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## It's Still Me: Safeguarding Vulnerable Transgender Elders

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# It's Still Me: Safeguarding Vulnerable Transgender Elders

Sarah Steadman<sup>†</sup>

**ABSTRACT:** Transgender individuals have many reasons to be concerned about their welfare in the current political and legislative climate. Transgender elders are especially vulnerable. They are more likely to be disabled than the general elder population. Moreover, transgender elders profoundly fear a future when they must rely on others to maintain and protect their gender identity and dignity. This fear is alarmingly realistic because if a transgender elder becomes incapacitated or requires institutional care, they are likely to face discrimination and other harms by their caretakers. In addition, transgender elders who are incapacitated are particularly at-risk if a non-affirming guardian is appointed to make decisions for them. Before the courts become involved, transgender individuals can take steps, described in this Article, to protect themselves from an unsuitable surrogate. If a court becomes involved, there are actions it can take to ensure that a transgender person is served by a surrogate who will protect their health, welfare, and identity.

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## INTRODUCTION

An 84-year-old transgender<sup>1</sup> man named George<sup>2</sup> had advanced dementia and was placed in a nursing home. Assuming he lived in a hostile environment for transgender elders, he hid his gender identity<sup>3</sup> from other residents and isolated himself. But George could not hide from the staff who bathed and dressed him in clothes that did not match who he was and had been for years. The staff and residents called him “she” and, rather than respond as someone else, he became unresponsive. When he had lived in his community, he had been a vibrant and charming man who engaged others with a sharp wit and keen observations about life and people. After a few weeks in the nursing home, however, he became unrecognizable to those who knew him—listless, completely withdrawn, sleeping through the day and no longer taking care of his basic hygiene or dressing himself. He stopped eating because he refused to go to the dining hall, not wishing to eat and socialize with others. The medical staff

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1. “Transgender is a broad term that can be used to describe people whose gender identity is different from the gender they were thought to be when they were born.” *Understanding Transgender People: The Basics*, NAT’L CTR. FOR TRANSGENDER EQUALITY (July 9, 2016), <https://transequality.org/issues/resources/understanding-transgender-people-the-basics> [<https://perma.cc/Q4FW-XUW9>]. See also WORLD PROF’L ASS’N FOR TRANSGENDER HEALTH, STANDARDS OF CARE FOR THE HEALTH OF TRANSEXUAL, TRANSGENDER, AND GENDER-NONCONFORMING PEOPLE 97 (7th ed. 2012) [hereinafter STANDARDS OF CARE] (defining transgender as “a diverse group of individuals who cross or transcend culturally defined categories of gender. The gender identity of transgender people differs to varying degrees from the sex they were assigned at birth.”). Although the focus of this article is on transgender individuals, other individuals whose gender identity is non-conforming (people whose gender expression differs from conventional expectations of masculinity and femininity) and those who are gender fluid (a person who at any time may identify as male, female, other, or a combination of identities) should also be afforded the protections and advocacy described, and supported in their gender identity when faced with incapacity.

2. George’s story is based generally on a client the Author represented as an attorney in private practice.

3. STANDARDS OF CARE, *supra* note 1, at 96 (defining gender identity as “a person’s intrinsic sense of being male (a boy or a man), female (a girl or woman), or an alternative gender.”).

diagnosed him with “failure to thrive.”<sup>4</sup> That was fitting because, without being recognized for who he was, he could not be himself in that setting and so he could not thrive.

However, a court had declared him to be legally incapacitated<sup>5</sup> and unable to make decisions about where he lived. So, even had he been capable of arranging to move out of that nursing home, he did not have the legal authority to do so. Fortunately, the court had appointed him a suitable guardian—transgender-aware and -affirming. With the advocacy of a culturally responsive attorney, the guardian identified a transgender-affirming caretaker with a private residence and moved George there. After only a few weeks of true caretaking, he became himself again and thrived—eating, bathing, dressing with care in his own style, and making those around him laugh and become inescapably fond of him. It is profound that even when his memory and other cognitive capacities were severely impaired, his identity remained key to his survival. And when he was no longer invisible, he no longer needed to hide. Instead, he was acknowledged and known for who he was, and so he responded. It proved, in his case, to be the difference between life and death. After his move “home,” surrounded by people who knew and saw *him*, he remained engaged and himself through his final days. George was fortunate, but how many others in similar situations are failing to thrive or will be without advocacy and reform?<sup>6</sup>

George’s story demonstrates what studies have already found: that feeling compelled to conceal one’s gender identity is significantly connected to depression for transgender people.<sup>7</sup> Moreover, “[a] real concern of many transgender people is that they will be misgendered in the event that they become reliant on others for care, especially if those carers have not been accepting of their gender identity or are uninformed about such matters.”<sup>8</sup> A sample of poignant statements by elder transgender individuals illustrates their fears as they

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4. The National Institute of Aging describes failure to thrive as a “syndrome of weight loss, decreased appetite and poor nutrition, and inactivity, often accompanied by dehydration, depressive symptoms, impaired immune function . . . .” Kathryn Agarwal, *Failure to Thrive in Elderly Adults: Evaluation*, UP TO DATE (May 2, 2016), <https://www.uptodate.com/contents/failure-to-thrive-in-elderly-adults-evaluation> [https://perma.cc/8HHN-MR46].

5. Statutory definitions of “incapacity” vary, *see, e.g.*, COLO. REV. STAT. § 15-14-102 (5) (2016) (“‘Incapacitated person’ means an individual other than a minor, who is unable to effectively receive or evaluate information or both or make or communicate decisions to such an extent that the individual lacks the ability to satisfy essential requirements for physical health, safety, or self-care, even with appropriate and reasonably available technological assistance.”).

6. *See* Nancy J. Knauer, *LGBT Issues and Adult Guardianship: A Comparative Perspective*, TEMPLE UNIV. LEGAL STUD. RES. PAPER NO. 2013-02, 14 (2013) (citing Jane Gross, *Aging and Gay, and Facing Prejudice in Twilight*, N.Y. TIMES (Oct. 9, 2007), <https://www.nytimes.com/2007/10/09/us/09aged.html> [https://perma.cc/SVG8-FTSX]).

7. Karen L. Fredriksen-Goldsen et al., *Physical and Mental Health of Transgender Older Adults: An At-Risk and Underserved Population*, 54 GERONTOLOGIST 488, 494 (2014).

