). Clements notes that a recent study found that 34.7% of women with AIDS had no informal support, such as help with child care and friends, while 54% of these women had no formal support including treatment and counseling. *Id.* Furthermore, because HIV/AIDS was first identified in men, the initial response was male oriented, including the CDC's surveillance definition of AIDS. *Id.* CDC has yet to alter its list of symptoms to include many symptoms occurring in HIV positive women. *Id.* In addition, women, children, and minorities are largely excluded from trials of experimental drugs; therefore, drugs approved in clinical trials will be approved on the basis of the white male protocol.

27. R. ACHTENBERG, *SEXUAL ORIENTATION AND THE LAW* sec. 13-02 (1987).

28. There is an urgency about estate planning for the client with HIV. Although the length of survival time after diagnosis with AIDS depends, in part, on the initial opportunistic infection, a recent study conducted in San Francisco suggests that the median survival for all patients with HIV is 18.4 months. Lempe, *Survival Trends For Patients with AIDS*, 263 J. A.M.A. 402-406 (1990). This span of time is relevant to the restrictions on wealth transfers for eligibility for public benefits, for the incontestability clause of most life insurance policies, and for the pre-existing condition clauses of most health insurance policies. Schatz, *The Crisis in AIDS and Health Insurance*, *Barrister Magazine* 45-47 (Spring 1989), reprinted in *AIDS Cases*, *supra* note 7, at 522-23. A client who plans disposition of his estate in the earlier phases of HIV can better plan financially to meet the high cost of AIDS care without impoverishing the family.

29. Senak, *When Your Client Has AIDS*, 74 A.B.A. J. 76, 78 (1988).



ture incapacity, without depending upon a substitute decisionmaker's input and without the risk that their decisions will be overturned."<sup>30</sup> Therefore, the attorney must demonstrate the benefits of coming to terms with the illness. In order to do so, the attorney must be practiced in the art of listening and must motivate the client to act swiftly in order to retain control and to make independent testamentary decisions.

The client may demonstrate symptoms of emotional disturbance or mental impairment caused by an organic mental disorder known as AIDS Related Dementia (ADC).<sup>31</sup> Evidence indicates that the majority of AIDS patients will develop ADC at some point during their illness.<sup>32</sup> Patients with ADC may be slightly inattentive and distractible, but overall intellectual abilities are preserved and formal testing may not reveal any serious drop in the intelligence quotient until the dementia has advanced significantly.<sup>33</sup> In most instances, ADC is not incapacitating and its symptoms may never be manifested.<sup>34</sup>

Studies have shown that the ability to choose disposition of property is seldom affected until the final stage of AIDS and then only in a small number of patients.<sup>35</sup> However, in general usage dementia is automatically defined as a severe impairment or loss of intellectual capacity and personality integration.<sup>36</sup> Thus, a person with AIDS may suffer additional stigma due to the disease's neurological implications. The estate planning attorney must consider this stigma and the resulting vulnerability of the client's testamentary documents based upon mental incapacity.<sup>37</sup> The primary

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30. Parry, *Life Services Planning for Persons with AIDS-Related Mental Illnesses*, 13 MENTAL AND PHYSICAL DISABILITY L. REP. 82, 83 (1989).

31. *Id.* at 82.

32. *Id.* at 82 n.1. ADC is caused by direct infiltration of HIV into the brain tissue, causing subcortical dementia. In one study, apathy, social withdrawal and emotional blunting were the most common initial behavioral symptoms. Buckingham & Van Gorp, *Essential Knowledge About AIDS Dementia*, SOCIAL WORK, 112, 113 (Mar.-Apr. 1988). Other symptoms include cognitive impairment, language disorder, movement disorders, psychosis, mood disorders, delirium, and dementia. Parry, *supra* note 30, at 82.

33. Buckingham & Van Gorp, *supra* note 32, at 113.

34. Parry, *supra* note 30, at 83.

35. Rivera, *supra* note 15, at 894.

36. Seaman, *Dementia and HIV-Infection, Treatment Issues*, THE GMHC NEWSLETTER OF EXPERIMENTAL AIDS THERAPIES (June 1, 1988), reprinted in AIDS CASES, *supra* note 7, at 522-23.

37. Authors Buckingham and Van Gorp found that a number of families challenged the wills of AIDS patients after their death on the grounds of mental incapacity due to ADC. They recommend referral for neuropsychological evaluation in order to determine the level of the patient's judgment and competency to make a will, as well as in documenting the client's mental state in the event that legal challenges are brought later. Buckingham & Van Gorp, *supra* note 32, at 114.

weapon against such an attack is early planning.<sup>38</sup>

### III. ESTATE PLANNING TECHNIQUES

For many HIV-positive clients, their purpose in seeking legal counsel is to seek assistance in planning their estates. Given the youth of many people who are HIV-positive, and the high cost of medical treatment of various HIV-related infections, many clients will have relatively small estates to pass. That should not diminish, however, the lawyer's efforts or the lawyer's knowledge of the range of available tools for estate planning.

#### A. Wills

A will is used as the primary estate planning tool for most clients. In many instances, the PLWA will see little reason for executing a will because assets have been depleted due to exorbitant health care costs. However, the will of the PLWA serves a purpose aside from disbursing assets — the will empowers the PLWA and demonstrates triumph over the feelings of isolation and helplessness.<sup>39</sup> In addition, a few personal items of the deceased serve as mementos for the surviving family members. Therefore, even where the client has few remaining or nominal assets, a will is highly recommended.

The attorney must draft the will as though the testator's intent will be challenged on three fronts: 1) faulty execution; 2) mental incapacity; and 3) undue influence. Certain precautions should be taken that will weaken the strength of these challenges.

First, the formalities of execution must be strictly adhered to.<sup>40</sup>

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38. For a discussion of estate planning and mental capacity in the HIV-AIDS context, see *infra* notes 41-47 and accompanying text.

39. Senak, *When Your Client Has AIDS*, 74 A.B.A. J. 76, 78 (Jul. 1988).

40. In Illinois, the formalities are that "every will shall be in writing, signed by the testator or by some person in his presence and by his direction and attested in the presence of the testator by two (2) or more credible witnesses." ILL. REV. STAT. ch. 110 1/2, para. 4-3 (1990). The law of the forum in which the will is executed and/or where property is retained should be observed. Some states require additional witnesses, and other formalities. Additionally, careful consideration should be given to the choice of witnesses. Professional people, who in the course of their daily business must evaluate the mental state of people are preferred. Mock and Tobin, *Estate Planning for Clients with AIDS*, 7 ST. LOUIS U. PUB. L. REV. 177, 183 n. 30 (1988). Alternatively, witnesses who are acquainted with the testator but who are not so intimately involved as to compromise their evaluation of the testator's mental state should be used. See *Estate of Harry H. Wilford*, No. 1987-236 (Court of Common Pleas, North Hampton City, Pa. June 26, 1988) reprinted in AIDS CASES, *supra* note 7, at 512-19 (subscribing witnesses had not seen testator for long period of time and had no previous observations of testator during period in which testator suffered from mental deterioration due to ADC). Finally, if the client is gay, one or more witnesses should be heterosexual who are sympathetic to alternative life styles. Mock and Tobin, *supra* note 40, at 183.

Second, thorough pre-will conferences wherein the client's testamentary capacity and emotional independence are assessed should be conducted. Astute personal observations and cogent discussions during the conferences may be pivotal in upholding the validity of the will.

### 1. *Mental Capacity*

The HIV-positive client must show testamentary capacity at the signing ceremony of the will. However, testamentary capacity does not mean perfect sanity. Indeed, a person suffering from dementia may be perfectly capable of executing a valid will.<sup>41</sup> The client need only demonstrate three things: 1) the nature of the property he is disposing of; 2) who the natural objects of his bounty are; and 3) the nature of the testamentary act s/he is performing.<sup>42</sup>

The attorney should obtain an opinion from the client's physician where the PLWA exhibits behavior that places his mental capacity in doubt. The attorney should ascertain whether the client is taking prescribed medication or taking other drugs that affect mental abilities and/or behavior or whether the client is suffering from ADC. Mind and/or behavior altering drugs should be suspended prior to the signing ceremony, if possible.<sup>43</sup> If the client is suffering from ADC, the attorney should request a statement from the physician that establishes the minimal effect it has upon the client's mental abilities.

As mentioned, the client must demonstrate testamentary capacity at the time the will is signed.<sup>44</sup> "The decedent's intent, no matter how consistently expressed to numerous people over the years, confirmed by the designation of his insurance beneficiaries and by his instructions to his attorney, is an insufficient foundation to sustain his will."<sup>45</sup> Therefore, the attorney must preserve evidence that can be used to rebut any later claim of mental incapacity.

