

**EQUALITY AT THE END: AMENDING
STATE SURROGACY STATUTES TO HONOR
SAME-SEX COUPLES' END-OF-LIFE
DECISIONS**

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Only three states presently grant the same benefits, protections, and responsibilities to same-sex couples as spouses in marriage. The consequences of this reality are especially felt by same-sex couples hoping to take advantage of state surrogacy statutes, as only a few state surrogacy statutes recognize nontraditional families in the end-of-life decision-making process. In this note, Rebecca Glatzer examines the various statutory approaches to surrogate decision making and then evaluates those approaches for their ability to effectuate the health care wishes of gay and lesbian couples. She concludes by suggesting that states reform their surrogacy statutes to recognize the rights of nontraditional families. In addition, she suggests a number of practical steps that same-sex couples can take in order to effectuate their end-of-life decisions in those states that do not reform their surrogacy statutes.

I. Introduction

While on a family trip to Washington, D.C., Bill Flanigan's partner of five years, Robert Daniel, was admitted in

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critical condition to the Shock Trauma Center at a University of Maryland hospital because of complications related to AIDS.¹ As Bill was kept in the waiting area of the hospital, he asked to see Robert and confer with his doctors.² They told him only “family” members were allowed to visit patients and that “partners” did not qualify.³ Flanigan explained that he had a durable power of attorney for health care decisions⁴ and that he and Daniel were registered as domestic partners⁵ in California.⁶ Even though the hospital had notice that Flanigan was Daniel’s family and legal agent for health care decisions, via Daniel’s medical records and Flanigan’s statements to hospital staff, the hospital blocked all communication between the two partners as Daniel slipped into unconsciousness for the last time.⁷ Bill was never able to say goodbye, and the University of Maryland Medical System Corp. made a traumatic situation even worse by inserting a breathing tube into Daniel, a measure that would have been unnecessary had Flanigan been given the opportunity to confer with doctors about Daniel’s wishes.⁸

1. News Release, Lambda Legal, University of Maryland Medical System to be Sued Wednesday by Gay Man Prevented from Visiting His Dying Partner at Shock Trauma Center in Baltimore (Feb. 26, 2002), at <http://www.lambdalegal.org/cgi-bin/iowa/documents/record?record=1011> (last visited Apr. 4, 2004) [hereinafter Shock Trauma Center].

2. *Id.*

3. *Id.*

4. A power of attorney allows an individual to grant power to another person to act on his or her behalf in legal and financial matters. Some powers of attorney are valid as soon as an individual signs them; others make clear that they are triggered only by the individual’s inability to handle his or her own affairs. A health care proxy, or durable power of attorney for health care, allows an individual to appoint a trusted partner, friend, or family member (known as an “agent”) to make health care decisions in the event that he or she is unable to express his or her wishes. See HUMAN RIGHTS CAMPAIGN, FAMILY: HEALTH CARE PROXY, at <http://www.hrc.org/Template.cfm?Section=Home&Template=/ContentManagement/ContentDisplay.cfm&ContentID=10326> (last visited Apr. 4, 2004).

5. Domestic partnership registries allow unmarried couples many of the benefits of married couples. By signing a register with a city, state, or private employer, identifying themselves as domestic partners, a couple qualifies for these benefits. Each domestic partner benefits program is unique. Some recognize only nongay couples, others recognize only lesbian and gay couples, but many recognize both. See LAMBDA LEGAL, MARRIAGE AND DOMESTIC PARTNERSHIP: A FACT SHEET (1999), at <http://www.lambdalegal.org/cgi-bin/iowa/documents/record?record=437> (last visited Apr. 4, 2004).

6. Shock Trauma Center, *supra* note 1.

7. Complaint of Lambda Legal, Flanigan v. Univ. of Md. Med. Sys. Corp., at <http://www.lambdalegal.org/cgi-bin/iowa/documents/record?record=1012> (last visited Apr. 4, 2004).

8. *Id.*

The facts of *Flanigan v. University of Maryland Medical System Corp.*⁹ demonstrate the terrible price gay and lesbian couples pay for not being allowed to legally marry in the majority of the United States.¹⁰ It is stressful when a patient becomes incapacitated, and families are forced to make decisions for their loved one, including whether to continue life-sustaining measures. While this is difficult emotionally and financially for any family, end-of-life decisions can be even more taxing on gay and lesbian couples because same-sex relationships are, for the most part, not recognized in the United States.¹¹ Because same-sex couples are denied the right to marry in most states,¹² same-sex couples and their families are denied access to the more than 1000 rights, protections, and responsibilities automatically granted to married heterosexual couples.¹³ Most importantly among these rights, at least for the purposes of this note, is the ability to make decisions on a partner's behalf in a medical emergency.¹⁴

9. *Id.* *Flanigan v. University of Maryland Medical System Corp.* ended with a jury verdict in favor of the hospital.

10. As of this writing, only one state, Massachusetts, allows same-sex couples to marry. See Christine McDonald & Bill Dedman, *About 2,500 Gay Couples Sought Licenses in 1st Week*, BOSTON GLOBE, June 17, 2004, A1. However, it remains to be seen whether same-sex couples who have married in Massachusetts will be stripped of this right. See The Advocate, *Proposed Marriage Ban Passes in Massachusetts*, Mar. 30, 2004, available at http://www.advocate.com/new_news.asp?id=11860&sd=03/30/04 (last visited on July 14, 2004). In Vermont, and now Connecticut, same-sex couples can join together in a civil union. In Connecticut, civil unions will take effect Oct. 1, 2005. See THE STATE, *Connecticut Approves Civil Unions for Gays* (Apr. 21, 2005), at <http://www.thestate.com/mld/thestate/news/local/11447784.htm>. For a list of rights accompanying Vermont civil unions, see OFFICE OF THE SEC'Y OF STATE, THE VERMONT GUIDE TO CIVIL UNIONS (2000), available at <http://www.sec.state.vt.us/otherprg/civilunions/civilunions.html> (last visited Apr. 4, 2004); see also HUMAN RIGHTS CAMPAIGN, STATE LAWS AFFECTING GLBT PEOPLE (2004), at http://www.hrc.org/Template.cfm?Section=Civil_Marriage&Template=/CustomSource/Law/LawLegislationSearch.cfm&Submitted=1&KeywordCode=19&StatusInd=lawcurrent&Sort=State (last visited Apr. 4, 2004) [hereinafter STATE LAWS AFFECTING GLBT PEOPLE].

11. STATE LAWS AFFECTING GLBT PEOPLE, *supra* note 10. Recently, two municipalities, San Francisco, California, and New Paltz, New York, issued marriage licenses to same-sex couples. The licenses were issued as acts of disobedience by the cities' two respective mayors, however, and not as official legal acts under the cities' charters. Associated Press, *N.Y. Town Joins Gay Marriage Fray* (Feb. 27, 2004), available at <http://www.cbsnews.com/stories/2004/02/27/national/main602838.shtml> (last visited Apr. 4, 2004).

12. STATE LAWS AFFECTING GLBT PEOPLE, *supra* note 10.

13. GAY & LESBIAN ADVOCATES & DEFENDERS, CIVIL MARRIAGE FOR SAME-SEX COUPLES: THE FACTS (2001), at <http://www.marriageequalityca.org/resources/downloads/files/education/civil-marriage-facts.pdf>.

14. HUMAN RIGHTS CAMPAIGN, RIGHTS AND PROTECTIONS DENIED SAME-SEX PARTNERS (2004), at <http://www.hrc.org/Template.cfm?Section=Center&>

On June 26, 2003, in *Lawrence v. Texas*,¹⁵ the most significant ruling ever for lesbian and gay Americans' civil rights,¹⁶ the U.S. Supreme Court struck down Texas's "Homosexual Conduct" law,¹⁷ which criminalized oral and anal sex by consenting gay couples and was widely used to justify discrimination against lesbians and gay men.¹⁸ While the case was specifically about an individual's private right to engage in consensual adult sex, it has far-reaching implications, as hinted in Justice Scalia's dissent.¹⁹ In addition to holding that states cannot criminalize this type of behavior, the Supreme Court recognized that homosexuals have the same claim to rights and human dignity as other individuals and their relationships are worthy of consideration and respect.²⁰

Since the *Lawrence* decision, states and municipalities have been eager to test the limits of the decision, to see if it goes as far as allowing for same-sex marriages. While currently only three states, Massachusetts, Connecticut, and Vermont, grant the same benefits, protections, and responsibilities as spouses in a marriage,²¹ recently, two municipalities, San Francisco, California,²² and New Paltz, New York,²³ issued marriage licenses to same-sex couples. The licenses were issued as acts of disobedience by the cities' two respective mayors, however, and not as official legal acts under the cities' charters.²⁴ Both officials have since stopped granting licenses to same-sex cou-

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(last visited Apr. 4, 2004).

15. *Lawrence v. Texas*, 539 U.S. 558 (2003).