8. ALZHEIMER’S AUSTRAL., DEMENTIA, TRANSGENDER AND INTERSEX PEOPLE: DO SERVICE PROVIDERS REALLY KNOW WHAT THEIR NEEDS ARE? 4 (2014) [hereinafter ALZHEIMER’S AUSTRAL.], [https://www.dementia.org.au/sites/default/files/130739\\_LGBTI%20Discussion%20Paper.2-21.pdf](https://www.dementia.org.au/sites/default/files/130739_LGBTI%20Discussion%20Paper.2-21.pdf) [https://perma.cc/A5B7-JTU2].

contemplate a potential future when they are unable to make their own decisions or care for themselves and must rely on others, and may require institutional care. A 61-year-old transgender woman spoke of her anxiety about long-term care placement: “my biggest fear right now, [is] not having the freedom to control my dignity.”<sup>9</sup> Others have said that they worry about: “people . . . attempt[ing] to force me into being the wrong gender”<sup>10</sup>; “[h]aving caregivers shave my face and put me in a dress because I have not had lower surgery”<sup>11</sup>; “[h]aving genitals that don’t fit my external appearance and being abused, mistreated or neglected as a result”<sup>12</sup>; “I have realistic concerns that I will not be treated as I would like when I am dependent on others”<sup>13</sup>; “[t]he day I need a caregiver, I will implement my end of life suicide plan.”<sup>14</sup>

A majority of LGBT people in mid-life anticipate receiving care that does not respect their gender identity.<sup>15</sup> This concern is alarmingly realistic because the incidence of discrimination, ignorance, and bias towards transgender persons by those who serve the elderly is well documented.<sup>16</sup> Further, a study of the physical and mental health of transgender elders reports that they are more likely to experience poorer health outcomes, including mental and/or physical disabilities, than the non-transgender LGB elder population.<sup>17</sup> Strikingly, the United States Transgender Survey (USTS), a national study of transgender and gender nonconforming persons, found that 39 percent of respondents reported a disability, compared to 15 percent of the U.S. population.<sup>18</sup> Given those statistics, some transgender persons will likely require others to care for them at some point. One such disability that affects the general elderly population in disproportionate numbers is dementia. In its later stages, dementia leads to

9. Allison Auldridge et al., *Improving the Lives of Transgender Adults: Recommendations for Policy and Practice* 25 (National Center for Transgender Equality 2012), <https://transequality.org/sites/default/docs/resources/TransAgingPolicyReportFull.pdf> [<https://perma.cc/AD3K-JDT8>].

10. *ALZHEIMER’S AUSTRALIA*, *supra* note 8, at 6.

11. Tarynn M. Witten & A. Evan Eyler, *Transgender and Aging: Beings and Becomings*, in *GAY, LESBIAN, BISEXUAL & TRANSGENDER AGING, CHALLENGES IN RESEARCH, PRACTICE, AND POLICY* 187, 212 (Tarynn M. Witten & A. Evan Eyler eds., 2012).

12. *Id.* at 212.

13. *ALZHEIMER’S AUSTRALIA*, *supra* note 8, at 6.

14. *Id.* at 8.

15. INST. OF MED. OF THE NAT’L ACAD., *THE HEALTH OF LESBIAN, GAY, BISEXUAL, AND TRANSGENDER PEOPLE: BUILDING A FOUNDATION FOR BETTER UNDERSTANDING* 274 (2011).

16. Nancy J. Knauer, *LGBT Elder Law: Toward Equity in Aging*, 32 *HARV. J.L. & GENDER* 301, 303 (2009).

17. Fredriksen-Goldsen et al., *supra* note 7, at 496. *See also*, KAREN I. FREDRIKSEN-GOLDSSEN ET AL., INST. FOR MULTIGENERATIONAL HEALTH, *THE AGING AND HEALTH REPORT: DISPARITIES AND RESILIENCE AMONG LESBIAN, GAY, BISEXUAL, AND TRANSGENDER OLDER ADULTS*, 22-23 (2011), [https://www.lgbtagingcenter.org/resources/pdfs/LGBT%20Aging%20and%20Health%20Report\\_final.pdf](https://www.lgbtagingcenter.org/resources/pdfs/LGBT%20Aging%20and%20Health%20Report_final.pdf) [<https://perma.cc/3JAT-GSBA>].

18. SANDY E. JAMES ET AL, NAT’L CTR. FOR TRANSGENDER EQUALITY, *THE REPORT OF THE 2015 U.S. TRANSGENDER SURVEY* 57 (2016) <https://transequality.org/sites/default/files/docs/usts/USTS-Full-Report-Dec17.pdf> [<https://perma.cc/XZV9-EK4D>].

profound incapacity that requires caretaking and, often, decision-making by others who act as surrogates.

If a transgender elder with dementia-related incapacity requires a surrogate decision-maker, that surrogate might not be knowledgeable about the individual's unique concerns, needs, and vulnerabilities related to their gender identity. In addition, the surrogate might not be comfortable with or supportive of the individual's gender identity and its external expression. The attendant bias could result in decisions that are harmful to the elder's well-being. Such a scenario would realize the fears expressed by transgender elders contemplating incapacity and caretaking by others.

Accordingly, it is vital that a transgender elder who is incapacitated select or be appointed a decision-maker who will treat them with dignity and intervene when others do not; one who will affirm and assist them in maintaining their identity, commit to educating themselves and others about transgender elders' unique needs; and one who will make decisions as the transgender individual would have when they had capacity. Equally vital is a decision-maker who will advocate zealously on their behalf for transgender-affirming care with medical and other service providers. Such an outcome requires both preventative and proactive legal measures and reforms.

Professor Nancy J. Knauer has identified distinct issues impacting LGBT people who require guardians.<sup>19</sup> This Article addresses transgender individuals' unique concerns and explores in depth the societal and legal challenges transgender elders confront when faced with incapacity and guardianship. Transgender elders must protect their self-determination, identity, and welfare by predetermining a surrogate decision-maker prior to incapacity. One who will, for example, make health care decisions that safely maintain their gender identities by addressing their particular health care needs. Alternatively, if a transgender elder becomes incapacitated and has not previously chosen a surrogate decision-maker—and, upon incapacity, cannot express a preference for who would serve in that role—a court should appoint a suitable decision-maker to ensure the well-being of the elder. That is, one who is culturally knowledgeable and respectful, an advocate, and who would make transgender-affirming health care and other decisions on the elder's behalf.

Part I of this article describes the current generation of transgender elders through demographic data, health status, and health care concerns. Part II identifies preventative legal measures that should be taken while a transgender person has capacity. It notes the challenges in identifying an appropriate surrogate decision-maker, and the need for protective language to be added to a transgender individual's health care power of attorney and advance directive to honor their gender identities. Last, it presents the range of state standards of

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19. Nancy J. Knauer, *LGBT Issues and Adult Guardianship*, in *COMPARATIVE PERSPECTIVES ON ADULT GUARDIANSHIP*, 299-311 (1st ed. Carolina Academic Press 2015).

decision-making for health care agents appointed by individuals—from protective of the individual’s self-determination to insufficiently protective.