Several steps may be instituted that create a record supporting testamentary capacity at the time of signing. First, on the day of execution, the client's physician can be asked to place a notation in the client's medical record indicating sound mental abilities. Sec-

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41. The comprehension level required to exercise the basic right to make a will is low. Parry, *supra* note 30, at 86 (1989); see *Roller v. Kurtz*, 6 Ill.2d 618, 627, 129 N.E.2d 693 (1955).

42. Mock and Tobin, *supra* note 40, at 180-81.

43. See *In re Thaler*, N.Y.L.J. at A7, col. 1 (Oct. 3, 1985) reprinted in AIDS CASES, *supra* note 7, at 509 (contestant claimed that testator was "heavily medicated and extremely incoherent").

44. *Malone v. Malone*, 16 Ill. App. 2d 291, 299-300, 167 N.E.2d 703, 707 (1960).

45. *Estate of Harry H. Wilford*, No. 1987-236 (Court of Common Pleas, North Hampton City, Pa.) (June 26, 1988) reprinted in AIDS CASES, *supra* note 7, at 512.

ond, the client can submit a brief, handwritten statement reciting the elements of proof necessary to prove testamentary capacity. In addition, the attorney should retain legible and concise notes outlining the client's testamentary capacity. Third, an audio tape of the client's responses to specific questions designed to prove testamentary capacity can be made.<sup>46</sup> In some cases, a video tape of the entire execution ceremony might be advised.<sup>47</sup>

Frequently, in order to anticipate the needs of a life partner, the gay or lesbian client will disinherit biological family members who are otherwise well provided for. Disinheritance must be made by specific language and the testator must effectively leave his entire estate to another person or entity.<sup>48</sup> Clauses should be inserted into the will that anticipate possible challenges by the disinherited family members. The will should contain a clause that specifically identifies the "natural objects of his bounty" in order to rebut any claim that testamentary capacity was lacking.<sup>49</sup> An additional clause may be inserted:

By way of explanation, I desire to say that I have much love and affection for (my son, sister, father cousin, etc.)(name)—, but I make no (further) bequests to them because they are financially solvent and well able to care for themselves. My association with my (friend, lover, etc.)(name)—, extends over a long period of time; we have worked together to enhance our joint assets, and I feel that she/he is entitled to benefit from me as she/he feels I should benefit from her/him.<sup>50</sup>

Complete disinheritance should be discouraged. Whenever feasible, biological family members should be given a small item of personal or sentimental value. This practice will often appease the family members and act as a deterrent to potential challenges.

## 2. Undue Influence

Particularly in the advanced stages of AIDS, the PLWA is phys-

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46. Due to possible claims of ADC, the use of audio tapes should be used with caution when the testator's speech has become slurred or slowed and very low pitched. While slurred or slow speech does not reflect incapacity, it may be interpreted as indicative of underlying cognitive impairment.

47. However, execution of wills and other documents in a hospital setting should be avoided. Video taping of signing ceremonies in hospitals carries the risk that the tape will be evidence for will contestants, showing a sickly, weakened testator who appears incapacitated.

48. *Shea v. Lyons*, 47 Ill. App. 2d 187, 192, 198 N.E.2d 151, 154 (1964) ("testator's heirs cannot be disinherited on mere conjuncture, and when the testator seeks to disinherit them he must express his intention clearly, either by express words or *necessary implication*") (emphasis in original); *In Re Cancik*, 106 Ill.2d 11, 18, 476 N.E.2d 738, 741 (1985) ("the only method of disinheriting [an heir] is to give the property to someone else . . .").

49. *Mock and Tobin*, *supra* note 40, at 183.

50. 2 AIDS LEGAL COUNCIL OF CHICAGO NEWSLETTER 6 (Feb. 1989).

ically and emotionally weakened.<sup>51</sup> Because the PLWA necessarily depends more heavily upon the primary care giver to provide medical and emotional support, the PLWA may be more susceptible to the influences of the care giver. Consequently, it is argued, the primary care giver has the opportunity to impose his or her will onto the PLWA. Under such circumstances, the validity of the will may be attacked on the grounds of undue influence. This is true whether the PLWA is heterosexual or homosexual.

"The undue influence which will void a will must be directly connected with the execution of the instrument and operate at the time it is made. It must be specifically directed toward procuring the will in favor of a particular party or parties, and it must be such as to destroy the freedom of the testator's will and render the instrument more the offspring of the will of another than of his own."<sup>52</sup> A rebuttable presumption of undue influence arises when a person is in a fiduciary relationship with the testator, receives a substantial benefit, was in a position of dominance, and procured the execution of the will.<sup>53</sup>

For several reasons, the will of a gay PLWA is more susceptible to claims of undue influence than the will of most heterosexual clients. First, in most instances, the life partner will also be both the primary care giver and the primary beneficiary. A disinherited biological family who is hostile to the PLWA's alternative life style is more prone to challenging the validity of the will. Second, although heterosexual spouses are considered to be "natural objects of one's bounty," homosexual spouses are considered illegitimate beneficiaries who improperly influence the testator's decisions.<sup>54</sup> Third, heterosexual spouses are expected to have a strong influence on each other, while the influence between homosexual spouses is considered unnatural and undue.<sup>55</sup> Finally, the legal system disfavors homosexual relationships and may be blemished by an unstated homophobia.<sup>56</sup>

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51. See PRESIDENTIAL COMMISSION REPORT, *supra* note 1 for an in-depth discussion on the advanced stages of AIDS.

52. *In re Estate of Lempke*, 203 Ill. App. 3d 999, 1005, 561 N.E.2d 350, 354 (1990).

53. *In re the Estate of Walls*, 203 Ill. App. 3d 574, 580, 561 N.E.2d 344, 347-48 (1990).

54. See, e.g., *In re Spaulding*, 83 Cal. App. 2d 15, 197 P.2d 889 (1947); *In re Anonymous*, 75 Misc. 2d 133, 347 N.Y.S.2d 263 (N.Y. Sup. Ct. 1973); *In re Kaufman*, 20 A.D.2d 464, 247 N.Y.S.2d 664 (N.Y. App. Div. 1964) *aff'd*, 15 N.Y.2d 825, 205 N.E.2d 864, 257 N.Y.S.2d 941 (1965). For a detailed analysis of each of these cases see Sherman, *Undue Influence and the Homosexual Testator*, 42 U. PITT. L. REV. 225, 232-48 (1981).

55. Rivera, *Queer Law: Sexual Orientation in the Mid Eighties, Part II*, 11 U. DAYTON L. REV. 275, 380-83 (1986).

56. See *In re Kaufmann*, 20 A.D.2d 464, 247 N.Y.S.2d 664 (1964), *aff'd*, 15 N.Y.2d 825, 205 N.E.2d 864, 257 N.Y.S.2d 941 (1963). Mock and Tobin find an

Potential undue influence claims can be avoided if the attorney implements some precautionary measures. First, the attorney must exclude the unrelated beneficiary from the planning process. The beneficiary should not be present either during the attorney-client interviews or during the execution of the will.<sup>57</sup> Second, all expressions of intent must come directly from the client. Hand-written instructions by the client during the planning process will provide evidence of the client's testamentary intent and will establish that he was not induced to sign a set of prewritten forms.<sup>58</sup> Third, the beneficiary should not be named executor if there is a disinterested party available. Fourth, whenever possible, the pre-will interviews and execution should take place in a neutral setting, such as the attorney's office, rather than in the shared home of the client and life partner.<sup>59</sup> Finally, the testator should state clearly to witnesses that he has read the will and that it reflects his own free will.<sup>60</sup>

### 3. In general

As a general matter, the attorney should draft the will to include attestation clauses and self-proving devices, whether or not required under the law of the state of domicile.<sup>61</sup> In some cases, an *in terrorem* clause, or no contest clause, may also be an effective deterrent to potential challenges.<sup>62</sup> To be effective however, the client must bequeath something of substantial value to the anticipated contestant, which will be lost if the will is challenged. This limits the practical application of *in terrorem* clauses to the fairly affluent client. However, the psychological application is worth considering.

Another deterrent to potential challenges is the use of multiple wills with essentially the same dispositive provisions executed approximately one month apart. Executing serial wills acts as a deter-

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underlying current in the opinion suggesting that the court disapproved of the long-term homosexual relationship between the testator and the beneficiary and that this disapproval had an impact on the Court's decision in finding undue influence. Mock and Tobin, *supra* note 40, at 188.

57. Mock and Tobin, *supra* note 40, at 188.

58. *Id.* at 189.

59. *Id.*

60. *Id.*

61. *Id.* at 183.