16. LAMBDA LEGAL, BACKGROUND ON LAMBDA LEGAL'S SUPREME COURT CASE CHALLENGING TEXAS'S "HOMOSEXUAL CONDUCT" LAW, at <http://www.lambdalegal.org/cgi-bin/iowa/documents/record?record=1190> (last visited Jan. 24, 2005) [hereinafter BACKGROUND].

17. TEX. PENAL CODE ANN. § 21.06(a) (Vernon 2003).

18. BACKGROUND, *supra* note 16.

19. *Lawrence*, 539 U.S. at 586 (Scalia, J., dissenting).

20. *Id.* at 578.

21. See STATE LAWS AFFECTING GLBT PEOPLE, *supra* note 10.

22. Associated Press, *supra* note 11.

23. *Id.*

24. Thomas Crampton & Christine Hauser, *Gay Marriage Debate Shifts to Small New York Village*, N.Y. TIMES, available at <http://www.nytimes.com/2004/02/27/nyregion/27CND-PALT.html?ex=1081224000&en=ccd2306acd76243a&ei=5070> (last visited Apr. 4, 2004); Miguel Marquez, *More Than 1,600 Same-Sex Marriages Performed*, CNN, Feb. 15, 2004, at <http://www.cnn.com/2004/US/West/02/15/samesex.marriage/> (last visited Apr. 4, 2004).

ples, one under threat of prosecution by the county district attorney,²⁵ and the other under order from the California Supreme Court;²⁶ the validity of the issued licenses in both municipalities has yet to be determined.²⁷

The issuing of the licenses in both municipalities came as lawmakers in Massachusetts debated a constitutional amendment banning gay marriage,²⁸ which was a response to a Massachusetts Supreme Judicial Court ruling that same-sex couples in that state should be free to obtain marriage licenses.²⁹ Despite the high court's finding that denying same-sex couples the right to marry is unconstitutional,³⁰ the state's legislature voted on March 30, 2004, to support a constitutional amendment ballot measure that would define marriage only as a union between a man and a woman and would offer same-sex couples the lesser protections of civil unions.³¹ As a consequence of the Supreme Judicial Court ruling, Massachusetts began issuing marriage licenses to same-sex couples in May of 2004.³² Currently, over 4266 same-sex couples have been married in Massachusetts;³³ however, the Massachusetts Governor and other state lawmakers asked the court to prevent gay marriages until the state's citizens can vote on the proposed constitutional amendment.³⁴ The pending amendment would

25. Cyd Zeigler, Jr., *Small N.Y. Town Issues Marriage Licenses: Young Mayor Faces Criminal Charges for Role in Ceremonies*, WASH. BLADE, Mar. 5, 2004, available at <http://www.washblade.com/2004/3-5/news/national/nymarr.cfm>.

26. Evelyn Nieves, *California High Court Halts Gay Marriages*, WASH. POST, Mar. 12, 2004, at A01.

27. Tatsha Robertson, *Mayor Weds 21 Gay Couples in N.Y. County Attorney Says the Marriages May Not Be Legal*, BOSTON GLOBE, Feb. 28, 2004, at A2.

28. Pam Belluck, *Setback Is Dealt to Gay Marriage*, N.Y. TIMES, Mar. 30, 2004, available at <http://www.nytimes.com/2004/03/30/national/30MARR.html>.

29. *Id.*

30. *Id.*

31. *Id.*

32. Associated Press, *Gay Couples Exchange Vows in Massachusetts* (May 18, 2004), available at <http://www.msnbc.msn.com/id/4991967/> (last visited Jul. 21, 2004); see also Terence Neilan, *High Court in Massachusetts Rules Gays Have Right to Marry*, N.Y. TIMES, Nov. 18, 2003, available at <http://www.nytimes.com/2003/11/18/national/18CND-GAYS.html?ex=1081224000&en=9d0cf7945372226f&ei=5070>.

33. HUMAN RIGHTS CAMPAIGN, STATISTICS: NUMBER OF SAME-SEX COUPLES MARRIED, at http://www.hrc.org/Content/ContentGroups/Issues1/marriage/statistics_Number_of_same_sex_couples_married.htm (last visited Jan. 21, 2005). See generally McDonald & Dedman, *supra* note 10.

34. See Belluck, *supra* note 28; Human Rights Campaign, *Massachusetts Marriage/Relationship Law: Pending Constitutional Amendment*, at <http://www.hrc.org> (last visited Jan. 24, 2005); see also MASSEQUALITY.ORG, LEGISLATURE TAKES

reverse the Massachusetts decision by defining marriage as between a man and a woman and would also establish civil unions, instead of marriage, for same-sex couples.³⁵

Despite these recent strides toward marriage equality, most states and the federal government have been slow to afford same-sex couples full marriage rights.³⁶ During the 2004 election season, many states passed ballot measures to amend their state constitutions to define marriage as only between a man and a woman; thus, precluding same-sex couples from taking part in the highly regarded institution.³⁷ The federal Defense of Marriage Act (DOMA) purportedly³⁸ gives states the right to refuse to recognize same-sex marriages performed in other states,³⁹ and though a recent Senate attempt to pass a constitutional amendment that would strictly define marriage as a union between a man and a woman failed, proponents of the amendment vowed to take up the matter again.⁴⁰

NEXT STEP TOWARD GAY MARRIAGE BAN, CIVIL UNIONS, at http://massequality.org/hot_ap_3_29_6.php (last visited Apr. 9, 2005).

35. MASSEQUALITY.ORG, *supra* note 34.

36. Congress recently voted on whether or not to add an amendment to the U.S. Constitution that would strictly define marriage as a union between a man and a woman. On July 14, 2004, the proposed amendment failed in the Senate, but its proponents promise to take up the issue again. See Craig Broffman & Ed Henry, *Same-Sex Marriage Senate Battle Over, War Is Not*, CNN, Jul. 15, 2004, at <http://www.cnn.com/2004/ALLPOLITICS/07/14/samesex.marriage/>; HUMAN RIGHTS CAMPAIGN, INFORMATION ABOUT THE ANTI-GAY CONSTITUTIONAL AMENDMENT RELATING TO MARRIAGE, at http://www.hrc.org/Template.cfm?Section=Federal_Marriage_Amendment1&Template=/TaggedPage/TaggedPageDisplay.cfm&TPLID=23&ContentID=14688 (last visited Jan. 21, 2005).

37. Charisse Jones, *Gay Marriage on the Ballot in 11 States*, USA TODAY, Oct. 15, 2004, available at http://www.usatoday.com/news/politicselections/2004-10-14-gaymarriage-ballots_x.htm; see NAT'L CONFERENCE OF STATE LEGISLATURES, SAME-SEX MEASURES ON THE 2004 BALLOT (Nov. 17, 2004) at <http://www.ncsl.org/programs/legman/stateVote/Marriage-mea.htm>. Thirty-three states have statutes defining marriage as between a man and a woman.

38. Some constitutional scholars, including Harvard law professor Lawrence Tribe, have argued that DOMA violates Article IV of the Constitution, which states, "[F]ull Faith and Credit shall be given in each State to the public Acts, Records, and judicial Proceedings of every other State." HUMAN RIGHTS CAMPAIGN, WHAT THE DEFENSE OF MARRIAGE ACT DOES, at http://www.hrc.org/Template.cfm?Section=Federal_Marriage_Amendment1&CONTENTID=15330&TEMPLATE=/ContentManagement/ContentDisplay.cfm (last visited Jan. 24, 2005) [hereinafter WHAT THE DEFENSE OF MARRIAGE ACT DOES]; see also Tom Curry, *Gay Marriage in Play as 2004 Issue*, MSNBC, Jul. 15, 2004, at <http://msnbc.msn.com/id/3070820/> (last visited Jan. 24, 2005).

39. WHAT THE DEFENSE OF MARRIAGE ACT DOES, *supra* note 38.

40. The amendment, known as the Federal Marriage Amendment (S.J. Res. 30), was introduced first in the House by Rep. Marilyn Musgrave (R-Colo.) and then in the Senate by Sen. Wayne Allard (R-Colo.). See Broffman & Henry, *supra* note 36; Carl Hulse, *Gay Official Denounces Amendment*, N.Y. TIMES, Mar. 24, 2005,

The tragic facts of *Flanigan* and the contentious climate for same-sex marriage highlight the importance of legal instruments, such as advanced medical directives⁴¹ and state surrogacy statutes,⁴² in enabling gay and lesbian patients to have their health care wishes honored. If properly enforced, advanced directives, which include living wills and health care powers of attorney,⁴³ can be a forceful method of ensuring an individual's health care desires are respected,⁴⁴ as all states have a living will statute or health care power of attorney statute to enforce the private wishes embodied in these directives.⁴⁵ If, however, the patient does not have the advanced directive on him when he enters the hospital, or if the hospital refuses to honor the directive, as in *Flanigan*, then his wishes may not be respected. Thus, for same-sex couples, drafting legal documents to protect their end-of-life wishes is no substitute for protection under state and federal statutes.