Part III provides an overview of a typical guardianship proceeding for adults alleged to be incapacitated. It discusses the need to identify the gender identity of persons for whom a guardian is to be appointed. Next, it proposes measures courts can take to identify and appoint transgender-affirming guardians, and recommends that the courts monitor the decisions made by the guardians on the transgender elder’s behalf. This Part concludes by identifying certain circumstances that require zealous advocacy by guardians, to protect the transgender individuals they serve.

## I. A DEMOGRAPHIC PICTURE OF TRANSGENDER ELDERS, THEIR HEALTH, AND HEALTH CARE

The lack of empirical research regarding the current transgender elder population impedes an accurate description of this group.<sup>20</sup> Similarly, it is challenging to reliably estimate the number of transgender elders in the United States because, among other factors, national population surveys omit questions about gender identity.<sup>21</sup> And transgender individuals who are members of more than one marginalized group—such as transgender people of color—underreport.<sup>22</sup> However, the most recent estimate is that transgender adults

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20. GARY J. GATES, THE WILLIAMS INST., HOW MANY PEOPLE ARE LESBIAN, GAY, BISEXUAL, AND TRANSGENDER? 2-3 (2011), <http://williamsinstitute.law.ucla.edu/wp-content/uploads/Gates-How-Many-People-LGBT-Apr-2011.pdf> [<https://perma.cc/3BRQ-DLNU>]. See also Knauer, *supra* note 16, at 9 (“The absence of empirical evidence is particularly acute in the case of transgender elders.”). See generally MARK E. WILLIAMS, & PAT A. FREEMAN, TRANSGENDER HEALTH: IMPLICATIONS FOR AGING AND CAREGIVING 104 (2008) (“Scholarly research regarding aging and the transgender community remains very limited. Much of what has been written about transgender aging issues is again based on extrapolation from research examining heterosexual and LGB elders.”); Nancy A. Orel, *Investigating the Needs and Concerns of Lesbian, Gay, Bisexual, and Transgender Older Adults: The Use of Qualitative and Quantitative Methodology*, 61 J. HOMOSEXUALITY 53, 60 (2014) (“One of the most challenging tasks in conducting any research with LGBT older adults is actually being able to locate this population in order to recruit their participation for specific research projects.”).

21. ANDREW R. FLORES, JODY L. HERMAN, GARY J. GATES, & TAYLOR N. T. BROWN, THE WILLIAMS INST., HOW MANY ADULTS IDENTIFY AS TRANSGENDER IN THE UNITED STATES? 2 (2016), <https://williamsinstitute.law.ucla.edu/wp-content/uploads/How-Many-Adults-Identify-as-Transgender-in-the-United-States.pdf> [<https://perma.cc/T68L-8UMX>].

22. JAIME M. GRANT, NAT’L GAY & LESBIAN TASK FORCE, OUTING AGE 2010: PUBLIC POLICY ISSUES AFFECTING LESBIAN, GAY, BISEXUAL AND TRANSGENDER ELDERS 138 (2010), <https://static1.squarespace.com/static/566c7f0c2399a3bdabb57553/t/566cb65a25981d5723b7ed00/1449965146749/2010-NGLTF-Outing-Age-Report-Public-Policy-Issues-Affecting-LGBT-Elders.pdf> [<https://perma.cc/L65M-Z9Y9>] (“[G]iven the fact that there is currently little to no research that samples transgender people in the general population, and the reality that highly vulnerable LGBT people—including a percentage of gender-nonconforming/trans people, people of color, immigrants, non-English speakers, undocumented and low-income people—are unlikely to identify as LGBT on even an anonymous

represent 0.6 percent of the United States' population, or approximately 1.4 million persons.<sup>23</sup> Moreover, although older adults are less likely than younger adults to identify as transgender, 0.5 percent (or 217,050 of adults) aged 65 and older identify as transgender.<sup>24</sup> The number of older transgender adults is expected to increase—paralleling the growth of the American elder population in general.<sup>25</sup> By 2030 one in five Americans will be 65 years of age or older, and those 85 or older will constitute a much greater percentage of the elder population by 2040.<sup>26</sup>

This nation's aging trend is significant, in part, because approximately one in ten people age 65 and older has Alzheimer's dementia.<sup>27</sup> That number increases to thirty-two percent of persons who are 85 or older.<sup>28</sup> The risk for Alzheimer's and other dementias rises significantly at age 65 and older. Accordingly, as the American population ages, the number of those with Alzheimer's will mirror this growth. Among those with Alzheimer's (and other types of dementias) will be elders who are transgender and have particular needs and vulnerabilities when they become incapacitated.

Compared to the general U.S. population, more American transgender adults are persons of color, primarily Hispanic or Latino and African-American.<sup>29</sup> Notably, rates of Alzheimer's and other dementias among Hispanic and African-American elders are significantly higher than those of their non-Hispanic white peers.<sup>30</sup> Regarding general well-being, for transgender elders of color "the combination of anti-transgender bias and persistent, structural racism [is] especially devastating. People of color in general fare worse than white participants across the board, with African-American transgender respondents faring worse than all others ..."<sup>31</sup>

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questionnaire, we believe that the [estimated LGBT population figures] significantly undercount the community.”)

23. FLORES ET AL., *supra* note 21, at 3.

24. *Id.* at 5.

25. Fredriksen-Goldsen et al., *supra* note 7, at 489.

26. LORRAINE A. WEST ET AL., 65+ IN THE UNITED STATES: 2010, at 5 (U.S. Census Bureau 2014).

27. ALZHEIMER'S ASS'N, 2018 ALZHEIMER'S DISEASE FACT AND FIGURES 17 (2018), <https://www.alz.org/media/HomeOffice/Facts%20and%20Figures/facts-and-figures.pdf> [https://perma.cc/WV9T-Z3FU] [hereinafter ALZHEIMER'S DISEASE] (“Alzheimer's disease is a degenerative brain disease and the most common cause of dementia. Dementia is also caused by other diseases and conditions. It is characterized by a decline in memory, language, problem-solving and other cognitive skills that affects a person's ability to perform everyday activities.”).

28. *Id.* at 17.

29. ANDREW R. FLORES, TAYLOR N. T. BROWN, & JODY L. HERMAN, THE WILLIAMS INST. RACE AND ETHNICITY OF ADULTS WHO IDENTIFY AS TRANSGENDER IN THE UNITED STATES 2 (2016), <http://williamsinstitute.law.ucla.edu/wp-content/uploads/Race-and-Ethnicity-of-Transgender-Identified-Adults-in-the-US.pdf> [https://perma.cc/8JFY-JPKC].

30. ALZHEIMER'S DISEASE, *supra* note 27, at 21 (“Most studies indicate that African-Americans are about twice as likely to have Alzheimer's and other dementias as older whites. Some studies indicate Hispanics are about one and one-half times as likely to have Alzheimer's and other dementias as older whites.”).