62. Generally, conditions in a clause against contesting the will or attempting to set it aside are valid. 5 W.BOWE & D. PARKER, PAGE ON WILLS, sec. 44.29 (1962). However, even though they are valid, conditions against contests are disfavored by courts and are very strictly construed. *Id.* See *Estate of Wojtalewicz v. Woitel*, 93 Ill.App.3d 1061, 418 N.E.2d 418 (1981) *cert. denied*, 49 Ill. Dec. 564 (1981) (court held that enforcement of intent of testator as expressed by *in terrorem* clause of will forbidding any proceeding to challenge any provisions of will would violate the law and public policy of the state). Therefore, the lawyer must carefully draft the *in terrorem* clause.

rent because it necessitates multiple contests. If the most recent will is declared invalid, the most recent prior will, if not revoked or invalid itself, will control disposition of the testator's assets.<sup>63</sup> Knowledge of the existence of additional wills, and therefore additional contests, may be enough to discourage the disinherited heir.

The extent to which the attorney must go in order to create an infallible record depends, in part, on the possibility of challenge from the testator's family. The attorney's personal observations and discussions during the pre-will interview process are important in ascertaining the potential threat of challenge. Each natural heir must be identified and evaluated to determine his/her attitudes and expectations toward the client. The attorney can then take appropriate precautionary measures.

### B. Durable Power of Attorney for Property

AIDS is a debilitating disease, which in the latter stages frequently strips the PLWA of the physical or mental ability to conduct his/her affairs. Disability and incapacity should be anticipated and planned for accordingly. The most common method of preserving the client's independence until such time as s/he is no longer capable is through the use of a Durable Power of Attorney for Property.<sup>64</sup>

A power of attorney is a simple technique in which the principal nominates an agent or attorney-in-fact to act in the principal's place and on the principal's behalf in the event the principal becomes incapacitated. Under Illinois statutory law, an agent, or attorney-in-fact, is permitted to conduct the principal's personal business or make health care decisions "until the death of the principal notwithstanding any lapse of time, the principal's disability or

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63. Mock and Tobin, *supra* note 40, at 183.

64. All 50 states and the District of Columbia have enacted laws authorizing "durable powers of attorney." Schlesinger, *Estate and Financial Planning for the Aging or Incapacitated Client*, in TAX LAW & ESTATE PLANNING SERIES: ESTATE PLANNING & ADMINISTRATION COURSE BOOK SERIES, No. 191 10 (Practising L. Inst. 1990). The attorney should be aware that he may be confronted with conflicts of laws issues. Callahan, *The Use of Trusts in Planning for Persons Under Disability*, in TAX LAW & ESTATE PLANNING SERIES: ESTATE PLANNING & ADMINISTRATION COURSE BOOK SERIES, No. 178 100 (Practising L. Inst. 1988).

Note that some state statutes specifically allow the attorney-in-fact to make health care decisions for the incapacitated principal, including life support issues. As of June 14, 1990, states that have such a provision include: the District of Columbia, California, Georgia, Illinois, Kansas, Kentucky, Maine, Mississippi, New York, Nevada, Ohio, Oregon, Rhode Island, South Carolina, South Dakota, Tennessee, Texas, Vermont, West Virginia and Wisconsin. SHILLING AND STRAUSS, DURABLE POWER OF ATTORNEY FOR HEALTH CARE, ESTATE PLANNING STUDIES, HARRIS BANK TRUST DEPT. 4 (Oct. 1990) [hereinafter DURABLE POWER OF ATTORNEY]. See *infra* notes 65-75 and corresponding text for a discussion regarding Illinois' Durable Power of Attorney for Health Care.

incapacity or appointment of a guardian for the principal after the agency is signed," unless the principal otherwise limits the duration of the power.<sup>65</sup> The principal may delegate limited or all inclusive powers and may be assured "the provisions of the agency will control."<sup>66</sup> If the principal desires, the agent's powers may be revoked upon a determination that the principal is no longer disabled.<sup>67</sup>

The client must carefully evaluate the agent for reliability and ability to perform as required. The agent is under no duty to act; however, when the power is exercised the agent must use due care.<sup>68</sup> If the agent fails to exercise due care, s/he may be liable for negligence.<sup>69</sup> Furthermore, if the court finds that the agent is not acting for the benefit of the principal, the court may appoint a guardian and direct the guardian to revoke the agency.<sup>70</sup> Note, however, that the agent "is not liable or limited merely because the agent also benefits from the act, has individual or conflicting interests in relation to the property, . . . or acts in a different manner with respect to the agency and the agent's individual interests."<sup>71</sup> Third persons who act in good faith reliance on the agency are protected as though they dealt directly with the principal.<sup>72</sup> Conversely, one who fails to comply with a direction of the agent arbitrarily or without reasonable cause will be subject to civil liability.<sup>73</sup>

The Durable Power of Attorney gives the PLWA the power to choose his/her surrogate decision-maker before becoming incapacitated. While this may appear to be an advantage to the lawyer, the client may be hesitant to execute a Power of Attorney for fear of losing control, whether the client is healthy or disabled. There are three drafting techniques that address a reluctant client's concerns. First, the power can "spring" into viability only upon, and for the duration of, the client's disability.<sup>74</sup> In Illinois, inserting the phrase "upon my disability as determined by . . ." in place of an effective

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65. ILL. REV. STAT. ch. 110 1/2, para. 802-5 (1990).

66. *Id.* para. 802-4. Note, however, that where the Power of Attorney is limited, appointment of a guardian may be necessary for the management of other aspects of the principal's affairs. Schlesinger, *supra* note 64, at 93.

67. ILL. REV. STAT. ch. 110 1/2, para. 802-5 (1990).

68. *Id.* para. 802-7.

69. *Id.*

70. Achtenberg, *supra* note 27, at 4-23. Without a court order, the guardian will have no authority over matters included in the Durable Power of Attorney. ILL. REV. STAT. ch. 110 1/2, para. 802-10 (1990).

71. ILL. REV. STAT. ch. 110 1/2, para. 802-7 (1990). Thus, for example, both the wife and the business partner of the client in the first scenario are qualified agents.

72. *Id.* para. 802-8.

73. *Id.*

74. *Id.* para. 802-4(a) which provides that "the principal may specify in the agency the event or time when the agency will begin and terminate "



date is one option.<sup>75</sup>

Second, although of questionable value in this context, the duration of the power may be limited. When the Power of Attorney expires, a new power may be executed. In this way, the power is kept fresh.<sup>76</sup> This approach is designed for the client who will be capable of executing serial powers in the future.

The client who is HIV seropositive may lose capacity to execute future Powers of Attorney. Therefore, a third approach is recommended: the duration of the power should continue to the death of the principal, but should be re-executed every two-three years for as long as the client remains competent.<sup>77</sup> Thus, the vitality of the power is retained and is not threatened by the incapacity of the client.<sup>78</sup>

In some states, including Illinois, a statutory form for Powers of Attorney are available.<sup>79</sup> Other documents may be used that are in "substantially the same form" as the statutory form.<sup>80</sup> However, the attorney should be cautious when using forms other than those drafted by the legislature. The better practice is to add, delete, or attach changes to the statutory form.

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75. The primary disadvantage to a springing durable power is that the disability may have to be conclusively established to a third person in order for him to honor the power. See Callahan, *supra* note 64, at 105. To avoid a court proceeding, care must be taken to define disability and to provide for the process by which that disability will be determined. *Id.* In addition, some procedure or mechanism for objectively certifying the onset of disability should be written into the terms of the springing power. *Id.* at 107. For example, the language inserted may be: "upon my disability as determined upon examination and affidavit by —, according to the following definition —."

76. Rivera, *supra* note 15, at 897. The ABA Probate and Trust Division Subcouncil established a special Durable Power of Attorney Committee:

spurred by reports that, contrary to the intent of clients, some banks, insurance companies, title companies, mutual funds and brokerage firms are adopting arbitrary rules of 'staleness,' negating the power if too old. For example, in a few cases some companies have indicated that they will not honor a durable power of attorney more than one year after execution, notwithstanding the fact that the intent of the principal in signing the power is often that the agent has authority to take needed action many years in the future.

Schlesinger, *supra* note 64, at 45. The Uniform Probate Code meets this problem by providing that the durable power of attorney shall not be affected by a lapse of time and the power "shall be exercisable . . . unless it states a time of termination, notwithstanding the lapse of time since the execution of the instrument." UNIFORM PROBATE CODE § 5-501 (1987) (Uniform Durable Power of Attorney Act).

77. Nechin, *Effective Property Management for Elderly and Disabled Individuals*, CBA SEMINAR ON PLANNING FOR DISABILITY AND LONG TERM CARE 14 (1990).

78. The durable power of attorney should state that the lapse of time does not affect the power and it shall be exercisable unless it states a time of termination.

79. ILL. REV. STAT. ch. 110 1/2, paras. 803-3, 804-10 (1990).

80. *Id.*

### C. Trusts

For an HIV-positive client who has a family to protect, the use of a living trust can be an important estate planning tool. The living trust provides several desirable features to many estate plans.