Recognizing that most individuals do not plan ahead, as evidenced by the fact that only eighteen percent of Americans have executed advanced directives,⁴⁶ many states have enacted surrogacy statutes⁴⁷ allowing families to make decisions for their incapacitated loved ones without going to court.⁴⁸ Health care surrogacy statutes operate in the absence of other advance directives⁴⁹ and designate a decision maker, according to a priority list.⁵⁰ The designee makes health care

at A2 (On July 14, 2004, it was defeated in the Senate by a vote of forty-eight to fifty—twelve votes shy of the sixty required by Senate rules.).

41. The term "advance directive" loosely defines a category of "anticipatory" health care decision-making methods. 2 ALAN MEISEL, *THE RIGHT TO DIE* § 10.2, at 5 (2d ed. 1995). The term most often refers to living wills and health care powers of attorney. See *id.* §§ 10.4-5, at 8-13.

42. See *id.* § 14.1, at 249.

43. *Id.* §§ 10.4-5, at 8-13.

44. ABA COMM'N ON LAW & AGING, HEALTH CARE POWER OF ATTORNEY AND COMBINED ADVANCE DIRECTIVE LEGISLATION, STATE HEALTH DECISIONS LEGISLATIVE UPDATE, 2002, available at <http://www.abanet.org/aging/HCPA-CHT04.doc> (last visited Jul. 1, 2004) (listing citations for all state living will and health care power of attorney statutes as of January 1, 2002); see also Mark Stephen Bishop, *Crossing the Decisional Abyss: An Evaluation of Surrogate Decision-Making Statutes as a Means of Bridging the Gap Between Post-Quinlan Red Tape and the Realization of an Incompetent Patient's Right to Refuse Life-Sustaining Medical Treatment*, 7 ELDER L.J. 153, 154-55 (1999).

45. Bishop, *supra* note 44, at 154-55.

46. See Stanley S. Herr & Barbara L. Hopkins, *Health Care Decision Making for Persons with Disabilities: An Alternative to Guardianship*, 271 JAMA 1017, 1017 (1994).

47. 2 MEISEL, *supra* note 41, § 14.1, at 249; see also Bishop, *supra* note 44, at 155.

48. Bishop, *supra* note 44, at 155.

49. 2 MEISEL, *supra* note 41, § 14.1, at 249.

50. *Id.* § 14.4, at 253; see also Bishop, *supra* note 44, at 155.

decisions on behalf of the incapacitated patient.⁵¹ Currently, all states and the District of Columbia have enacted some form of surrogate decision-making statute.⁵² As this note will illustrate, few states have statutes that are sensitive to the needs of gay and lesbian patients.⁵³ Other states have enacted statutes that are inadequate under the current circumstances, and the remaining states do not address the concerns of gay and lesbian patients at all.⁵⁴ This note argues that although some state surrogacy statutes are better than others, all state surrogacy statutes should be amended to fully address the needs of gay and lesbian families dealing with end-of-life decisions. The failure of state surrogacy statutes to include nontraditional families in the end-of-life decision-making process denies gays and lesbians their

51. 2 MEISEL, *supra* note 41, § 14.4, at 253; *see also* Bishop, *supra* note 44, at 155.

52. Every state, and the District of Columbia, has enacted a living will statute or a health care power of attorney statute. *See* ALA. CODE § 22-8A (2004); ALASKA STAT. §§ 13.26.332–.358 (Michie 2004); ARIZ. REV. STAT. ANN. § 36 (West 2004); ARK. CODE ANN. § 20-13-104 (Michie 2003); CAL. PROB. CODE §§ 4600–4805 (West 2005); COLO. REV. STAT. ANN. §§ 15-14-501 to -611 (West 2004); CONN. GEN. STAT. ANN. §§ 1-43 to -56 and §§ 19a-570 to -580d (West 2004); DEL. CODE ANN. tit. 16, §§ 2501–2518 (2004); D.C. CODE ANN. §§ 21-2201 to -2213 (2004); FLA. STAT. ANN. §§ 765.101–.404 (West 2005); GA. CODE ANN. §§ 31-36-1 to -13 (2004); HAW. REV. STAT. ANN. §§ 327E-1 to -16 (Michie 2004); IDAHO CODE §§ 39-4501 to -4509 (Michie 2004); 755 ILL. COMP. STAT. ANN. 45/1-1 to 4-12 (West 2004); IND. CODE ANN. §§ 30-5-1-1 to 30-5-10-4 (Michie 2004); IOWA CODE ANN. §§ 144B.1–.12 (West 2004); KAN. STAT. ANN. §§ 58-625 to -632 (2003); KY. REV. STAT. ANN. §§ 311.621–.643 (Michie 2004); LA. REV. STAT. ANN. §§ 40:1299.58.1–.10 (West 2005); ME. REV. STAT. ANN. tit. 18-A, §§ 5-801 to -817 (West 2004); MD. CODE ANN., HEALTH-GEN. § 5-601 to -608 (2003); MASS. ANN. LAWS Ch. 201D, § 1–17 (Law. Co-op. 2004); MICH. COMP. LAWS ANN. §§ 700.5501–.5520 (West 2004); MINN. STAT. ANN. § 145C.01–.16 (West 2005); MISS. CODE ANN. §§ 41-41-201 to -229 (1998); MO. ANN. STAT. §§ 404.703–.872 (West 2004); MONT. CODE ANN. §§ 50-9-101 to -111, -201 to -206 (2003); NEB. REV. STAT. §§ 30-3401 to -3432 (1995 & Supp. 2002); NEV. REV. STAT. ANN. §§ 449.800–.860 (Michie 2003); N.H. REV. STAT. ANN. §§ 137-J:1 to :16 (2004); N.J. STAT. ANN. §§ 26:2H-53 to -78 (West 2004); N.M. STAT. ANN. §§ 24-7A-1 to -16 (Michie 2004); N.Y. PUB. HEALTH LAW §§ 2980–2994 (McKinney 2004); N.C. GEN. STAT. §§ 35A-1210 to -1219 (2003); N.D. CENT. CODE §§ 23-6.5-01 to -18 (2004); OHIO REV. CODE ANN. §§ 1337.11–.17 (Anderson 2004); OKLA. STAT. ANN. tit. 63, §§ 3101.1–.16 (West 2005); OR. REV. STAT. §§ 127.505–.660 (2003); PA. STAT. ANN. §§ 5401–5416 (West 2004); R.I. GEN. LAWS §§ 23-4.10-1 to -12 (2004); S.C. CODE ANN. §§ 62-5–504 (Law. Co-op. 2004); S.D. CODIFIED LAWS §§ 34-12C-1 to -8, §§ 59-7-2.1 to -2.8 (Michie 2004); TENN. CODE ANN. § 34-6-101 to -310 (2004); TEX. HEALTH & SAFETY CODE ANN. §§ 166.001–.166 (Vernon 2004); UTAH CODE ANN. §§ 75-2-1101 to -1118 (2004); VT. STAT. ANN. tit. 14, §§ 3451–3465 (2004); VA. CODE ANN. §§ 54.1-2981 to -2993 (Michie 2004); WASH. REV. CODE ANN. §§ 11.94.010–.900 (West 2005); W. VA. CODE ANN. §§ 16-30-1 to -24 (Michie 2004); WIS. STAT. ANN. §§ 155.01–.80, 11.243.07 (West 2004); WYO. STAT. ANN. §§ 3-5-201 to -213 (Michie 2003).

53. *See, e.g.*, discussion *infra* Part III.

54. *Id.*

human dignity and undermines the constitutional liberty interest established by the U.S. Supreme Court in *Cruzan v. Director, Missouri Department of Health*.⁵⁵

Part II of this note describes the history of health care decision making in the United States, leading up to the development of state surrogacy statutes. Part III first examines the various statutory approaches to surrogate decision making, and then classifies each statute into one of the three categories mentioned above: statutes that are sensitive to the needs of gay and lesbian patients, statutes that are inadequate under the current circumstances, and statutes that do not address the concerns of gay and lesbian patients at all. Part IV then evaluates these three categories of surrogacy statutes in their ability to effectuate the health care wishes of gay and lesbian patients, identifying the attributes of existing statutes that best protect the interests of gay and lesbian patients. Part IV also offers recommendations about how to strengthen these statutes to be more responsive to the needs of nontraditional families and recommends what steps same-sex couples can take to protect their rights.

II. History of Health Care Decision Making in the United States

An individual's right to refuse medical treatment is well established in the common law, mostly as a derivation of the doctrine of informed consent.⁵⁶ In 1891, the U.S. Supreme Court recognized that "no right is held more sacred, or is more carefully guarded, by the common law than the right of every individual to the possession and control of his own person, free from all restraint or interference of others, unless by clear and unquestionable authority of law."⁵⁷ The Court's statement embodies the informed consent doctrine requiring a patient to be fully informed before giving consent for treatment.⁵⁸ An extension of this principle is that a patient also has the right to refuse medical treatment.⁵⁹ A problem arises in the implementation of this

55. *Cruzan v. Dir., Mo. Dep't of Health*, 497 U.S. 261 (1990).