31. JAIME M. GRANT ET AL., WASHINGTON NAT'L CTR. FOR TRANSGENDER EQUALITY AND NATIONAL GAY AND LESBIAN TASK FORCE, INJUSTICE AT EVERY TURN: A REPORT OF THE NATIONAL

### A. *Health and Access to Health Care*

“[T]ransgender individuals are among the most stigmatized and medically underserved groups, facing barriers at every phase of accessing care, from getting into the doctor’s office to paying for care.”<sup>32</sup> Like the rest of the elder population, transgender elders use health care services more often than the younger population. But their access to and the sufficiency of those services is significantly compromised because of discrimination.<sup>33</sup> In general, transgender individuals face an elevated risk of disability and have poorer health outcomes.<sup>34</sup> Compared to 5 percent of the general U.S. population, 30 percent of respondents to a National Transgender Discrimination Survey (NTDS)<sup>35</sup> reported significant difficulty concentrating, remembering, or making decisions due to a physical, mental or emotional condition.<sup>36</sup>

For transgender persons of color, racial discrimination is an additional barrier to health care access, and, as a group, they have even poorer health outcomes.<sup>37</sup> Transgender persons with disabilities are particularly vulnerable, having higher rates of suicide attempts than the non-disabled transgender population.<sup>38</sup> Notably, at 48 percent, the prevalence of depression is also significantly greater for transgender older adults<sup>39</sup> compared to the approximately 1 percent rate of depression among the general older population.<sup>40</sup> Depression is associated with cognitive decline and is a significant risk factor for dementia.<sup>41</sup> In one study, depression almost doubled the risk of dementia and

TRANSGENDER DISCRIMINATION SURVEY 2 (2011), <https://www.hivlawandpolicy.org/sites/default/files/Injustice%20at%20Every%20Turn.pdf> [<https://perma.cc/KRE5-FXY3>]. See JAMES ET AL., *supra* note 18, at 6.

32. Sarah E. Gage, *The Transgender Eligibility Gap: How the ACA Fails to Cover Medically Necessary Treatment for Transgender Individuals and How HHS Can Fix It*, 49 NEW ENG. L. REV. 499, 500 (2015).

33. INST. OF MED. OF THE NAT’L ACAD., *supra* note 15, at 273. See also, GRANT ET AL., *supra* note 31, at 72 (“Access to health care is a fundamental human right that is regularly denied to transgender and gender nonconforming people.”). See also, JAMES ET AL., *supra* note 18, at 93.

34. See, e.g., Fredriksen-Goldsen et al., *supra* note 7, at 494. See also JAMES ET AL., *supra* note 18, at 57 (“39% of respondents indicated that they had one or more disability . . . compared to 15% of the general population”); see also SERVICES & ADVOCACY FOR LGBT ELDER (SAGE), SIX THINGS EVERY LGBT OLDER ADULT SHOULD KNOW ABOUT CARDIOVASCULAR DISEASE AND HYPERTENSION (2014), <https://www.lgbtagingcenter.org/resources/pdfs/6thingscardiovascular.pdf> [<https://perma.cc/5HAW-53W6>] (“LGBT older adults and people of color are especially vulnerable to cardiovascular disease and hypertension, due to poorer health outcomes.”).

35. GRANT ET AL., *supra* note 31.

36. JAMES ET AL., *supra* note 18, at 57.

37. GRANT ET AL., *supra* note 31, at 72.

38. ANN P. HAAS ET AL., THE WILLIAMS INST., SUICIDE ATTEMPTS AMONG TRANSGENDER AND GENDER NON-CONFORMING ADULTS 10 (2014), <https://williamsinstitute.law.ucla.edu/wp-content/uploads/AFSP-Williams-Suicide-Report-Final.pdf> [<https://perma.cc/593L-W6ZV>].

39. FREDRIKSEN-GOLDSSEN ET AL., *supra* note 17, at 26.

40. David C. Steffens et al., *Prevalence of Depression Among Older Americans: The Aging, Demographics and Memory Study*, 21 INT’L PSYCHOGERIATRICS 879, 879 (2009).

41. Jane S. Saczynski et al., *Depressive Symptoms and Risk of Dementia: The Framingham Heart Study*, 75 NEUROLOGY 35, 36-39 (2010).

Alzheimer's.<sup>42</sup> Given the higher rates of disability, depression, and poor health among transgender elders, it is reasonable to assume a corresponding higher rate of cognitive impairment, including dementia—a disease that is chronic and progressive and eventually results in incapacity and death.<sup>43</sup>

Furthermore, addressing stigma and victimization against transgender persons is vital to decrease the health risks faced by that population.<sup>44</sup> Significant threats to the health of transgender elders include fear of accessing health services and concealment of gender identity.<sup>45</sup> Troublingly, the NTDS revealed that up to 24 percent of transgender respondents reported having been denied medical care due to their transgender or gender non-conforming status.<sup>46</sup> Further, up to 28 percent had postponed medical care due to discrimination, and 33 percent delayed or did not seek preventive health care.<sup>47</sup> The refusal to provide medical care is especially concerning because the rate of suicide attempts by those denied treatment was an alarming 60 percent.<sup>48</sup> Again, transgender people of color experience more obstacles to health care access than their transgender peers.<sup>49</sup> “The [double] jeopardy of racism . . . [and] transphobia has been shown to create more significant barriers to care for LGBT people of color,”<sup>50</sup> including a higher percentage who are denied medical treatment.<sup>51</sup>

A study on the health of transgender elders found evidence of anti-transgender bias in medical settings: one quarter or more of participants had encountered discrimination by a physician.<sup>52</sup> Such discrimination results in transgender individuals hiding their gender identity from providers—which is a double threat to their health and welfare. First, fear-based identity concealment by transgender elders is linked to increased depression and stress.<sup>53</sup> Second, they

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42. *Id.*

43. The Author found no research specifically on numbers of transgender elders with dementia or that included cognitive impairment among the disabilities cited. Research needs to be done to learn the extent of incapacity among transgender elders and the population-specific risk factors.

44. Fredriksen-Goldsen et al., *supra* note 7, at 488-90.

45. *Id.* at 7-8, 31.

46. GRANT ET AL., *supra* note 31, at 6, 73 (24 percent of transgender women and 20 percent of transgender men reported having been refused medical care.). *See also id.* at 73 (“Denial of health care and multiple barriers to care are commonplace in the lives of transgender and gender non-conforming people. Respondents in our study seeking health care were denied equal treatment in doctor’s offices and hospitals (24%), emergency rooms (13%), mental health clinics (11%), by EMTs (5%) and in drug treatment programs.”)