First, a living trust is less vulnerable to contest than a durable power of attorney for property.<sup>81</sup> Lending institutions and other businesses may have been involved in the creation or operation of the trust during the settlor's lifetime, and therefore will have reputational and financial stakes in supporting the trust. Living trusts are more established and more familiar to most people than durable powers of attorney, and are therefore less likely to be questioned. In particular, the authority of a trustee is less likely to be challenged than is the authority of the holder of a durable power of attorney.

Second, a living trust allows the client to continue to control his property during periods of disability, through plans prepared in advance. Much as with the durable power of attorney, an attorney must define in the terms of the trust instrument a method for determining disability.<sup>82</sup> This will permit the trust to avoid court proceedings on this delicate issue. The settlor must name a co-trustee or successor trustee who will be empowered to take control upon a determination of the settlor's disability.<sup>83</sup> The trust instrument may provide for return of control to the settlor-trustee upon a determination that disability no longer exists.<sup>84</sup>

The same definition and method of determining disability must be included in both the durable power of attorney and the living trust for the same client. The Illinois Probate Code contains a definition of disability<sup>85</sup> that could provide some guidance. Consideration should be given, however, to refining that definition by providing some detailed specifications of disabilities that relate to the client's circumstances. For an HIV-positive client, possibilities include reference to AIDS-related dementia, or mental deterioration from opportunistic infections like toxoplasmosis. Physical disabilities from AIDS or related infections could also be considered for inclusion in the definition of disability.

Generally, a close relative or gay partner should not be called upon to make the determination of disability. Use of these persons to make the determination may raise questions of conflict of interest if they are trust or estate beneficiaries, and their close emotional

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81. Callahan, *supra* note 64, at 100.

82. Schlesinger, *supra* note 64, at 96.

83. *Id.* at 92-98.

84. *Id.* at 97.

85. ILL. REV. STAT. ch. 110 1/2, para. 11a (1990).

ties may make it difficult for them to make objective decisions. Similarly, the use of the successor or co-trustee to make the decision is inappropriate because of the increased financial authority and fees that will result from the shift of trust authority to that person. Similar considerations cloud the choice of the holder of the durable power of attorney to make the determination of disability. The most secure arrangement is to have one or two disinterested physicians make the determination. This avoids problems of conflict or emotional involvement, and adds experience in evaluating physical and mental capacity to the decision-making process. If particular physicians are named, alternates should be named as well.

Third, property controlled in a living trust will not be subject to probate proceedings upon the settlor's death.<sup>86</sup> Thus, probate may be avoided entirely if the client transfers all or substantially all of his or her assets into the living trust, or through other inter vivos transfers such as gifts. If a small amount of assets (other than realty) remains, the client's estate could be administered through the Illinois Small Estates Act,<sup>87</sup> which allows transfer of personalty totalling less than \$25,000 by affidavit.<sup>88</sup> This small estate procedure, or the avoidance of probate altogether, is generally desirable for HIV-positive clients who wish to avoid the public notice required by full-scale probate proceedings.<sup>89</sup>

Fourth, property included in a living trust will be under the trustee's control and not subject to revocation or amendment by a guardian if a guardianship should arise.<sup>90</sup> If substantially all of the client's assets are in living trusts, guardianship may be avoided altogether. This may be a worthwhile planning objective, because guardianship proceedings typically result in both delay and cost with the onset of disability.<sup>91</sup> If the incapacity is a result of critical

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86. Mock and Tobin, *supra* note 40, at 194.

87. ILL. REV. STAT. ch. 110 1/2, para. 25 (1990).

88. *Id.*

89. Note, however, that the time limitation for filing creditors claims is much shorter for assets that are subject to probate and much longer for assets in trust. This may, in some cases, make probate a desirable option, particularly considering the high cost of health care for PLWAs. Mock and Tobin, *supra* note 40, at 194.

90. ILL. REV. STAT. ch. 110 1/2, para. 11a-18(d) (1990).

91. Callahan, *supra* note 64, at 148. See also ILL. REV. STAT. ch. 110 1/2, paras. 11a-1 to 11a-13 (1990). Guardianship proceedings in Illinois require a petition accompanied by a written report on the proposed ward's disability, including evaluations and recommendations by at least one licensed physician. *Id.* paras. 11a-8, 11a-9. A hearing must be set within thirty (30) days of the petition with note to all parties named in the petition. *Id.* para. 11a-10(a). In many cases, a guardian ad litem will be appointed and entitled to reasonable compensation. *Id.* para. 11a-10(c). The court may also appoint and allow reasonable compensation for counsel for the respondent. *Id.* para. 11a-10(b). The respondent may have to be examined by experts who are also entitled to reasonable compensation. *Id.* para. 11a-11(b). Finally, the court must enter a written order stating

illness and death is imminent delays are particularly troublesome.<sup>92</sup> An HIV client may also wish to avoid the public aspects of guardianship proceedings, to protect his or her privacy. This may be so even in states, like Illinois, that allow guardianship proceedings to be closed to the public.<sup>93</sup>

Avoidance of guardianship through use of living trusts may have important psychological effects, as well. An HIV-positive client who makes conscious choices regarding asset management and who provides continuity and security for loved ones is exercising control over life's affairs. This is part of the crucially important sense of empowerment that the lawyer should help the client to achieve.

For a client who feels that even the loss of control symbolized by a living trust is too great, a convertible standby trust may provide an answer. A revocable trust is established, unfunded or minimally funded, with the client-settlor as trustee. This allows the client to continue to manage his or her assets as usual. A durable power of attorney is executed as a companion to the minimally-funded living trust. Under the durable power of attorney, the attorney-in-fact is given specific authority to fund the trust from the settlor's previously non-trust assets, once the client has become disabled. In addition, the trust converts from revocable to irrevocable upon the settlor's disability. The successor or co-trustee will then take over management of the trust assets.

If a trust is created properly, it may be unnecessary to appoint a guardian.<sup>94</sup> In order to accomplish this end, the durable power of attorney should contain a complete listing of the assets that are to be transferred to the trust upon the client's disability.<sup>95</sup> The trust should give the trustee the right to accept additional assets from whatever source, including the attorney-in-fact.<sup>96</sup> To complete the funding of this trust, the client's will should contain a trust pour-over provision.<sup>97</sup>

Fifth, a living trust may act as a vehicle to better health care during disability. Because many people with AIDS have had significant difficulty in obtaining prompt (or any) insurance coverage of

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the facultal basis for its findings and making the appointment. *Id.* para. 11a-12(b).

92. Callahan, *supra* note 64, at 148.

93. ILL. REV. STAT. ch. 110 1/2, para. 11a-11 (1990).

94. If the ward has any property not subject to the trust, a guardian may be necessary to manage that property. *See* ILL. REV. STAT. ch. 110 1/2, paras. 11a-17, 11a-18 (1990).

95. *See* Schlesinger, *supra* note 64, at 31 (discussing situations where the attorney-in-fact has been held to be operating ultra vires where gifts were made, absent specific authorizations).

96. *Id.* at 44-45.

97. *Id.*

health claims,<sup>98</sup> client eligibility for public health benefits is often a major planning goal. However, the client's personal assets may be completely exhausted before this goal is achieved. Through use of a living trust, it may be possible in some instances to reserve a small amount of assets for some personal comforts, and yet meet public eligibility requirements, provided planning is done far enough in advance.

For this to happen, the trust must have a provision giving the trustee absolute discretion over disbursements. Such a provision removes the beneficiary's right to payment from the trust. Thus, the beneficiary (who is also the settlor) has no enforceable rights to the trust assets until the trustee elects to make a distribution to the beneficiary, and the beneficiary's creditors have no right to the trust assets.<sup>99</sup> Shielding the client's assets in this manner may make it easier to qualify for public assistance without first rendering the client destitute.

Without a discretionary trust, future creditors may be able to reach the client's assets.<sup>100</sup> Protection of assets held in an irrevocable living trust will depend upon the degree of interest the settlor retains. Generally, a settlor who gives up total control of his or her assets held in trust may be able to protect those assets from present or future creditors. A creditor must prove that its claim was in existence at the creation of the trust.<sup>101</sup> Future claimants must prove that there was actual fraudulent intent on the settlor-debtor's part.<sup>102</sup> Moreover, beneficiaries of a trust can be protected from creditor claims through use of a spendthrift provision.<sup>103</sup>

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98. Schatz, *The Crisis in AIDS and Health Insurance*, BARRISTER MAGAZINE 45-47 (Spring 1989).

99. Messer, *Drafting Trusts for Disabled Beneficiaries*, 79 ILL. BAR J. 138, 139 (Mar. 1991). However, this provision will not defeat a state reimbursement claim in Illinois although alternative routes which achieve the same result exist. *Id.* at 139-140.

100. In general, if a revocable living trust is used, creditors will be able to reach the assets held in trust. See J. DUKEMINIER & S. JOHANSON, *WILLS, TRUSTS, AND ESTATES* 535 (4th ed. 1990).