56. *Id.* at 269; see also Bishop, *supra* note 44, at 157.

57. *Union Pac. Ry. Co. v. Botsford*, 141 U.S. 250, 251 (1891); see also Bishop, *supra* note 44, at 157.

58. See, e.g., *Cantebury v. Spence*, 464 F.2d 772, 780 (D.C. Cir. 1972); see also Bishop, *supra* note 44, at 157.

59. See *Cruzan*, 497 U.S. at 270.

principle, however, if a patient is incapacitated and is unable to personally exercise the right to refuse medical treatment.⁶⁰

A. Incapacity and the Right to Refuse Treatment

In 1976, New Jersey first recognized an incapacitated patient's right to refuse medical treatment through a guardian in *In re Quinlan*.⁶¹ The New Jersey Supreme Court based this recognition on an implicit and qualified constitutional right to privacy.⁶² Other states soon followed New Jersey in recognizing a patient's right to refuse medical treatment,⁶³ based on either the common-law doctrine of informed consent, a state or federal constitutional right to privacy, or state statutes.⁶⁴

In *Cruzan v. Director, Missouri Department of Health*, the U.S. Supreme Court recognized a constitutional liberty interest, derived from the Fourteenth Amendment, allowing patients to refuse life-sustaining treatment.⁶⁵ The issue before the court in *Cruzan* was the constitutionality of Missouri's procedural obligation, which required the patient's guardian to demonstrate by clear and convincing evidence that the patient would have wanted the life-sustaining treatment withdrawn.⁶⁶ Because Nancy Cruzan's parents were unable to establish by clear and convincing evidence her desire to remove the life support, the Missouri courts denied their petition to remove her feeding tube.⁶⁷ While the Supreme Court recognized a Fourteenth Amendment liberty in-

60. Bishop, *supra* note 44, at 157.

61. See *In re Quinlan*, 355 A.2d 647, 664 (N.J. 1976).

62. See *id.* at 662-64; see also Bishop, *supra* note 44, at 158.

63. See, e.g., *In re Conservatorship of Drabick*, 200 Cal. App. 3d 185, 200 (1988) (California Court of Appeals based the right to refuse life-sustaining medical treatment on the state's probate law, which appeared to support the right, and the court permitted the conservator to order withdrawal of the treatment); *Bovia v. Superior Court*, 179 Cal. App. 3d 1127, 1137 (1986) (California Court of Appeals upheld the right to refuse medical treatment based upon an express right of privacy in the California Constitution); *Superintendent of Belchertown State Sch. v. Saikewicz*, 370 N.E.2d 417, 424, 427 (Mass. 1977) (Supreme Judicial Court of Massachusetts based right to refuse medical treatment on both a constitutional right to privacy and the doctrine of informed consent); *In re Conroy*, 486 A.2d 1209, 1225 (N.J. 1985) (The New Jersey Supreme Court, though acknowledging the federal right to privacy it had established in *In re Quinlan*, decided a right-to-refuse-treatment case solely on the common-law doctrine of informed consent).

64. See, e.g., *Drabick*, 200 Cal. App. 3d at 200; *Bovia* 179 Cal. App. at 1137; *Saikewicz*, 370 N.E.2d at 424, 427; *Conroy*, 486 A.2d at 1225.

65. *Cruzan v. Dir., Mo. Dep't of Health*, 497 U.S. 261, 278 (1990).

66. See *id.* at 280.

67. See *id.* at 285.

terest, the majority qualified its result, stating that the right to refuse treatment is not absolute, and the individual's interests must therefore be balanced against relevant state interests.⁶⁸

These state interests included the preservation of life, prevention of suicide, protection of the integrity of the medical profession, and protection of innocent third parties.⁶⁹ Individual interests implicated included the patient's right to autonomy and self-determination, encompassed in the right to a dignified death.⁷⁰ Ultimately, the Court held that Missouri's interest in preserving life was sufficient to justify its procedural requirement.⁷¹

After *Cruzan*, state judiciaries began to develop requirements allowing surrogate decision makers to refuse life support on behalf of incapacitated patients, but each state required petitioners to satisfy a different burden of proof in order to obtain permission from the courts to withdraw life-sustaining medical treatment for a patient.⁷² This was problematic because state courts were inconsistent in selecting and adopting decision-making standards to govern the decision to withdraw treatment.⁷³ Some states required a "substituted judgment approach,"⁷⁴ while others required a "best interest" approach.⁷⁵

Additionally, state courts had inconsistent requirements for the level of evidence required to meet the decision-making standards.⁷⁶ Some states required a standard of clear and convincing evidence,⁷⁷ while others only required a preponderance of evidence.⁷⁸ Thus, state courts recognized an incapacitated patient's right to refuse life-sustaining treatment, as exercised by a surrogate, but the courts differed in both the decision-making standards used and the burden of

68. *See id.* at 279.

69. Bishop, *supra* note 44, at 159.

70. *Id.* at 164.

71. *Cruzan*, 497 U.S. at 284.

72. Bishop, *supra* note 44, at 159.

73. *See generally In re Estate of Longeway*, 549 N.E.2d 292 (Ill. 1989); *Superintendent of Belchertown State Sch. v. Saikewicz*, 370 N.E.2d 417 (Mass. 1977); *see also* Bishop, *supra* note 44, at 159.

74. Bishop, *supra* note 44, at 159.

75. *Id.*

76. *Id.*

77. *See Cruzan v. Dir., Mo. Dep't of Health*, 497 U.S. 261, 281 (1990) (holding that the Constitution does not forbid a state from adopting a clear and convincing standard as a procedural safeguard); *see also* Bishop, *supra* note 44, at 159.

78. *See, e.g., In re Guardianship of Jane Doe*, 583 N.E.2d 1263, 1272 (Mass. 1992) (requiring a preponderance of evidence to support a patient's wishes).

proof required.⁷⁹ This problem not only established the lack of reliable guidance surrounding the issue, but also emphasized the need for a statutory answer to determine the best approach regarding surrogate decision making instead of a solution devised by the judiciary.⁸⁰

1. SUBSTITUTED JUDGMENT APPROACH

Some courts facing the issue of surrogate decision making have used a substituted judgment standard, where the decision maker makes a decision for the incapacitated patient conforming closely to what the patient would have decided were the patient capable.⁸¹ In making such a subjective decision, the surrogate decision maker must first take into account any prior expressions by the patient regarding end-of-life or medical decisions.⁸² If no prior expressions exist, then the surrogate decision maker looks to the patient's philosophical, religious, and moral views, life goals, values about the purpose of life and the way it should be lived, and attitudes towards sickness, medical procedures, suffering and death, in order to determine what the patient's preferences regarding treatment might have been.⁸³ As the *Cruzan* case demonstrates, the state can require, as a procedural safeguard, the decision maker to justify his decision through the presentation of evidence.⁸⁴ The court may require that evidence of the patient's intent meet the "clear and convincing" standard, as was the case in *Cruzan*, or it may require a lesser burden of proof.⁸⁵

2. BEST INTEREST APPROACH

Other courts grappling with the issue of surrogate decision making have used a best interest approach.⁸⁶ This approach is especially appropriate when the patient has never been capable of making his own decisions and where determining what the patient would have

79. See *id.*; Bishop, *supra* note 44, at 159.

80. Bishop, *supra* note 44, at 159-60.

81. *In re Estate of Longeway*, 549 N.E.2d 292 (Ill. 1989); see also *Superintendent of Belchertown State Sch. v. Saikewicz*, 370 N.E.2d 417 (Mass. 1977).

82. *In re Estate of Longeway*, 549 N.E.2d at 299.

83. *In re Jobes*, 529 A.2d 434, 445 (N.J. 1987) (quoting Steven A. Newman, *Treatment Refusals for the Critically and Terminally Ill: Proposed Rules for the Family, the Physician, and the State*, 3 N.Y.L. SCH. HUM. RTS. ANN. 35, 45-46 (1985)).

84. See *Cruzan v. Dir., Mo. Dep't of Health*, 497 U.S. 261, 285 (1990).

85. *Id.* at 280.