47. *Id.* at 76.

48. HAAS ET AL., *supra* note 38, at 2.

49. JAMES ET AL., *supra* note 18, at 10 (“One-third of those who saw a health care provider in the past year reported having at least one negative experience related to being transgender, such as being refused treatment, verbally harassed . . . having to teach the provider about transgender people in order to get appropriate care, with higher rates for people of color and people with disabilities.”)

50. GRANT, *supra* note 22, at 72.

51. GRANT ET AL., *supra* note 31, at 73. *See also*, JAMES ET AL., *supra* note 18, at 97 (noting that American Indian respondents (50 percent) reported the highest level of negative experiences, and rates among Middle Eastern (40 percent) and multiracial (38 percent) respondents were also higher).

52. Fredriksen-Goldsen et al., *supra* note 7, at 489.

53. *Id.* at 7.

are more likely to avoid seeking medical care at all—which includes not receiving necessary (for many) gender transition-related medical care.<sup>54</sup> Moreover, transgender elders face bias on multiple fronts if they belong to other marginalized groups, such as racial and ethnic minorities.<sup>55</sup> Further, if they are gay, lesbian, or bisexual, their sexual orientation compounds the potential for bias by health care providers and institutions.<sup>56</sup> Disturbingly, when medical providers learn that a patient is transgender, the incidence of discrimination and abuse against them *increases*.<sup>57</sup> This underscores the critical need for advocacy by surrogates in health care settings.

This population also faces the additional burden that medical providers generally are ignorant about transgender-specific health care needs. Fifty percent of NTDS and twenty-four percent of USTS respondents reported having had to teach their medical providers about transgender appropriate care.<sup>58</sup> For example, medical providers may not realize that male-to-female transgender persons still need to be screened for prostate cancer and for breast cancer, and female-to-male transgender persons need pap smears to screen for cervical cancer. For transgender elders seeking health care, the necessity of educating their medical providers first raises issues of trust and competency regarding those providers. Second, it requires that they be medically knowledgeable consumers and assert their needs in a system that is often intimidating for the general population (the doctor knows best). It is troubling and unfair that they must meet this additional educational and advocacy threshold to get their health care needs met. Third, it is unrealistic for many who are already daunted by the potential for bias if they disclose their gender identity. These burdens compound the anxiety the transgender individual may feel about their health status generally, and any specific health conditions or concerns.

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54. *Id.* at 10-11; *see also*, JAMES ET AL., *supra* note 18, at 98 (“[N]early one-quarter (23%) of respondents reported that they avoided seeking health care they needed in the past year due to fear of being mistreated as a transgender person.”); *see also*, Mark E. Williams & Pat A. Freeman, *Transgender Health: Implications for Health and Caregiving*, 18 J. GAY & LESBIAN SOC. SERV. 93, 98 (2008) (“[H]ormone therapy has the potential for many drug interactions . . .”).

55. Sexual orientation is separate from gender identity and describes a person’s sexual and romantic attraction to other people. Transgender individuals may be heterosexual, lesbian, gay, bisexual, asexual or other.

56. “[M]any LGBT persons are also members of other groups that face substantial discrimination. These groups have had to navigate multiple instances of discrimination based on race, ethnicity, language, degree of physical ability, geographic location, etc.” Orel, *supra* note 20, at 15, 61. *See also Guidelines for Psychological Practice With Transgender and Gender Nonconforming People*, 70 AM. PSYCHOLOGIST 832, 838 (2015); Williams & Freeman, *supra* note 54, at 98 (“Transgender people of color may be the most at risk for inadequate health care and health insurance coverage due to compounding sources of stigmatization and discrimination related to racism, transphobia and poverty.”).

57. GRANT ET AL., *supra* note 31, at 75.

58. *Id.* at 76; JAMES ET AL., *supra* note 18, at 96.

## B. *Transgender-Specific Health Care*

Typically, transgender persons lack access to care that is trans-affirmative.<sup>59</sup> As the authors of the NTDS noted:

Access to health care is a fundamental human right that is regularly denied to transgender and gender non-conforming people . . . . Participants in our study reported barriers to care whether seeking preventive medicine, routine and emergency care, or transgender-related services. These realities, combined with widespread provider ignorance about the health needs of transgender and gender non-conforming people, deter them from seeking and receiving quality health care.<sup>60</sup>

Transitioning refers to the period when a person begins to live and present themselves according to their gender identity, rather than the gender they were assigned at birth.<sup>61</sup> It often includes changing one's appearance, dress, name, and pronouns.<sup>62</sup> A majority of transgender people who transition seek transition-related treatment, primarily counseling and hormone therapy.<sup>63</sup> Most individuals who transition gender do so when they are young or middle-age adults.<sup>64</sup> Transitioning may also include other forms of physical modification or surgery.<sup>65</sup> A review of the literature on transition-related hormone therapy reveals that 80 percent of those who receive "trans-affirmative care experienced an improved quality of life, decreased gender dysphoria,<sup>66</sup> and "a reduction in negative psychological symptoms."<sup>67</sup> That finding shows the importance of trans-affirmative care to the well-being of transgender individuals.

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59. See Fredriksen-Goldsen et al., *supra* note 7, at 497; *Guidelines for Psychological Practice*, *supra* note 56, at 835; *see also id.* at 839 ("Although the landscape is beginning to change with the recent revision of Medicare policy and changes to state laws, many TGNC people are still likely to have little to no access to TGNC-related health care as a result of the exclusions in their insurance.").

60. GRANT ET AL., *supra* note 31, at 72.

61. JAMES ET AL., *supra* note 18, at 40.

62. *Id.*

63. GRANT ET AL., *supra* note 31, at 78 (noting that 84 percent of transgender respondents receive transition-related counseling, especially to qualify for transition-related medical care, and that 76 percent of transgender respondents accessed hormone therapy); *see also id.* at 180 (noting that hormone therapy is "[t]he administration of hormones to facilitate the development of secondary sex characteristics as part of a medical transition process. Those medically transitioning from female to male may take testosterone while those transitioning from male to female may take estrogen and androgen blockers.").

64. TARYNN M. WITTEN & EVAN A. EYLER, GAY, LESBIAN, BISEXUAL & TRANSGENDER AGING, CHALLENGES IN RESEARCH, PRACTICE, AND POLICY 2 (2012).

65. *Id.* at 83 ("[A]lthough the majority reported wanting to 'someday' be able to have surgery. The high costs of gender-related surgeries and their exclusion from most health insurance plans render these life changing (in some cases, life-saving) and medically necessary procedures inaccessible to most transgender people.").

66. AM. PSYCHIATRIC ASS'N, DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS 451 (5th ed. 2013).

67. *Guidelines for Psychological Practice*, *supra* note 56, at 846.