101. See *Mandolini Co. v. Chicago Produce Suppliers, Inc.*, 184 Ill. App. 3d 578, 540 N.E.2d 505 (1989) (the general law in Illinois is that only those creditors with claims existing at the time of a transfer may bring a cause of action).

102. *Id.* at 584.

103. ILL. REV. STAT. ch. 110, para. 2-1403 (1990). A spendthrift clause provides that the trust funds cannot be attached by creditors of the beneficiary. Such clauses have been upheld in a variety of circumstances. See, e.g., *Dep't of Mental Health and Developmental Disabilities v. Phillips*, 114 Ill.2d 85, 500 N.E.2d 29 (1986) (despite statute giving Department of Mental Health right to recover reimbursement of expenditures, where trust was created to provide money for mentally handicapped beneficiary's education, maintenance, medical care, support, general welfare and comfortable living expenses that the Department of Mental Health was unable to furnish, Department was not entitled to reimbursement from trust fund); *Christ Hosp. v. Greenwald*, 82 Ill. App. 3d 1024, 403 N.E.2d 700 (1980) (spendthrift clause used to insulate insurance policy

One disadvantage of a living trust is its cost, which must be weighed against those of guardianship and probate proceedings. Attorneys' fees and asset transfer costs can equal or exceed the costs of alternate estate planning approaches.<sup>104</sup> Title to bank accounts, shares of stock, notes, bonds, and realty<sup>105</sup> must be reregistered.<sup>106</sup> Although the client may be able to handle some of these transfers *pro se*, at a savings, the attorney will have to be very careful in arranging for this approach. Failure to complete a transfer into trust may defeat the entire plan, throwing the client's estate into unanticipated expenses of guardianship and probate proceedings. For that reason, it is very important for the attorney to document a clear understanding with the client as to who bears the responsibility for transferring items of property into the trust.<sup>107</sup>

#### D. Other Lifetime Transfers

##### 1. Joint Tenancies

Another useful lifetime planning tool is the joint tenancy with right to survivorship. In a joint tenancy, two (or more) people share equal ownership interests of an asset.<sup>108</sup> Under a joint ten-

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proceeds from third-party judgment creditors, and contained in trust agreement which governed payment of pension benefits, was valid).

However, the lawyer must carefully draft the discretionary spendthrift trust to clearly express the settlor's intent that the trust be a supplementary support trust. Whether or not creditors may reach the trust funds depends on the settlor's intention. See generally J. DUKEMINIER & S. JOHANSON, *supra* note 100, at 548-568 (for a thorough discussion of spendthrift trusts). Therefore, even if the trustee has absolute discretion in disbursing monies, and the trust provides that the funds cannot be attached by any legal process, if the court finds that the settlor intended the spendthrift trust to pay certain debts, the funds can be attached. See, e.g., *Button v. Elmhurst Nat'l Bank*, 169 Ill. App. 3d 28, 522 N.E.2d 1368 (1988) (where the court determined that the settlor intended the testamentary spendthrift trust to reimburse the Dept. of Mental Health for services rendered to the beneficiary, despite the spendthrift clause). In determining whether the settlor intended the spendthrift trust to pay certain debts, unless the trust instrument provides otherwise, it will be assumed that the settlor was aware of debts he might be legally obligated to pay and that the trust was intended to pay for such debts. *Id.* at 43.

104. Nechn, *supra* note 77, at 3.

105. Transferring out of state real estate into a trust will avoid ancillary probate proceedings in the state where the real estate is located. When transferring real estate the lawyer must be aware of possible problems in the following areas: due on sale clauses in the mortgage; a right of first refusal if the property is a condominium; and, title problems. Additionally, it is recommended that the title policy be endorsed over to the trustee or a warranty deed be executed and to add the trustee as insured on fire and liability policies. Nechn, *supra* note 77, at 3.

106. *Id.*

107. *Id.*

108. According to common law, joint tenancy is created only when the parties, having identical interests, convey those interests simultaneously via the same instrument which is then held by one and the same undivided possession. See, e.g., *Olney Trust Bank v. Pitts*, 200 Ill. App. 3d 917, 921, 558 N.E.2d 398, 400

ancy, it is presumed that the property was intended as a gift to the surviving joint tenant.<sup>109</sup> After the death of one joint tenant, the remaining joint tenant will continue to own the property outright.<sup>110</sup> Any property can be held in joint tenancy, though joint tenancy in real property and joint bank accounts are the most frequently encountered uses of this device.

For the creation of an appropriate joint tenancy, the client must intend the ownership and survivorship consequences of a joint tenancy.<sup>111</sup> Therefore, the client's written document must clearly express such an intention.<sup>112</sup> Furthermore, the instrument setting forth a joint tenancy should comply with the general requirements of a will as to definitions of description of subject matter, parties and certainty of its object.<sup>113</sup>

A joint tenancy can be severed either voluntarily or involuntarily by destroying any one of the unities required for the joint tenancy.<sup>114</sup> Thus, a joint tenant can sever the tenancy by conveying his or her interest without consent or permission of the other.<sup>115</sup> A joint tenant's creditors can place a lien upon the debtor's interest in the property. However, a creditor's lien on a joint tenant's interest in the property will not effectuate a severance of the joint ten-

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(1990); *Minonk State Bank v. Grassman*, 103 Ill. App. 3d 1106, 1108, 432 N.E.2d 386, 388 (1982), *aff'd* 95 Ill. 2d 392 (1983). See also *In re Estate of Denler*, 80 Ill. App. 3d 1080, 400 N.E.2d 641 (1980) (discussing the creation of a joint account).

109. See *In re Estate of Clements*, 152 Ill. App. 3d 890, 894, 505 N.E.2d 7, 9 (1987); *Franklin v. Anna Nat'l Bank of Anna*, 140 Ill. App. 3d 533, 488 N.E.2d 1117 (1986).

110. See *In re Estate of Abbot*, 157 Ill. App. 3d 289, 292, 510 N.E.2d 619, 622 (1987); *Clements*, 152 Ill. App. 3d at 894, 505 N.E.2d at 9.

111. *O'Vadka v. Rend Lake Bank*, 203 Ill. App. 3d 1007, 1014-15, 561 N.E.2d 360, 365 (1990); *Franklin v. Anna National Bank of Anna*, 140 Ill. App. 3d 533, 536, 488 N.E.2d 1117, 1119 (1986); *In re Estate of Denler's*, 80 Ill. App. 3d 1080, 1087-88, 400 N.E.2d 641, 647 (1980). In Illinois, the presumption of donative intent may be overcome by clear and convincing evidence. *Estate of Dompke v. Dompke*, 186 Ill. App. 3d 930, 936, 542 N.E.2d 1222, 1225 (1989); *Clements*, 152 Ill. App. 3d at 894, 505 N.E.2d at 9. In evaluating donative intent, it is proper to take into consideration the facts surrounding the creation of the joint tenancy and all the circumstances and events occurring after the creation of the joint tenancy. *Abbott*, 157 Ill. App.3d at 292, 510 N.E.2d at 622; *In re Estate of Duncan*, 77 Ill. App. 3d 927, 397 N.E.2d 497 (1979) (after considering the facts and circumstances surrounding the creation of two savings accounts, court concluded the decedent had intended to create joint tenancy accounts); *Franklin*, 140 Ill. App.3d at 536, 488 N.E.2d at 1119. However, a donor's decision made subsequent to creation of the joint tenancy, that he did not want the proceeds to pass to the survivor may not, in itself, be sufficient to sever the joint tenancy.

112. *O'Vadka*, 203 Ill. App. 3d at 1014-15, 561 N.E.2d at 365.

113. *Id.* (specifically, the instrument creating a joint tenancy should follow the requirements of a will when setting forth descriptions of subject matter, the parties, and certainty of the instrument's object).

114. *Olney Trust Bank*, 200 Ill. App. 3d at 921, 558 N.E.2d at 400-401.

115. *Id.*

ancy,<sup>116</sup> although execution on a judgment against one of the tenants will.<sup>117</sup>

When planning the survivorship aspects of a joint tenancy, the client must consider the expected longevity of the planned co-tenant. When the client has HIV or AIDS and is planning to make a life partner who is also HIV seropositive as the co-tenant, the possibility exists that the co-tenant may become incompetent or die before the client. In that event, use of joint tenancy has been futile and the client might not then have the competence to make alternate dispositions of the property.

Because joint tenants do not owe a fiduciary duty to each other, the creator of a joint tenancy must have faith in the fiscal competence and good faith of the intended joint tenant. In particular, if the creator of the joint tenancy were to become incompetent, the remaining co-tenant must be trusted not to waste the jointly-held assets or to use them wrongfully.<sup>118</sup>

If these considerations do not discourage the client, joint tenancy may provide a simple and effective means for transferring property inter vivos, thereby avoiding probate and public scrutiny.