86. See Ardath A. Hamann, *Family Surrogate Laws: A Necessary Supplement to Living Wills and Durable Powers of Attorney*, 38 VILL. L. REV. 103, 117 (1993).

decided is impossible.⁸⁷ Under this approach, the surrogate decision maker must make an objective determination of whether the refusal of any treatment would be in the best interest of the patient.⁸⁸ In making such a decision, the decision maker weighs such factors as “relief from suffering, preservation or restoration of bodily functioning, and quality and extent of sustained life.”⁸⁹ The best interest approach requires the decision maker not only to determine the relevant factors, but also to make a decision based on what is determined to be best for the patient.⁹⁰

B. Inadequacies of the Judicial Approach and the Need for Legislative Guidance Regarding End-of-Life Decisions

Although states have recognized the right of an incapacitated patient to refuse life-sustaining treatment,⁹¹ the judicial process can be onerous.⁹² The Supreme Court of New Jersey articulated this point well in *In re Jobes*:⁹³

No matter how expedited, judicious intervention in this complex and sensitive area may take too long. Thus, it could infringe on the very rights that we want to protect. The mere prospect of a cumbersome, intrusive and expensive court proceeding, during such an emotional and upsetting period in the lives of a patient and his or her loved ones, would undoubtedly deter many persons from deciding to discontinue treatment. And even if the patient or the family were willing to submit to such a proceeding, it is likely that the patient’s rights would nevertheless be frustrated by judicial deliberation. Too many patients have died before their right to reject treatment was vindicated in court.⁹⁴

In addition to dealing with the arduousness of the judicial system, gay and lesbian families have to cope with how the court will regard their nontraditional relationship. A court may not allow the partner of an incapacitated patient standing to determine the fate of his partner, particularly if the incapacitated partner has not executed an advanced directive and the couple has not made any effort to have their union

87. *Id.*

88. See *In re Estate of Longeway*, 549 N.E.2d 292, 299 (Ill. 1989); see also Hamann, *supra* note 86, at 117.

89. Hamann, *supra* note 86, at 117.

90. *Id.*

91. 1 ALAN MEISEL, *THE RIGHT TO DIE* §§ 2.2–2.5 (2d ed. 1995).

92. See *id.* § 5.15.

93. *In re Jobes*, 529 A.2d 434, 449 (N.J. 1987).

94. *Id.*

recognized by the state.⁹⁵ Because the rights of gays and lesbians to marry is currently only recognized by one state,⁹⁶ many courts will not grant gay and lesbian individuals the right to sue in court for any of the rights associated with marital relations.⁹⁷

However, recently the Nassau County Supreme Court in New York ruled that a gay man trying to sue St. Vincent's Hospital for the wrongful death of his deceased partner had standing to sue for wrongful death and medical malpractice.⁹⁸ The factual and legal circumstances in this case weighed in favor of the court granting the plaintiff standing.⁹⁹ The plaintiff, John Langan, was joined with his partner of fifteen years, Neil Spicehandler, in a Vermont civil union.¹⁰⁰ The court noted that New York regularly recognizes "common-law"¹⁰¹ spouses from other states¹⁰² and that New York law does not define spouses as people of different sexes.¹⁰³ While this New York court ruling is a significant first for same-sex couples in New York, it remains to be seen if a civil union would be treated similarly in other states and whether same-sex couples who have a civil union would be granted standing in court for other purposes, such as determining the fate of an incapacitated partner. This judicial problem highlights the need in each state for a legislative statute that addresses the needs of gay and lesbian couples, so that such families do not have to resort to the court to determine the fate of a loved one.¹⁰⁴

95. Only Massachusetts allows same-sex marriage, and Connecticut and Vermont allow legal recognition similar to marriage via civil unions. However, same-sex couples living in California, the District of Columbia, and Hawaii can take advantage of domestic partnership laws that provide a range of health care benefits and other protections. STATE LAWS AFFECTING GLBT PEOPLE, *supra* note 10.

96. McDonald & Dedman, *supra* note 10.

97. STATE LAWS AFFECTING GLBT PEOPLE, *supra* note 10.

98. News Release, Lambda Legal, Gay Man Can Pursue Wrongful Death Case as a Spouse, New York Court Rules; Lambda Legal Says 'Break Through Ruling' Is Nation's First (Apr. 15, 2003), at <http://www.lambdalegal.org/cgi-bin/iowa/documents/record?record=1250> (last visited Jan. 20, 2005) [hereinafter Gay Man Can Pursue Wrongful Death Case].

99. *Id.*

100. *Id.*

101. *Id.*

102. *Id.*

103. *Id.*

104. *Id.*

C. Inadequacy of Existing Decision-Making Instruments

In response to the pleas for legislative guidance in the right-to-die context, all states have enacted various forms of legislation to implement advance directives, such as living will statutes and health care power of attorney (HCPA) statutes.¹⁰⁵ A living will is generally an instrument formally executed by an individual that clearly expresses that individual's intent regarding the withdrawal or withholding of life-sustaining treatment in the event of incapacity.¹⁰⁶ In contrast, HCPA statutes are legal instruments through which an individual selects some other person to be the individual's agent and to make health care decisions for the individual, should he or she become incapacitated.¹⁰⁷

HCPA statutes are more flexible than living wills because, unlike living wills, they allow for adjustment to unforeseen circumstances arising after incapacity and also allow the individual to specifically limit the authority of the designated agent.¹⁰⁸ The obvious problem with both of these instruments, however, is that, to be effective, they must be properly executed before an individual becomes incapacitated.¹⁰⁹ Surveys indicate that only seventeen percent of people have executed a living will or a HCPA.¹¹⁰ In the absence of an advance directive and without a surrogate decision-making statute, the patient and the patient's family are relegated to the judicial system to determine the fate of their loved one.¹¹¹

III. The Answer: Surrogate Decision-Making Statutes

Parties involved in litigation can suffer several readily identifiable costs, including loss of time,¹¹² financial costs,¹¹³ physical and

105. 2 MEISEL, *supra* note 41, §§ 10.4-5, at 8-13 (describing types of advance directives, such as living wills and proxy directives, which are manifested in HCPA Statutes); *see also* Bishop, *supra* note 44, at 162.

106. *See* Hamann, *supra* note 86, at 125.

107. *See id.* at 128-29.

108. *See id.* at 130.

109. Bishop, *supra* note 44, at 162.

110. *See* Edward J. Larson & Thomas A. Eaton, *The Limits of Advance Directives: A History and Assessment of the Patient Self-Determination Act*, 32 WAKE FOREST L. REV. 249, 277 n.191 (1997) (reporting that seventeen percent of patients studied had executed an advanced directive before hospitalization); *see also* Herr & Hopkins, *supra* note 46, at 1017.

111. *See* 2 MEISEL, *supra* note 41, ch. 14, at 249-70.

112. *See id.* § 5.47.

113. *See id.* § 5.50.

emotional strain,¹¹⁴ disruption in patient care,¹¹⁵ unwanted publicity,¹¹⁶ and diminished privacy.¹¹⁷ Recognizing burdens the judicial process places on both patients and family, all fifty states and the District of Columbia have adopted surrogate decision-making statutes.¹¹⁸ Surrogate statutes operate when an advance directive does not exist or is defective.¹¹⁹ The general purpose of surrogate statutes is to allow the surrogate to exercise the patient's recognized right to refuse medical treatment in the absence of an advance directive without being subject to unwanted court proceedings.¹²⁰

The general scheme of the statutes, which create a statutory procedure regarding surrogate decision making, involves first assessing whether an advance directive exists, and if so, whether a surrogate has been appointed through the directive.¹²¹ If no surrogate has been designated or an advance directive is unclear regarding a specific medical treatment that the incapacitated patient faces, then a surrogate is appointed through a procedure outlined in the statute, and that person can make decisions for the patient based on either the substituted judgment or the best interests of the patient.¹²² The following sections focus on surrogate decision-making statutes in New Mexico, Illinois, and New York, each of which takes a different approach to the surrogate decision-making process. The analysis will begin by ex-

114. *See id.* § 5.51.

115. *See id.* § 5.53.

116. *See id.* § 5.55.

117. *See id.* § 5.54.

118. *See* sources cited *supra* note 52.

119. *Id.*

120. *See, e.g.*, 755 ILL. COMP. STAT. ANN. 40/5(b) (West 2004) ("This Act is intended to define the circumstances under which private decisions by patients with decisional capacity and by surrogate decision makers on behalf of patients lacking decisional capacity to make medical treatment decisions or to terminate life-sustaining treatment may be made without judicial involvement of any kind."); W. VA. CODE § 16-30-2(a) (2004) ("The purpose of this article is to ensure that a patient's right to self-determination in health care decisions be communicated and protected; and to set forth a process for private health care decision making for incapacitated adults, including the use of advance directives, which reduces the need for judicial involvement and defines the circumstances under which immunity shall be available for health care providers and surrogate decision makers who make health care decisions The intent of the Legislature is to establish an effective method for private health care decision making for incapacitated adults, and to provide that the courts should not be the usual venue for making decisions.").

121. *See* Colleen M. O'Conner, *Statutory Surrogate Consent Provisions: An Overview and Analysis*, 20 MENTAL & PHYSICAL DISABILITY L. REP. 128 (1996).

122. *See generally id.*

aming the New Mexico statute, and, in turn, each of the other states will be compared to New Mexico in their ability to cater to the needs of gay and lesbian couples.