Transgender-specific, affirming medical care is necessary health care<sup>68</sup> “for a vulnerable population that is uniquely dependent on medical treatments to realize their identities and to live healthy, authentic lives.”<sup>69</sup> For example, transgender elders who have received cross-gender hormones for long periods may be at increased risk of complications associated with other common health care problems of the elderly, such as cardiac or pulmonary conditions and drug interactions.<sup>70</sup> Abruptly stopping hormones results in “a high likelihood of negative outcomes such as . . . depressed mood, dysphoria, and/or suicidality.”<sup>71</sup> In addition, cross-gender hormone therapy may increase the risk of some chronic diseases, such as diabetes.<sup>72</sup> Also, given the elevated prevalence of depression, disability, and suicide attempts by those who are disabled, it is essential to monitor the mental health status of elderly transgender individuals who are at risk and, if indicated, engage them in mental health treatment. Further, transgender persons need a mix of traditionally gender-specific disease prevention screenings.<sup>73</sup>

### C. *Bias in Institutional Care*

Older adults who are incapacitated, such as by advanced Alzheimer’s dementia, may require institutionalization at later stages of the disease when round the clock supervision and medical care become necessary. Similar to their experience with health care systems, transgender elders face bias and mistreatment in institutional settings.

Shelly, a trans woman has recently moved into a residential care facility. She has been on gender affirming hormones for decades. Since moving into residential care she has not received her hormones. Staff have noticed that Shelly has become depressed and withdrawn and she has begun saying that she wants to end her life.<sup>74</sup>

A survey of LGBT elders placed in long-term care revealed that only 22 percent of respondents felt they could be open about their LGBT identities with facility staff, 89 percent predicted that staff would discriminate based on their

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68. See GRANT ET AL., *supra* note 31, at 85. See generally STANDARDS OF CARE, *supra* note 1.

69. Kellan Baker & Andrew Cray, *Why Gender-Identity Nondiscrimination in Insurance Makes Sense*, CTR. FOR AM. PROGRESS 6 (2013), <https://cdn.americanprogress.org/wp-content/uploads/2013/05/BakerNondiscriminationInsurance-6.pdf> [<https://perma.cc/CWG4-RJNR>].

70. WILLIAMS & FREEMAN, *supra* note 54, at 98-99.

71. STANDARDS OF CARE, *supra* note 1, at 68.

72. GRANT, *supra* note 22, at 79.

73. Baker & Cray, *supra* note 69, at 5.

74. ALZHEIMER’S AUSTL., *supra* note 8, at 3.

sexual orientations and/or gender identities, and 43 percent reported instances of mistreatment.<sup>75</sup>

Because of the incongruence between genital anatomy and the gender expression<sup>76</sup> of many transgender older adults,<sup>77</sup> when personal care such as bathing is required, concealing their nonconforming gender identity is not an option.<sup>78</sup> Others may be outed due to the visible effects of surgery, such as scars. And institutional staff are largely uninformed about the particular needs of transgender residents.<sup>79</sup> This may include not maintaining their gender expression, such as hairstyle, or dressing them in gender identity-incongruent clothing.<sup>80</sup> Because the risk of discrimination by medical providers increases with the revelation of a patient's transgender status, that threat likely similarly exists among care providers in institutional settings.

## II. ADVANCE PLANNING: PROTECTIVE LEGAL MEASURES TO BE TAKEN PRIOR TO INCAPACITY

Due to the potential for anti-transgender bias and ignorance by caregivers, it is crucial for a transgender elder—while still retaining capacity—to select a transgender-affirming surrogate decision-maker who would make decisions upon that individual's incapacity. Those decisions would honor the individual's preferences and advocate for their welfare and transgender health care and other needs. This Part describes the difficulty in identifying suitable surrogate decision makers for a transgender person, and, accordingly, the preventative legal measures that transgender persons should take or be assisted with completing while having capacity. I provide a context for the importance of those preventative measures by noting the unreliable range of state standards of decision-making for health care agents appointed by individuals.

### *A. Issues in Identifying a Suitable Surrogate Decision-Maker*

Transgender and LGB elders face particular challenges in finding culturally competent care and caregivers.<sup>81</sup> Consequently, they can find it difficult to identify a decision-maker who will make transgender-affirming decisions in

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75. JUSTICE IN AGING, LGBT OLDER ADULTS IN LONG-TERM CARE FACILITIES: STORIES FROM THE FIELD 6, 8 (2011), <http://www.justiceinaging.org.customers.tigertech.net/wp-content/uploads/2015/06/Stories-from-the-Field.pdf> [<https://perma.cc/ZLU2-HLTN>].

76. See GRANT ET AL., *supra* note 31, at 180 (“How a person presents or expresses his or her gender identity to others, often through manner, clothing, hairstyles, voice or body characteristics.”).

77. Inst. of Med., *Later Adulthood*, in THE HEALTH OF LESBIAN, GAY, BISEXUAL, AND TRANSGENDER PEOPLE: BUILDING A FOUNDATION FOR BETTER UNDERSTANDING 275 (2011).

78. JUSTICE IN AGING, *supra* note 75, at 15.

79. GRANT, *supra* note 22, at 97.

80. ALZHEIMER'S AUSTL., *supra* note 8, at 4.

81. GRANT, *supra* note 22, at 86.

their stead. Most elders who need caregivers, including decision-makers, look to their spouses and children to serve in those roles.<sup>82</sup> However, LGBT elders are single and live alone at twice the rate of non-LGBT elders.<sup>83</sup> “[T]hese realities place older LGBT people at high risk of finding themselves without care when they need it.”<sup>84</sup> Further, the national transgender surveys found that relationships were ended for 27 to 45 percent of transgender adults who came out to their spouses or partners.<sup>85</sup> The rate of relationship severance was considerably higher for male-to-female transgender individuals, than for female-to-male.<sup>86</sup> And, significantly for purposes of this Article, those age 65 and older experienced rejection due to being transgender at two times the rate of younger transgender respondents.<sup>87</sup>

Additionally, as noted, a minority of transgender adults are parents. Further, 21 percent of USTS respondents and 30 percent of NTDS respondents reported having been rejected by one or more of their children when they came out as transgender.<sup>88</sup> The number rejected rose for those who lived as their preferred gender continuously and for those who had undergone medical treatment to aid their transition.<sup>89</sup> Twenty-one percent of USTS respondents who were parents reported having been rejected by one or more of their children after coming out to them.<sup>90</sup> Compared to female-to-male transgender parents, male-to-female transgender parents reported being rejected by their children significantly more often.<sup>91</sup>

Yet, transgender elders are more likely than LGB adults to have children,<sup>92</sup> and the National Transgender Discrimination Survey found that 70 percent of respondents with children continued to have relationships with them after coming out as transgender.<sup>93</sup> Thus, in theory, this could mean that transgender adults who are parents—a minority—would potentially have a family member willing to serve as a guardian or power of attorney. However, this would only suffice if the child intended to be a transgender-affirming surrogate for their parent, and if the child would be the transgender parent’s preference to serve in

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82. Services & Advocacy for LGBT Elders (SAGE), *Social Isolation* (2018), <https://www.sageusa.org/your-rights-resources/social-isolation/> [<https://perma.cc/YJW8-XAGD>].