## 2. Totten Trusts

A client who wishes to avoid probate and to provide a spouse or life partner with cash funds only after the client's death might be advised to consider a Totten Trust. A Totten Trust is a simple device that allows the client to exercise independent control over funds held in a bank account during his/her lifetime.<sup>119</sup> The client need only establish a banking account and designate a beneficiary who becomes entitled to the funds upon the client's death. The depositor/client has sole authority to withdraw funds during his/her lifetime.<sup>120</sup> Upon the client's death, the beneficiary is immediately entitled to the balance of the account.<sup>121</sup>

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116. *Harms v. Sprague*, 105 Ill. 2d 215, 221-222, 473 N.E.2d 930, 933 (1984) (lien on real property will not sever joint tenancy absent conveyance by deed following expiration of a redemption period); *Van Antwerp v. Horan*, 390 Ill. 449, 455, 61 N.E.2d 358, 360-61 (1945).

117. *In re Estate of Brach*, 76 Ill. App. 3d 1050, 1053, 395 N.E.2d 583, 586 (1979).

118. It should be noted that should the HIV client be adjudicated incompetent and a conservator be appointed, whose only duty is to care for and manage the incompetent's estate, the joint tenancy will continue. See *Brach*, 76 Ill. App. 3d at 1053, 395 N.E.2d at 586.

119. See Note, *Totten Trust As Testamentary Substitute*, 41 ALB. L. REV. 605 (1977) (an indepth discussion on Totten Trusts).

120. *Achtenberg*, *supra* note 27, at 4-29.

121. *Id.* at para. 4-33.



### 3. Gifts

If there is little risk that the client's testamentary intent will be challenged, the client might consider gifting his/her assets to the desired beneficiary. Note, however, that gifts are subject to the same claims of undue influence and mental capacity as other testamentary dispositions.<sup>122</sup> Furthermore, if a court finds that the donor fraudulently conveyed the gift, it will be subject to the claims of creditors.<sup>123</sup> Nevertheless, if the requirements for making gifts are carefully followed,<sup>124</sup> a gift may be a quick, simple and emotionally satisfying way for the client to dispose of his/her property.<sup>125</sup>

### 4. Life Insurance

Life insurance can be a nominal investment which ensures a large sum of money upon the death of the insured. In addition, life insurance benefits pass directly to the named beneficiary upon the death of the insured, thereby avoiding probate proceedings.<sup>126</sup> Furthermore, proceeds paid to a beneficiary or to a trust are not subject to creditors' claims except as to premiums paid in fraud.<sup>127</sup>

The client should be made aware of the advantages of retaining life insurance and should be advised to promptly pay the premiums and to take advantage of all periodic offers by the insurer to increase coverage without further questioning or medical examination. On the other hand, the value of life insurance is considered an asset of the client under Medicaid rules. Thus, the client may have to cancel the policy in order to become eligible for Medicaid.<sup>128</sup>

If the client did not procure life insurance prior to contracting HIV, life insurance may be unavailable. The client should be made aware that insurance companies routinely require HIV antibody testing and deny coverage to those who test positive. Additionally, coverage may be denied based upon the answers to questions on the application that are very specifically and narrowly targeted to

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122. *Klaskin v. Klepak*, 126 Ill. 2d 376, 388, 534 N.E.2d 971, 975 (1989).

123. *See, e.g., Wilkey v. Wax*, 82 Ill. App. 2d 67, 69-70, 225 N.E.2d 813, 814 (1967) (creditor has claim upon gift if donor transferred gift with intent to defraud creditor).

124. Elements of a valid inter vivos gift are donative intent, donor's parting with exclusive dominion and control over the gift, and delivery to donee. *Rasmussen v. LaMagdelaine*, No. 2-90-0374, slip op. at 6 (Ill. App. Ct. Jan. 30, 1991); *Hall v. Country Casualty Ins. Co.*, 204 Ill. App. 3d 765, 778, 562 N.E.2d 640, 648 (1990).

125. *Mock and Tobin, supra* note 40, at 200.

126. *See* MUNCH, LIFE INSURANCE IN ESTATE PLANNING (1981) (for a thorough discussion on the use of life insurance in estate planning).

127. ILL. REV. STAT. ch. 110 1/2, para. 4-5 (1990).

128. *Rivera, supra* note 15, at 39. Cancelling the policy may be avoided if ownership of the policy is in another party or the policy is converted into an irrevocable funeral trust. *Id.*

symptoms of AIDS. Moreover, HIV antibody test results that are administered by an insurer are sent to the Medical Information Bureau, a national insurance clearinghouse.<sup>129</sup> Knowing this, the client may choose not to apply for life insurance.

### 5. Other

Other arrangements, such as stock purchase and profit sharing plans at the client's workplace, retirement plans, annuities, and certain types of bonds, allow the client to designate a death beneficiary. For that reason, they should be considered as useful, though limited, estate planning tools. Proceeds from these asset transfer arrangements will be paid directly to the beneficiary, thus avoiding probate.

## V. PLANNING FOR PERSONAL CARE

### A. Guardianships for Disabled Adults

Although guardianship proceedings will frequently prove time-consuming, public, and expensive, lawyers doing estate planning work for HIV-positive clients should be familiar with guardianship as a possible tool. It may be that the client has already made guardianship arrangements before consulting a lawyer, or indeed may be the subject of ongoing guardianship proceedings. If neither of these is true, it may be that the guardianship alternative should be considered, despite its drawbacks, for what it offers as a personal planning care device. In particular, nomination of a guardian for a HIV-positive client should be considered as a back-up to other plans that might be open to challenge.

The Illinois Probate Act permits a competent person to designate a guardian for his or her estate,<sup>130</sup> and a guardian for his or her person.<sup>131</sup> Both types of guardian would assume authority upon the disability of the principal, who would then become the ward. Technically, the nominee would assume guardianship upon appointment by a court, acting in the best interests of the principal.<sup>132</sup> Without court order, a person nominated as a guardian has no power, duty, or liability with respect to any person, property, or health care matter.<sup>133</sup>

The nomination may be made in a document created solely for that purpose, or it may be incorporated in another legally-significant document. The importance of this option relates primarily to

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129. *Id.* at 42.

130. See ILL. REV. STAT. ch. 110 1/2, paras. 803-1 to 803-4 (1990).

131. See *Id.* paras. 804-1 to 804-10.

132. *Id.* para. 11a-6.

133. *Id.* paras. 11a-17c, 11a-18e.

the evidence needed to prove the guardianship nomination. In any event, the validity of the guardianship appointment must be proven by competent evidence. However, if the document is executed and attested in the same manner as a will, it has prima facie validity.<sup>134</sup> If the guardianship appointment is made in a will, it is best to duplicate the terms of the appointment in a separate document as well, to protect it from any declaration of testamentary invalidity. In addition, care must be taken that a guardianship appointment made in a will is available when it is needed, prior to the death of the testator-principal. Finally, use of a will to name a guardian could subject the testamentary plan to public scrutiny prior to the testator's death, which may create family problems in some cases.

If nomination of a guardian is made in a formal document other than a will, it is likely that the formalities of execution of those documents could confer prima facie validity to the nomination as well. For example, the Durable Powers of Attorney Act in Illinois does not require execution of durable powers with the formalities of a will.<sup>135</sup> However, the Act specifically provides for nomination of a guardian as part of the statutory form. Specifically, one paragraph of the statutory form designates the attorney-in-fact as the guardian, unless the principal strikes out that paragraph.<sup>136</sup> Presumably, a validly-executed durable power of attorney would render valid an included guardianship nomination.

### *B. Provision for Minor Beneficiaries of the Client*

HIV-positive clients who have minor children, or who wish to leave property to minors, need to plan for management of assets left to those children. Several legal approaches are available.

#### *1. Guardian of a Child's Assets*

One approach is to leave assets to the child outright. If the minors are the children of the client, this may require appointment of a guardian of their estates, or assets. Guardianship of the estate of a minor is subject to the same expenses, publicity, and administrative delays as is guardianship of the estate of a disabled adult.<sup>137</sup>

If there is more than one minor child, additional complications arise under guardianships. Separate guardianships will have to be established, although the same adult may serve as guardian for each child. Because separate guardianships are involved, the children's assets will have to be separated at the time the guardianships are

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134. *Id.* para. 11a-6.

135. *Id.* paras. 803-3, 804-10.

136. *Id.* paras. 803-3, 804-10.

137. *Id.* para. 11.

created.<sup>138</sup> If one child later develops special needs, it will not be possible to invade assets being held in another guardianship. This lack of flexibility could be a major incentive to use a common trust fund for minor children, rather than separate guardianships.