A. The New Mexico Uniform Health Care Decisions Act¹²³

New Mexico is one of a few states that has adopted some form of the Uniform Law Commissioner's Uniform Health Care Decisions Act (UHCDA),¹²⁴ which was endorsed by the American Bar Association in 1994.¹²⁵ The Committee's purpose in creating the UHCDA was to provide a new template in surrogacy statutes that provided for individual autonomy, comprehensive decision-making options, and simplicity consistent with the way individuals and health care providers actually operate.¹²⁶ The UHCDA is noted for its flexibility to coexist in a statutory scheme that has provisions for advanced directives or lacks such provisions.¹²⁷ In adopting the UHCDA, however, New Mexico changed the existing document and adapted it to the needs of its citizens.¹²⁸

New Mexico's UHCDA begins with a provision describing the production, use, and revocation of advance directives.¹²⁹ The New Mexico statute allows surrogates to "make any health care decision the principal could have made while having capacity."¹³⁰ This sentence in the statute closes the gap for advance directives that do not include particular types of medical treatment in their instructions. Included among the powers of surrogates is the ability to appoint an agent to make surrogate health care decisions, as long as the agent is not affiliated with the hospital at which the patient is receiving treatment, selection of health care providers, selection of the type of tests and procedures to be used, the use of medications, the applicability of

123. N.M. STAT. ANN. §§ 24-7A-1 to -18 (Michie 2004).

124. *See id.* Delaware, Maine, and New Mexico each adopted the Act in some form. *See* ABA COMM'N ON LAW & AGING, *supra* note 44.

125. *See* Charles P. Sabatino, *The New Uniform Health Care Decisions Act: Paving a Health Care Decisions Superhighway?*, 53 MD. L. REV. 1238, 1239 (1994).

126. *See* UNIFORM HEALTH-CARE DECISIONS ACT prefatory note (1993), available at <http://www.law.upenn.edu/b11/ulc/fnact99/1990s/uhcda93.htm> (last visited Jan. 24, 2005).

127. *See generally id.*; *see also* Sabatino, *supra* note 125.

128. *Compare* N.M. STAT. ANN. §§ 24-7A-1, -18 (Michie 2004), *with* UNIFORM HEALTH CARE DECISIONS ACT, *supra* note 126.

129. *See* N.M. STAT. ANN. §§ 24-7A-1 to -5 (Michie 2004).

130. *Id.* § 24-7A-2(b).

“do not resuscitate” orders, and the removal or maintenance of life-sustaining treatment, including artificial hydration and nutrition.¹³¹

New Mexico’s statute contains a hierarchical ranking of potential surrogates, in the case where no health care agent or advance directive exists.¹³² In the statute, the hierarchical order for choosing a surrogate is: (1) the incapacitated patient’s spouse; (2) “an individual in a long-term relationship of indefinite duration with the patient in which the individual has demonstrated an actual commitment to the patient similar to the commitment of a spouse and in which the individual and patient consider themselves to be responsible for each other’s well-being;” (3) an adult child; (4) a parent; (5) an adult brother or sister; or (5) a grandparent.¹³³ This format is ideal for nontraditional families, including gay and lesbian couples, because it legally mandates that individuals in committed relationships have a say in treatment decisions for their incapacitated partners.¹³⁴ In states where civil unions exist, such as Vermont and Connecticut, the individuals in a civil union are considered to be “spouses.”¹³⁵ If a statute were in place in Vermont or Connecticut with a statutory scheme similar to that of the New Mexico UHCDA, then health care workers would first consult the incapacitated patient’s same-sex spouse for health care decision making in the absence of an advance directive. In those states where civil unions are not legally recognized, like New Mexico, the health care worker, after determining the incapacitated patient has no legal spouse, would consult the patient’s domestic partner, or life partner to make treatment decisions. This grants the partner (whether heterosexual or homosexual) access to the decision-making process in a position on par with that of a traditional spouse.¹³⁶

The New Mexico UHCDA also provides a remedy for situations where more than one surrogate is present in a particular class and to-

131. *Id.* § 24-7A-5.

132. *Id.* § 24-7A-5(b).

133. *Id.* §§ 24-7A-5(b)(1)–(6).

134. *Id.*

135. N.M. STAT. ANN. §§ 24-7A-5(b)(1)–(6). The family member with the second level of priority is listed as “[a]n individual in a long-term relationship of indefinite duration with the patient in which the individual has demonstrated an actual commitment to the patient similar to the commitment of a spouse in which the individual and the patient consider themselves to be responsible for each other’s well-being.” *Id.* § 24-7A-5(b)(2); see also Duncan Joseph Moore, *Medical Surrogacy Mediation: Expanding Patient, Family and Physician Rights and Reformulating the Virginia Health Care Decisions Act*, 10 VA. J. SOC. POL’Y & L. 410, 431 (2003).

136. See sources cited *supra* note 10.

gether they cannot agree on a specific treatment option.¹³⁷ The statute creates a remedy that requires the physician to follow the decision of a majority of the class.¹³⁸ If no consensus can be reached among the members of a class, however, then the New Mexico law authorizes a treating physician to disqualify the class and “individuals having lower priority” from the surrogate decision-making process.¹³⁹ Such a decision leaves possible surrogates the option of petitioning a court for the guardianship rights of the incapacitated patient.¹⁴⁰ This option, however, presents a time-consuming and costly remedy, and one that would prove complicated in situations where an incapacitated patient needed an immediate medical decision.¹⁴¹ Furthermore, there is no guarantee that a court will give due weight to the role of a life partner if the members of the class were forced to hash out their differences in court.¹⁴²

B. The Illinois Health Care Surrogate Act¹⁴³

The Illinois Health Care Surrogate Act¹⁴⁴ (IHCSA) is in many ways just as comprehensive as the New Mexico UHCDA.¹⁴⁵ Its hierarchical scheme, however, is not respectful of the needs of nontraditional families. The Illinois General Assembly enacted the IHCSA in 1991 to enable health care decision making on behalf of incapacitated patients without any judicial intervention.¹⁴⁶ Under the IHCSA, in the absence of a valid living will or health care power of attorney, a surrogate is authorized to make health care decisions for the incapacitated patient.¹⁴⁷ The surrogates are prioritized as follows: (1) the pa-

137. See N.M. STAT. ANN. § 24-7A-5(e) (Michie 2004).

138. *Id.*

139. *Id.*

140. See *id.* § 45-5-303(a).

141. See generally *In re Jobes*, 529 A.2d 434 (N.J. 1987); see also discussion *infra* Part II.B.

142. See *Gay Man Can Pursue Wrongful Death Case*, *supra* note 98 and accompanying text.

143. 755 ILL. COMP. STAT. ANN. 40/1 to 40/65 (West 2004).

144. *Id.*

145. Compare N.M. STAT. ANN. §§ 24-7A-1 to -18 (Michie 2004), with 755 ILL. COMP. STAT. ANN. 40/1 to 40/65. See generally Steven M. Fatum et al., *A Review of the Illinois Health Care Surrogate Act*, 80 ILL. B.J. 124, 124 (1992); Robert J. Lightfoot II, *Butcher v. Fashingbauer: The “Case” for a Surrogate Decision Maker Statute in Minnesota*, 16 HAMLINE J. PUB. L. & POL’Y 231, 262–67 (1994).

146. 755 ILL. COMP. STAT. 40/5(b) (2004).

147. *Id.*

tient's guardian (if one exists),¹⁴⁸ (2) the patient's spouse,¹⁴⁹ (3) an adult child of the patient,¹⁵⁰ (4) a parent of the patient,¹⁵¹ (5) an adult brother or sister of the patient,¹⁵² (6) an adult grandchild of the patient,¹⁵³ (7) a close friend of the patient,¹⁵⁴ and (8) the guardian of the patient's estate.¹⁵⁵

If more than one member in the highest available priority class exists, then the IHCSA requires those members to make reasonable efforts to reach a consensus.¹⁵⁶ If they cannot reach a consensus, then the majority of the members in the class will control the decision unless the minority member(s) of the class initiate guardianship proceedings under the Illinois Probate Act of 1975.¹⁵⁷ While this safety net exists to break a tie, this is clearly not the intent of the statute.¹⁵⁸

The IHCSA is unsatisfactory for nontraditional couples because its surrogate priority list assumes the existence of traditional (that is, heterosexual) close-knit family relationships.¹⁵⁹ The only way that a domestic or life partner would be able to have his voice heard in the process is to be recognized as a "close friend of the patient," which is

148. *Id.* at 40/25(a)(1).

149. *Id.* at 40/25(a)(2).

150. *Id.* at 40/25(a)(3).

151. *Id.* at 40/25(a)(4).

152. *Id.* at 40/25(a)(5).

153. *Id.* at 40/25(a)(6).