83. *Id.*

84. GRANT, *supra* note 22, at 87.

85. GRANT ET AL., *supra* note 31, at 95.

86. GRANT ET AL., *supra* note 31, at 95; *see also*, JAMES ET AL., *supra* note 19, at 67.

87. JAMES ET AL., *supra* note 18, at 67.

88. *Id.* at 69; *see also*, GRANT ET AL., *supra* note 31, at 99.

89. GRANT ET AL., *supra* note 31, at 99 (noting that 37 percent of those who lived as their preferred gender all of the time reported being rejected, and 35 to 37 percent of those who had received medical interventions to transition).

90. JAMES ET AL., *supra* note 18, at 65.

91. *Id.* at 69; GRANT ET AL., *supra* note 31, at 99.

92. Fredriksen-Goldsen et al., *supra* note 7, at 493.

93. GRANT ET AL., *supra* note 31, at 88.

that role. Nonetheless, it does lend some hope to an otherwise seemingly bleak set of circumstances.

Further, identifying a suitable and willing surrogate decision-maker among other family members may not be an option because 57 percent of NTDS respondents and 44 percent of USTS respondents experienced family rejection when they came out as transgender.<sup>94</sup> “[T]ransgender individuals, even more so than LGB individuals, face rejection from family and community members, who therefore may not be available or appropriate as caregivers.”<sup>95</sup> A report on LGBT aging and health found that LGBT elders were much less likely to receive care from a family member than their non-LGBT peers, with only 3 percent receiving care from an adult child and only eight percent from another relative.<sup>96</sup> Moreover, identifying an appropriate surrogate may be more difficult for transgender persons of color, who tend to be more socially isolated.<sup>97</sup> Consistent with that finding, transgender persons of color, especially American Indian, report higher rates of family rejection.<sup>98</sup>

Alternatively, for some transgender elders, an appropriate surrogate decision-maker might be identified from among their social network, if no family member was identified or preferred.<sup>99</sup> But some studies have found that transgender adults have limited social support, even lower than LGB adults who do not identify as transgender.<sup>100</sup> In contrast, another study found that they have larger social networks in comparison.<sup>101</sup> In an adaptive response to rejection by biological family, close, family-like peer relationships are a common phenomenon among LGBT adults. These relationships are referred to as “[c]hosen families—single-generation cohorts of intimate friends and loved ones—[and] have long provided LGBT people a foundation for surviving intense societal neglect, stigmatization and abuse, thus supporting health and self-actualization across the lifespan.”<sup>102</sup> For example, one study found that 42 percent of LGBT caregivers care for friends, neighbors, or others who are not members of their biological families.<sup>103</sup> Another reported that 46 percent of LGBT elders are caregivers to members of their biological families or families

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94. *Id.* at 7; JAMES ET AL., *supra* note 18, at 70.

95. Inst. of Med., *supra* note 77 at 267.

96. FREDRIKSEN-GOLDSSEN ET AL., *supra* note 17, at 45-47.

97. GRANT, *supra* note 22, at 92 (“Extrapolating from studies on poverty in the general population, it is likely that the risk of social isolation may be particularly high for . . . LGBT elders of color . . .”).

98. GRANT ET AL., *supra* note 31, at 94. *See also*, JAMES ET AL., *supra* note 18, at 76.

99. FREDRIKSEN-GOLDSSEN ET AL., *supra* note 17, at 48 (“[A]mong LGBT older adults, friends play a much greater role in caregiving.”).

100. Fredriksen-Goldsen et al., *supra* note 7, at 494.

101. Elena A. Erosheva et al., *Social Networks of Lesbian, Gay, Bisexual, and Transgender Older Adults*, 38 RESEARCH ON AGING 98, 114-15 (2016).

102. GRANT, *supra* note 22, at 31.

103. *Id.* at 87. Although the study reported that research on caregiving by transgender elders is lacking. *Id.* at 89.

of choice.<sup>104</sup> Therefore, a chosen family member may be identified to serve as a transgender-affirming surrogate decision-maker.<sup>105</sup>

*B. Appointing an Agent for Decision-Making: Powers of Attorney and a Guardian Preference*

A majority of transgender people reportedly do not complete advance health care directives and other estate planning, and do not have a power of attorney for health care decisions.<sup>106</sup> In a national report on LGBT aging, only 37 percent of transgender elders had completed a durable power of attorney for health care—a much lower rate than their LGB peers.<sup>107</sup> Transgender elders should protect their welfare and health by appointing a surrogate health care decision-maker and nominating a preferred guardian prior to incapacity.<sup>108</sup> Those actions would prevent the imposition of a biased surrogate who could make potentially harmful decisions, or fail to make sound ones. A transgender advocate's guide for advance planning goes further, by recommending specific language to be included in a transgender individual's health care power of attorney.<sup>109</sup> The suggested language grants the agent the authority to instruct health care providers to honor the transgender adult's gender identity and expression:

The Agent has the authority . . . to direct any healthcare provider, medical staff, or other person to address me by my name and gender pronouns of choice, and to preserve to the fullest extent possible an appearance consistent with my gender identity.<sup>110</sup>

In addition, advance health care directives, which instruct medical providers on the principal's medical treatment preferences, can be written to include language instructing that medical care shall include, for example, continued cross-gender hormone therapy (as long as it is not medically contraindicated due

104. MARJORIE H. CANTOR, MARK BRENNAN, & R. ANDREW SHIPPY, NATIONAL GAY AND LESBIAN TASK FORCE POLICY INSTITUTE, CAREGIVING AMONG OLDER LESBIAN, GAY, BISEXUAL, AND TRANSGENDER NEW YORKERS 2 (2004) (on file with author).

105. See Knauer, *supra* note 6, at 20. Knauer argues that guardian preference provisions in adult guardianship laws “should include non-marital partners regardless of gender and provide a mechanism for the recognition of chosen family.”

106. Karen Fredriksen-Goldsen, *Informal Caregiving in the LGBT Communities*, in GAY, LESBIAN, BISEXUAL, AND TRANSGENDER AGING: CHALLENGES IN RESEARCH, PRACTICE AND POLICY (2011).

107. FREDRIKSEN-GOLDSSEN ET AL., *supra* note 17, at 39 (The majority of LGBT respondents who had not completed a durable power of attorney for health care reported that “they do know someone that they would be comfortable with acting in this role.”)