Once a child reaches majority, the guardianship terminates and the child receives the assets being held by the guardian. In Illinois, this results in an eighteen-year old having to take responsibility for managing and spending the assets. If the child dies before reaching the age of majority, the assets will pass through the child's estate, thereby bypassing any alternate takers the original client (and owner of the property) might have preferred.<sup>139</sup>

## 2. *Transfers Under the Uniform Transfers to Minors Act*

Another approach would be for the client to utilize the Uniform Transfers to Minors Act.<sup>140</sup> Under this Act, the client could designate a custodian and successor custodians to care for property left to each child. The client may make this designation in any written instrument conveying a present or future property interest to the minor.<sup>141</sup> Therefore, the action may be taken in a lifetime transfer of property, either immediate or in an executory contract, or in a will.<sup>142</sup> If a future interest is created, the custodian will not hold a possessory interest until the interest becomes present, at which time the custodian takes over in enforcing the transfer.<sup>143</sup>

A separate custodianship must be established for each minor.<sup>144</sup> Because of the division of assets this entails, custodianship under the Uniform Act will prove as inflexible as guardianship would if one child develops greater needs than another. As with guardianship, a minor's death will terminate the custodianship, and the assets will pass to the minor's beneficiaries, rather than those of the client who set up the custodianship.<sup>145</sup> Unlike a guardianship, which may terminate when the minor reaches eighteen, a custodianship will continue until the minor has become twenty-one years old.<sup>146</sup>

Custodianship will result in certain costs: "reasonable" expenses<sup>147</sup> and compensation of the custodian.<sup>148</sup> These costs should

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138. H. WEINSTOCK, A GUIDEBOOK OF PRINCIPLES AND TECHNIQUES, § 3.16 (3d ed. 1988).

139. *Id.* at 48.

140. ILL. REV. STAT. ch. 110 1/2, para. 251-274 (1990).

141. *Id.* para. 254(a).

142. *Id.* para. 254(c).

143. *Id.*

144. *Id.* para. 261.

145. *Id.* para. 271.

146. *Id.* para. 252(12).

147. *Id.* para. 266(a).

not be as great as with a guardianship, for a custodian, unlike a guardian, is authorized to make distributions to the minor without a court order.<sup>149</sup>

### 3. *Trusts for Minors*

Many of the limitations of guardianships of a minor's estate and of custodianships under the Uniform Gifts to Minors Act can be avoided through use of trusts. Flexible administrative provisions and broad discretionary powers in a trustee can permit many unforeseen circumstances to be dealt with satisfactorily. This can be especially important when planning for the protection of a minor child until majority or beyond.

Trusts were discussed more fully earlier in this Article,<sup>150</sup> for they are applicable far beyond situations involving minors. That discussion, however, is fully applicable herein.

### 4. *Guardian of the Minor's Person*

If the client is the legal guardian of the minor in question, the client should also nominate a guardian of the minor's person. The guardian of the child's person will be the person actually responsible for seeing to the child's welfare. In most jurisdictions, the test is which potential guardian is in the best interests of the child, and that should continue to be the test. Homophobia or concern over HIV may cause some parties to lose sight of that basic test.<sup>151</sup>

The client should state clearly why the particular guardian named has been chosen. This statement of reasons will provide the court naming the guardian with strong evidence of the deceased's perceptions of the child's best interests.<sup>152</sup> This can be particularly important if the client is a gay or lesbian custodial parent and the preferred guardian is not the other biological parent, or if the child is also HIV-positive.<sup>153</sup>

Considerations in the choice of the personal guardian are the guardian's age and health, value system and religion, willingness to accept custody, and ability to care for the client's children. Blood relatives may not always be the best choice, particularly if they are

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148. *Id.* para. 266(b).

149. *Id.* para. 265(a).

150. See *supra* notes 81-107 and corresponding text for a thorough discussion on trusts.

151. See generally Smith, *Legal Issues Confronting Families Affected by HIV*, 24 J. MARSHALL L. REV. 545 n.5 (1991) (discussing types of homophobia).

152. Achtenberg, *supra* note 27, at 4-12.

153. *Id.* The child of an HIV-positive client is at substantial risk of contracting HIV if it was born to a mother who was HIV-positive, but not otherwise. *Id.*

of a generation older than the client. Appointment of an elderly guardian creates the risk that the child will suffer a second significant loss and dislocation a few years after the first.<sup>154</sup> Other factors to consider in nominating a personal guardian for minors are whether the nominee has other children, and of what ages; where the guardian lives; the guardian's financial ability to handle a new child; and the guardian's ability to deal with the possibility that the child may be HIV-positive.

To ease the financial difficulties of a potential guardian, and in order to provide a strong incentive for the court to appoint the client's nominee, the client should consider granting the nominee some financial support. In particular, the client should consider making the nominee the trustee or custodian of whatever account has been set up, *inter vivos* or in the will, for the minor child. This will allow the guardian access to funds set aside for the benefit of the child. In addition, the guardian should be permitted reasonable compensation. Finally, executors and trustees should be permitted to distribute property to a custodian under the Uniform Transfers to Minors Act.<sup>155</sup>

### C. Medical Directives

Many HIV-positive clients will have observed the premature illness and death of other people with AIDS. The prospect of duplicating a common degenerative process can be frightening and may have led the client to some strongly held views on what kind of care they would or would not want in a variety of medical circumstances. This may be particularly true with respect to the administration of pain medications and life sustaining treatments. Similarly, the client may have strong preferences about funeral arrangements and the disposition of his or her body.

With each of these issues, the client needs to be able to feel in control of his or her health care and dying process, as a matter of dignity and the final exercise of individual will. It may also be a matter of some financial concern to clients that they do as little as possible to deplete scarce family or personal funds during a final illness. The client who has resolved issues of health care and treatment of remains may find that such empowerment will make it easier to live each remaining day as fully as possible.

Many clients will have strong preferences about who is to manage their health care upon disability. Same sex couples and unmarried heterosexual couples may want their life partner, not their

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154. 2 F HOOPS, FAMILY ESTATE PLANNING GUIDE sec. 330 (3d ed. 1982).

155. *Id.*, ILL. REV. STAT. ch. 110 1/2, para. 271(a)(2) (1990). If the instrument creating the interest in the minor does not authorize creation of a custodianship, then distribution is required at age 18 rather than age 21. *Id.*

biological family, to make certain important decisions. If so, the client's preferences must be documented carefully because no state's laws will recognize decision-making authority as flowing from the non-status relationship.

According to the American Hospital Association, about 70% of the estimated 6,000 deaths that occur daily in the United States involve a joint doctor-patient-family decision not to use all available means of extending life.<sup>156</sup> However, it is estimated that about 10,000 people in the United States are being kept alive in states of permanent unconsciousness, through use of modern technology.<sup>157</sup> Clearly, a client with strong views on such matters should make those views known in as definite a manner as possible, in order to avoid either persistent vegetative existence or a possible debate among medical personnel and family members, perhaps involving the courts as well.

The Supreme Court has held that each individual has a constitutionally-protected right to determine his or her own medical treatments, but has left the states free to require a high level of proof of the patient's decisions.<sup>158</sup> Without clear and convincing evidence<sup>159</sup> of a person's desire to avoid massive life support intervention, court action may be inevitable in the face of any interested party's opposition to termination of such support. Testimony as to conversations the patient had concerning his or her attitudes towards massive medical intervention may or may not be sufficient.<sup>160</sup> In Illinois, evidence of a patient's habits, background, ethical standards, and religious beliefs are all admissible to establish a person's medical wishes.<sup>161</sup>

On the average, court resolution of these issues takes nine years.<sup>162</sup> In many instances, a person with AIDS could die after months in a medically-sustained vegetative state, yet before court-ordered termination of the treatment and with no recognition of the client's rights. It is therefore highly important that a lawyer dealing with HIV-positive clients advise them that most states, including Illinois, have made available statutory directives that can provide conclusive evidence of a person's intent. In Illinois, the

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156. Malcolm, *Right to Die Case Nearing a Finale*, N.Y. Times, Dec. 7, 1990, at A24, col. 1.

157. 136 CONG. REC. E943 (daily ed. April 3, 1990)(statement of Rep. Levin).

158. *Cruzan v. Director, Missouri Dept. of Health*, 110 S. Ct. 2841, 2847 (1990).

159. *Id.* at 2844; *In re Longeway*, 133 Ill. 2d 33, 549 N.E.2d 292 (1989). Both cases illustrate the need for clear and convincing evidence.

160. See *Cruzan*, 110 S.Ct. at 2855.

161. *In re Greenspan*, 137 Ill. 2d 1, 558 N.E.2d 1194 (1990).

162. ZARTMAN, HEALTH CARE INSTRUCTIONS, POWERS AND PROXIES AFTER CRUZAN 5 (Chicago Bar Association Seminar, Nov. 1, 1990) (unpublished manuscript).

available directives are the living will<sup>163</sup> and the power of attorney for health care.<sup>164</sup>

### 1. *The Living Will*

A living will is a declaration by a person to physicians to withhold or withdraw medical treatments which are merely delaying death from a terminal condition.<sup>165</sup> A person executing a living will must be of sound mind and either have reached the age of majority or have obtained the status of an emancipated person.<sup>166</sup> The will must be signed by the declarant, or another at the declarant's direction and must be witnessed by two individuals 18 years or older.<sup>167</sup> Because of changes in medical technology, and possible shifts in the client's views, living wills should be reviewed on a regular basis, perhaps even annually.