154. *Id.* at 40/25(a)(7). A close friend is expressly defined as:

[A]ny person 18 years of age or older who has exhibited special care and concern for the patient and who presents an affidavit to the attending physician stating that he or she (i) is a close friend of the patient, (ii) is willing and able to become involved in the patient's health care, and (iii) has maintained such regular contact with the patient as to be familiar with the patient's activities, health, religious and moral beliefs. The affidavit must also state the facts and circumstances that demonstrate that familiarity.

Id. at 40/10.

155. *Id.* at 40/25(a)(8).

156. *Id.* at 40/25(a).

157. *See id.*

158. The Act states, "it shall be the responsibility of those surrogates to make reasonable efforts to reach a consensus as to their decision on behalf of the patient regarding the foregoing of life-sustaining treatment." 755 ILL. COMP. STAT. 40/25 (2004), amended by Act July 27, 1997, Public Act No. 90-24, sec. 25, § 40/25, Ill. Leg. Serv. 2937-38 (West); see also Rebecca J. O'Neill, *Surrogate Health Care Decisions for Adults in Illinois—Answers to the Legal Questions that Health Care Providers Face on a Daily Basis*, 29 LOY. U. CHI. L.J. 411, 427 (1998).

159. See 755 ILL. COMP. STAT. 40/25 (2004); see also Michael L. Closen & Joan E. Maloney, *The Health Care Surrogate Act in Illinois: Another Rejection of Domestic Partners' Rights*, 19 S. ILL. U. L.J. 479, 484 (1995).

category seven on the list of possible decision makers.¹⁶⁰ Conceivably, a life partner who is not “technically” family could be a lot closer to the patient than any family members related by “blood.”¹⁶¹ The IHCSA’s hierarchical scheme is not only a potentially demeaning characterization of the relationship between the incapacitated patient and his partner, but it also conceivably relegates the incapacitated patient to the position of a child, allowing parents and siblings to make decisions for the patient before even recognizing the partner’s wishes, the person with whom the patient chose to spend his life. Although a statute cannot capture the full complexity of all family relationships, Illinois should rework the IHCSA to do a better job of reflecting the composition of many of today’s family relationships and honoring the last wishes of gay and lesbian patients.

C. The New York Health Care Proxy Law¹⁶² and Surrogate Decision-Making Committee

For incapacitated patients, New York takes a novel approach to the health care decision-making process.¹⁶³ New York creates a quasi-judicial surrogate decision-making process, which allows doctors more participation in the surrogate decision-making process.¹⁶⁴ First, New York provides that a patient may appoint a proxy health care decision maker through a standard health care proxy that can either limit the surrogate to decisions based on written advance directives and oral statements, or allow the proxy to have more latitude in surrogate decision making with regards to the patient’s expressed wishes.¹⁶⁵ In determining the decision-making standard for an appointed proxy, the statute requires the surrogate to act in accordance with the patient’s expressed preferences and personal beliefs, and in the absence of knowledge concerning personal wishes, the statute directs the surrogate to act in accordance with the patient’s best interests.¹⁶⁶

160. See 755 ILL. COMP. STAT. 40/25(a)(7) (2004); see also Closen & Maloney, *supra* note 159.

161. See Closen & Maloney, *supra* note 159, at 484.

162. N.Y. PUB. HEALTH LAW §§ 2980–2994 (McKinney 2004).

163. See *id.*

164. See *id.* § 2982(2).

165. See *id.* § 2981(5).

166. See *id.* § 2981(2).

In the absence of an advance directive, the New York law creates a hierarchical scheme that begins with either a committee of the person or a guardian appointed by the court.¹⁶⁷ The committee of the person is a procedure by which a county court can appoint a committee consisting of one specific person to handle the affairs of an incapacitated person.¹⁶⁸ The statute then goes on to list the possible surrogates in hierarchical order, including close friend as the last option for obtaining surrogacy rights. The statute fails, however, to include individuals in long-term relationships not defined by marriage.¹⁶⁹ Just like the IHCSA, the designation of “close friend” in the New York statute leaves open the possibility that a partner of an incompetent patient would be able to assert surrogate decision-making authority through this option, but this would place him at the bottom of the surrogacy hierarchy, giving all other members of the patient’s family priority before the partner in obtaining surrogacy rights.¹⁷⁰

The New York statute, however, is unique in the way it provides a remedy for surrogates in the same class who cannot make a consensus decision regarding an incapacitated patient’s care.¹⁷¹ Instead of relying on a majority of persons in an individual surrogacy class, like New Mexico and Illinois, New York provides for a dispute mediation system that is authorized to mediate any dispute about the patient, the attending physician, the hospital, or any person listed on the surrogate list.¹⁷² The New York dispute mediation system is created by each hospital’s governing authority, and must include a physician able to attest to the patient’s incompetence, an additional physician to provide a concurring determination, and a family member or guardian of the patient.¹⁷³ If disputes cannot be resolved within seventy-two hours, then a physician has the ability to transfer the patient to another physician or hospital, and those involved in the dispute have the right to seek judicial review of the issue.¹⁷⁴ New York’s method of

167. *Id.* § 2965(2)(a)(i).

168. Moore, *supra* note 135, at 425.

169. See N.Y. PUB. HEALTH LAW §§ 2965(2)(a)(i)–(vi).

170. See *id.* §§ 2961(5), 2965(2)(a)(vi).

171. See *id.* § 2972.

172. *Id.* § 2972(2).

173. See *id.* § 2972(2).

174. *Id.* § 2972(4)(b).

resolving disputes gives doctors a greater hand in the health care decision-making process.¹⁷⁵

New York's statutory method of resolving conflicts among surrogates in the same class who cannot make a consensus decision regarding an incapacitated patient's care is questionable in several respects. First, it grants the primary physician enormous power in determining the patient's fate, particularly because the physician is so involved with the patient.¹⁷⁶ Second, no guarantee exists that this dispute mediation process will grant adequate respect to the incapacitated patient's relationship with his life partner and that the partner will be given a voice in such an informal process. In addition, the New York statute is unsatisfactory because it fails to provide for the possibility that a life partner or person in a long-term relationship with the incapacitated patient not legally characterized as "marriage" would be the appropriate choice for the surrogate.

IV. Recommendation

In light of the preceding discussion, this note makes a two-part recommendation. First, it recommends that other states should follow New Mexico and alter their surrogacy statutes to authorize long-term partners to make surrogacy decisions. Second, it advises same-sex couples on how to protect their end-of-life decisions. Although the first recommendation is preferred, the second recommendation is necessary to protect the dignity of gay and lesbian couples who live in states currently without surrogacy statutes that are amenable to the interests of nontraditional families.

A. Statutory Reforms

The purpose of most surrogacy statutes is to give surrogacy rights to individuals who are most closely associated with the incapacitated patient and can therefore best execute their substituted judgment.¹⁷⁷ The failure of most state surrogacy statutes to recognize

175. Compare N.M. STAT. ANN. §§ 24-7A-1 (Michie 2004), and 755 ILL. COMP. STAT. 40/1 (2004), with N.Y. PUB. HEALTH LAW §§ 2980-2994 (McKinney 2004).

176. See generally N.Y. PUB. HEALTH LAW §§ 2980-2994.

177. See, e.g., W. VA. CODE § 16-30-2(a) (Michie 2004). "The purpose of this article is to ensure that a patient's right to self-determination in health care decisions be communicated and protected; and to set forth a process for private health care

life partners as potential surrogates, however, flouts the express intent of statutes in states like Illinois and New York¹⁷⁸ and fails to realize the constitutional liberty interest established by the Supreme Court in *Cruzan*.¹⁷⁹ In a world full of changing family structures, it is necessary to recognize the rights of nontraditional families, including those in same-sex relationships, with regard to medical surrogacy.¹⁸⁰

New Mexico's authorization of individuals in long-term relationships to be legal surrogates is the best available example of how states can recognize the rights of gay and lesbian relationships. However, it is not without its flaws. The statute's vague language allowing individuals in "long-term relationship[s] resembling marriage" to be surrogates may not be enough to safeguard the rights of nontraditional relationships. The New Mexico law does not expressly apply to gays and lesbians, and as such may be misconstrued to exclude such couples from its reach. Although such a rule could reasonably apply to both same-sex and opposite-sex couples, a hospital or court may construe the statute to apply only to heterosexual couples, arguing that the legislative intent of the statute did not intend to reach gays and lesbians. Therefore, the best possible way to safeguard the rights of nontraditional couples would be to expressly incorporate them into state surrogacy statute's hierarchies.

In the meantime, however, the next best thing is for states to replicate New Mexico's UHCDA.¹⁸¹ New Mexico's authorization of individuals in long-term relationships to be legal surrogates in the second spot in the surrogacy hierarchy allows gay and lesbian partners to make decisions for their loved one before siblings, parents, and grown children.¹⁸² This gives the relationship between the incapacitated patient and her partner the validity it deserves—while being politically palpable and not upsetting the idea many voters have that marriage should be reserved for heterosexual couples.¹⁸³ Furthermore, it allows

decision making for incapacitated adults, including the use of advance directives, which reduces the need for judicial involvement"

178. See 755 ILL. COMP. STAT. 40/1 to 40/65; N.Y. PUB. HEALTH LAW §§ 2980–2994.

179. *Cruzan v. Dir., Mo. Dep't of Health*, 497 U.S. 261, 286–87 (1990); see also Closen & Maloney, *supra* note 159.