Questions may arise under the statute as to whether a persistent vegetative state, wherein the patient merely requires nutrition, would be considered terminal. In Illinois, the Living Will Act does not specifically extend to withholding of nutrition and hydration.<sup>168</sup> However, courts in Illinois have declared *artificial* nutrition and hydration to be forms of medical treatment.<sup>169</sup> These decisions effectively make a persistent vegetative state, with concomitant inability to take nutrition without medical assistance, a terminal condition.

It is important that the client make his or her intentions known as fully as possible to friends and family, as well as in a living will. Doing so will better prepare everyone to accept the client's decision at a later date, and will provide useful evidence in support of the living will. In some cases, ambiguously-worded living wills have been denied effect.<sup>170</sup> If the living will is not granted conclusive effect, both it and conversations the client had with others will provide useful evidence of the person's intentions.

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163. ILL. REV. STAT. ch. 110 1/2, paras. 701-756 (1990).

164. *Id.* para. 804-1. In addition, the District of Columbia and 18 other states specifically authorize delegation of health care decisions. DURABLE POWER OF ATTORNEY, *supra* note 64, at 4-5.

165. ILL. REV. STAT. ch. 110 1/2, para. 701 (1990).

166. *Id.* para. 703(a).

167. *Id.* para. 703(b).

168. *Id.* para. 702(d).

169. See *In re Estate of Greenspan*, 137 Ill. 2d 1, 558 N.E.2d 1194 (1990) (administration of artificial nutrition and hydration is a form of medical treatment not distinguishable from other types of medical treatment); *In re Longeway*, 133 Ill. 2d 33, 549 N.E.2d 292 (1989) (court held that common law right to refuse treatment falls under the doctrine of informed consent and includes artificial nutrition and hydration under appropriate circumstances).

170. See *In re Browning*, 543 So.2d 258 (1989).



## 2. The Health Care Power of Attorney

In many states, including Illinois, a durable power of attorney for health care will provide a more flexible approach to health care management. Based upon a theory of substituted judgment,<sup>171</sup> it permits an agent selected by the now-incompetent patient to make health care decisions on behalf of the patient, based upon the agent's judgment of what the principal would decide under the same circumstances. The agent's duties are similar in all respects to the power for property.<sup>172</sup>

The durable power does not require a diagnosis of terminal illness before it is operational; rather, it becomes operational from the date signed unless the client designates a later effective date.<sup>173</sup> Just as with the durable power of attorney for property, what constitutes the disabling event and the method of determining incompetence should be clearly defined in the document.<sup>174</sup> The durable power for health care should be coordinated with any similar provisions in the durable power of attorney for property.

Unless the principal otherwise limits the power, the agent is empowered to make all health care decisions, including the power to withhold or withdraw life sustaining treatment or provisions of food and fluids.<sup>175</sup> The agent has visitation rights equivalent to a spouse<sup>176</sup> and access to medical records.<sup>177</sup> In addition, the agent is authorized to contract for and bind the principal to payment for health care services, and to "have and exercise those powers over the principal's property as are authorized under the statutory property power, to the extent the agent deems necessary to pay health care costs . . ." <sup>178</sup> The power may extend beyond death of the principal to the extent necessary to permit "anatomical gift, autopsy or disposition of remains."<sup>179</sup>

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171. *Longeway*, 133 Ill. 2d at 49, 549 N.E.2d at 299.

172. The agent is not under a duty to assume control over the principal's health care, but if the agent chooses to act, s/he must use due care. ILL. REV. STAT. ch. 110 1/2, para. 804-10(b) (1990). If the court finds that the agent is not acting for the benefit of the principal, the court may appoint a guardian and direct the guardian to revoke the agency. Without a court order, the guardian will not have authority over matters included in the power of attorney. *Id.* para. 802-10. Additionally, where the power is limited, appointment of a guardian may be necessary for the management of other aspects of the principal's health care. *Id.*

173. *Id.* para. 804-10(2)(3).

174. Similarly, it is sometimes advisable to create a power which springs into viability once the principal is adjudged incompetent.

175. ILL. REV. STAT. ch. 110 1/2, para. 804-10(b)(1) (1990).

176. *Id.* para. 804-10(b)(2).

177. *Id.* para. 804-7(c).

178. *Id.* para. 804-10(b)(3).

179. *Id.* para. 804-3. If the agent is empowered to make decisions regarding anatomical gift, autopsy and disposition of remains, those decisions "shall con-

In Illinois, the client's wishes regarding medical directives are best protected by executing both a Living Will<sup>180</sup> and a Durable Power of Attorney.<sup>181</sup> Prior to executing these documents, the client should discuss them with his/her physician. Possible scenarios should be discussed in light of the client's prognosis.<sup>182</sup> Decisions made during these discussions should be embodied in a writing.<sup>183</sup> Note that the physician may need reassurances about the legality of the documents or his/her immunity from prosecution for acting on it.<sup>184</sup>

The client is responsible for notifying and distributing copies of the Living Will and/or Durable Power of Attorney for Health Care to his/her physician or health care provider.<sup>185</sup> The physician must make the directive a part of the patient's records.<sup>186</sup> The physician must inform the client or the client's representative if s/he is unwilling to comply with the directive.<sup>187</sup>

Recently, Congress enacted scattered portions of The Patient Self Determination Act, effective November 5, 1991,<sup>188</sup> which seeks to "help individuals to establish these advance directives by educat-

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control over the decision of other persons who might otherwise have priority." *Id.* at para. 804-7(d). This is an important provision for the gay or lesbian client or an unmarried heterosexual who wants a life partner to control the funeral. It is particularly appropriate where there is tension between the client's chosen family and biological family.

180. See ILL. REV. STAT. ch. 110 1/2, paras. 701 to 710 (1990).

181. See *id.* paras. 802-1 to 802-11.

182. See *Rivera, supra* note 15, at 898. For a good guide for client, lawyer and physician responsibilities and scenarios see generally Emanuel and Emanuel, *The Medical Directive: A New Comprehensive Advance Care Document*, 261 J. A.M.A. 3288 (1989). The included chart reads similar to a graph with possible scenarios such as persistent vegetative state or brain damage without terminal illness, listed on the horizontal axis and common treatments and procedures like mechanical breathing and artificial nutrition and hydration listed on the vertical axis. *Id.* at 3290. The client and his physician can use this graph as a guide in their discussions and check off one of the choices given: "I do want," "I do not want," "I am undecided," and "I want a trial." The guide is especially helpful for the lawyer who is yet unfamiliar with the possible conditions and treatments. *Id.*

183. *Rivera, supra* note 15, at 898.

184. A survey conducted in Colorado revealed that 23% of physicians were not familiar with Living Wills, and 74% were not familiar with durable powers of attorney. 136 CONG. REC. E943, E944 (daily ed. April 3, 1990) (remarks of Rep. Levin). Similarly, a survey in Arkansas found that only 38.4% of physicians reported being familiar with state's advance directive laws. *Id.* As Representative Levin points out, "there is no reason to believe that these numbers do not reflect the country as a whole." *Id.*

185. ILL. REV. STAT. ch. 110 1/2, paras. 703(d), 804-7(a) (1990).

186. *Id.* paras. 703(d), 804-7(a).

187. *Id.* paras. 703(d), 804-7(b).

188. Omnibus Budget Reconciliation Act of 1990, Pub. L. No. 101-508, 1990 U.S. CODE CONG. & ADMIN. NEWS (104 Stat.) 291 (to be codified at 42 U.S.C. § 4206(2)(f)(1)(A)) (sections of the Patient Self Determination Act HR 5067 were incorporated into this Act).

ing them and their health care providers about their rights."<sup>189</sup> Some of the affirmative duties which this legislation places upon physicians who care for Medicare or Medicaid patients include: 1) to inform patients of their rights under state law; 2) to inquire whether the patient has an advance directive; 3) to document the directive or any treatment wishes the patient may have; and 4) to implement the directives to the extent permissible under state law.<sup>190</sup>

### III. CONCLUSION

Lawyers doing estate planning for Persons Living With AIDS and HIV need to do far more than establish a pattern of asset disbursement. They must explore a much wider range of issues: of asset management during life, of planning for personal care during periods of physical or mental disability, and of making arrangements for death and bodily remains. Perhaps most important of all, lawyers working in this challenging and important field must explore these issues in such a way as to recognize the individuality and dignity of clients facing a debilitating and ultimately life-destroying infection. Client empowerment under such circumstances can prove difficult, but is the heart of the lawyer's job.

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189. 136 CONG. REC. E943 (daily ed. April 3, 1990) (remarks of Rep. Levin).

190. *Id.*