180. *Lawrence v. Texas*, 539 U.S. 558, 578 (2003).

181. N.M. STAT. ANN. § 24-7A (Michie 2004).

182. *Id.*

183. According to a recent CBS Poll, Americans continue to oppose the idea of same-sex marriage. CBS NEWS, POLL: FEW FAVOR SAME-SEX MARRIAGE, at <http://>

the person closest to the incapacitated patient to make health care decisions, which is the second best choice if the patient cannot make the decision for himself.¹⁸⁴ While the New Mexico statute enfranchises gay and lesbian couples with regard to medical surrogacy, it also enfranchises heterosexual couples who currently cohabit in nontraditional marriage-like relationships.¹⁸⁵

B. Steps for Same-Sex Couples Not Protected by State Statute

In states where same-sex partners are relegated to “close friend” at the end of the list of possible surrogates, same-sex couples should take action to make sure their health care wishes are honored. Moreover, they must do so both before and during the hospital visit.

1. BEFORE THE HOSPITAL VISIT

Same-sex couples should execute health care proxies, also known as a durable power of attorney for health care.¹⁸⁶ This advanced directive allows the partners to designate each other as agents on one another’s behalf in the event one of the partners becomes incapacitated and cannot make health care decisions for himself.¹⁸⁷ As long as the health care proxy was executed in a manner consistent with the laws of the couple’s state,¹⁸⁸ it will allow one partner to visit the other in the hospital, to receive personal property the hospital recovers at the time of a partner’s incapacitation, and to authorize medical treatment and surgical procedures.¹⁸⁹ There are three important considerations regarding a health care proxy, however. The first is that in many states the health care proxy only becomes effective if the patient is incapacitated.¹⁹⁰ The second consideration is that a health care proxy becomes ineffective at death, so same-sex couples should

www.cbsnews.com/stories/2004/03/15/opinion/polls/main606453.shtml (last visited Apr. 4, 2004).

184. *Cruzan*, 497 U.S. at 285.

185. See N.M. STAT. ANN. § 24-7A-5(b)(2).

186. GAY & LESBIAN ADVOCATES & DEFENDERS, LEGAL PLANNING FOR SAME-SEX COUPLES: PREPARING FOR THE UNEXPECTED, at http://www.glad.org/rights/Legal_Planning_for_Couples.pdf (last visited Apr. 4, 2004) [hereinafter LEGAL PLANNING FOR SAME-SEX COUPLES].

187. *Id.*

188. *Id.*

189. *Id.*

190. HUMAN RIGHTS CAMPAIGN, FAMILY: HEALTH CARE PROXY, at <http://www.hrc.org/template.cfm?Section=Home&Template=/ContentManagement/ContentDisplay.cfm&ContentID=18671> (last visited Jan. 23, 2005).

also execute wills.¹⁹¹ The third consideration is that a health care proxy is not valid in all states; in states that do not recognize health care proxies, durable powers of attorney may serve the same function.¹⁹² Furthermore, to prevent a partner's actions from being questioned with regard to an incapacitated partner, the couple should execute a living will.¹⁹³

A living will, also known as a "medical directive," is a statement of a person's wishes regarding end-of-life care.¹⁹⁴ "Unlike a health care proxy, a living will does not empower another person to make important medical decisions if [the patient is incapacitated]."¹⁹⁵ Instead, it provides direction to the health care provider or chosen representative of the patient's wishes and helps to ensure those directions are followed.¹⁹⁶ A living will also serves the purpose of substantiating the incapacitated partner's wishes, should they be contested by other family members in court.¹⁹⁷

Same-sex couples should also draft hospital visitation authorizations, because many hospitals only allow biological or legal family members to visit a patient in the hospital, unless the unrelated visitors have a hospital visitation authorization.¹⁹⁸ This document makes it clear that each partner wants the other partner to have the right to visit, if he ever becomes hospitalized.¹⁹⁹ Without a hospital visitation authorization, a partner may be detained in a waiting room during an emergency situation. In states where health care proxies do not become effective until the patient cannot make decisions for himself, the same-sex partner of a patient with only a health care proxy may be detained in the waiting room, until the patient becomes incapacitated.

Another way same-sex couples can protect their rights is to make sure their local hospital's policies include visitation rights.²⁰⁰ Even though the Joint Commission on Accreditation of Healthcare Organizations (JCAHO), the organization that evaluates and accredits hospi-

191. *Id.*

192. LEGAL PLANNING FOR SAME SEX COUPLES, *supra* note 186.

193. *Id.*

194. *Id.*

195. *Id.*

196. *Id.*

197. *Id.*

198. LAMBDA LEGAL, HOSPITAL VISITATION: A RIGHT FOR ALL FAMILIES, at <http://www.lambdalegal.org/cgi-bin/iowa/documents/record?record=1013> (last visited Jan. 19, 2005).

199. *Id.*

200. *Id.*

tals nationally, defines family as, “[t]he person(s) who plays a significant role in the individual’s [patient’s] life, [which] may include a person(s) not legally related to the individual,”²⁰¹ hospitals do not always recognize same-sex couples as family because of inadequate staff training or other policy deficiencies.²⁰²

Same-sex couples should contact the patient advocate or community relations office of their local hospital and inquire if the hospital policy allows same-sex partners to visit family members.²⁰³ If the hospital has a written policy to reflect this definition of family, then same-sex couples should get a copy of the policy and have it included in their medical records, along with a copy of their health care proxy and living will, so that it can be quickly accessed in an emergency situation.²⁰⁴ If the local hospital does have a written policy, then same-sex couples should go a few steps further and ask that hospital staff be trained to know that “family” includes same-sex partners and ask for a nondiscrimination statement in the hospital’s bill of rights that includes “sexual orientation.”²⁰⁵ If the local hospital does not have a written policy, then couples can write to the patient advocate or community relations office to see that one or both of these are included.²⁰⁶

2. DURING THE HOSPITAL VISIT

During a hospital visit, if the patient is able to complete his own paperwork upon entering the medical facility, then he can list his partner as “next of kin” or as the “emergency contact,” which may help prevent an incident of discrimination.²⁰⁷ If, during a hospital visit, a same-sex couple’s status as “family” is not being respected by medical personnel, then Lambda Legal, a national civil rights organization, suggests the following steps:²⁰⁸ First, calmly explain to hospital personnel that as the patient’s life partner, you are a family member. Explain that you should be with your partner for companionship, and that he may be worried without you. Second, pick up an in-

201. *Id.*

202. *Id.*

203. *Id.*

204. *Id.*

205. *Id.*

206. *Id.*

207. *Id.*

208. *Id.*

hospital phone and call the operator; ask for a patient advocate. Explain the situation, and ask the patient advocate to get permission for you to be with your partner. Third, if necessary, ask the patient advocate to call the patient's primary care physician to explain your family status to medical personnel (assuming that the primary care physician has an understanding of the patient's family and medical wishes). Fourth, call the primary care physician and ask him to speak with hospital personnel to explain who you are—that you are family and that you should be with your partner. Fifth, ask for a copy of the patient's rights and responsibilities policy from hospital personnel. These usually explain that patients have the right to be visited by family. Explain that hospital accreditation standards include partners as family.²⁰⁹

Unfortunately, the onus is on the homosexual couple to safeguard their rights in this already burdensome situation. It is, however, essential that gays and lesbians follow these steps to guarantee that they can play the appropriate role in their partner's end-of-life decision-making process. These steps will help nontraditional couples protect their human dignity.

V. Conclusion

While it remains to be seen whether the *Lawrence* decision will be used by courts to grant same-sex couples the ability to marry, the Supreme Court holding in that case did grant validity to same-sex intimate relationships. The failure of most statutes to include same-sex couples in their statutory schemes for end-of-life decision making denies them the legitimacy their relationships deserve, while denying them dignity during an already traumatic period. Everyone deserves some solace and compassion when their loved ones are ill.

New Mexico's state surrogacy statute, while not flawless, is the best state statute currently available to protect the end-of-life decisions of same-sex couples. Other states should alter their state surrogacy statutes to mirror New Mexico's statute, by placing individuals in a long-term relationship with the patient at the top of the surrogacy hierarchy. This will better protect the constitutional liberty interest established by the Supreme Court in *Cruzan* and give dignity and re-

209. *Id.*

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spect to the last wishes of gay and lesbian patients who cannot make decisions for themselves.

Same-sex couples who live in states without surrogacy statutes should take action both before and during hospital visits to ensure their end-of-life wishes will be honored. To protect themselves, same-sex couples should take the practical steps of executing advanced directives, living wills and hospital visitation authorizations.