108. Durable powers of attorney for health care remain valid when the principal (the person who appointed the agent) becomes incapacitated. See, e.g., N.M. STAT. ANN. § 24-7A-2(B) (West 1995).

109. Corey Prachniak, *Creating End-of-Life Documents for Trans Individuals: An Advocate's Guide*, NAT'L RES. CTR. ON LGBT AGING & WHITMAN-WALKER HEALTH (2014), <https://www.lgbtagingcenter.org/resources/pdfs/End-of-Life%20PlanningArticle.pdf> [<https://perma.cc/HXZ3-4MYQ>].

110. *Id.* at 2.

to health conditions or status). Additionally, the transgender advocate's guide suggests the following language:

During any period of treatment, if I am unable to personally maintain my [preferred gender] appearance, I direct [my physician and all medical personnel] to do so to the extent reasonably possible, irrespective of whether I have obtained a court-ordered name change, changed my gender [marker] on any identification document, or undergone any transition-related medical treatment.<sup>111</sup>

Durable powers of attorney for health care should also be used to nominate the person a transgender elder would choose to serve as their guardian<sup>112</sup> should the elder become legally incapacitated—i.e., determined by a court to be unable to manage her or his personal and financial affairs.<sup>113</sup> However, completing durable powers of attorney for health care and property obviates the need, in many cases, for a guardianship because a surrogate can act for the principal without court appointment.<sup>114</sup> Powers of attorney are also considered less restrictive alternatives to guardianship, because voluntarily granting another decision-making authority does not equate to a court's involuntary removal of a person's self-determination and fundamental civil liberties. Further, powers of attorney restrict the authority of the surrogate to powers specifically granted in the document.

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111. *Id.* at 3.

112. Many advance directive forms include a provision designating who the principal wants to have appointed as their guardian if circumstances require one. *See, e.g.*, N.M. STAT. ANN. § 24-7A-4, 5 (West 2015). *See also* Sally Hurme & Erica Wood, *Introduction*, 2012 UTAH L. REV. 1157, 1191 (“[A] guardian means a “person or entity appointed by a court with the authority to make some or all personal decisions on behalf of an individual the court determines lacks capacity to make such decisions.”).

113. Statutory definitions of incapacity vary by state, *see, e.g.*, COLO. REV. STAT. ANN. § 15-14-102(5) (West 2016) (“‘Incapacitated person’ means an individual other than a minor, who is unable to effectively receive or evaluate information or both or make or communicate decisions to such an extent that the individual lacks the ability to satisfy essential requirements for physical health, safety, or self-care, even with appropriate and reasonably available technological assistance.”); DEL. CODE ANN. tit. 12, § 3901(a)(2) (West 2014) (“[I]n the case where a guardian of the person is sought, such person is in danger of substantially endangering person’s own health, or of becoming subject to abuse by other persons or of becoming the victim of designing persons”).

114. But the scope of authority of powers of attorney do not include decisions regarding custody, placement or residence—authority that may be needed if the incapacitated elder has to be moved, and is unable to make or communicate an informed, safe and responsible choice of where to reside, including an institutional setting.

### C. *Statutory Standards of Health Care Decision-Making for Agents*

“Health care agents . . . act as an extension of that individual’s voice.”<sup>115</sup> This ethical surrogate decision-making standard ensures that an individual’s wishes, self-determination, and autonomy are preserved and protected. State laws that are protective of an individual’s wishes and autonomy require a health care agent to make decisions for the individual, called the principal, based on the decision the principal would have made had she retained capacity; or, for advance health care directives, based on the principal’s written instructions.<sup>116</sup> For example, “An agent shall make a health-care decision in accordance with the principal’s individual instructions, if any, and other wishes to the extent known to the agent.”<sup>117</sup> Only when the principal’s wishes are not known should an agent make decisions according to the agent’s subjective assessment of the principal’s best interests. And ethics require that the agent base a best interests evaluation on the values of the principal they serve, not on the agent’s values. Finally, the agent should be required to *follow* the principal’s values in determining their best interests, rather than merely “consider” them as allowed by states that require the agent to only contemplate the principal’s values.<sup>118</sup>

North Dakota’s statutory optional health care directive form is ideal for a transgender person to educate their agent about their concerns regarding health care, and to state their transgender-affirming preferences regarding health care decisions made for them by their agent.<sup>119</sup> In the section of the form in which the principal gives the agent instructions for health care, there is a section titled, “These are my beliefs and values about [health care].”<sup>120</sup> It begins with this statement: “I want you to know these things about me to help you make decisions about my health care,” then includes space to write “My goals for my health care” and “My fears about my health care.”<sup>121</sup>

Conversely, an advance directive statute that is not protective of a transgender person’s wishes regarding maintaining their gender expression (such as through continued cross-gender hormone therapy) provides: “[I]f the

115. A.B.A. COMM’N ON L. & AGING, HEALTH CARE-DECISION-MAKING AUTHORITY: WHAT IS THE DECISION-MAKING STANDARD? 1 (2015), [https://www.americanbar.org/content/dam/aba/administrative/law\\_aging/What\\_is\\_the\\_Decision\\_Making\\_Standard.authcheckdam.pdf](https://www.americanbar.org/content/dam/aba/administrative/law_aging/What_is_the_Decision_Making_Standard.authcheckdam.pdf) [<https://perma.cc/772G-A4JG>].

116. *See, e.g.*, N.J. STAT. ANN. § 26:2H-61(f) (West 1991) (“[T]he health care representative shall seek to make the health care decision the patient would have made had he possessed decision making capacity under the circumstances . . . .”); N.M. STAT. ANN. § 24-7A-2(E) (West 2016).

117. N.M. STAT. ANN. § 24-7A-2(E) (West 2016).

118. *See, e.g., id.* (“Otherwise, the agent shall make the decision in accordance with the agent’s determination of the principal’s best interest. In determining the principal’s best interest, the agent shall *consider* the principal’s personal values to the extent known to the agent.”) (emphasis added). *See also* CAL. PROB. CODE § 4684 (West 2000). *But see* N.J. STAT. ANN. § 26:2H-61(f) (West 1991) (not requiring the consideration of the principal’s values in a best interests decision-making determination).

119. N.D. CENT. CODE § 23-06.5-17 (West 2017).

120. *Id.*

121. *Id.*

principal's wishes are unknown, [the agent shall make health care decisions] in accordance with the *agent's . . . assessment of the principal's best interests and in accordance with accepted medical practice.*"<sup>122</sup> If an agent is uncomfortable with and biased against transgender identity and expression, then their subjective "assessment" of the principal's best interests may not be transgender-affirming health care. For transgender persons who do not conform to society's norms, a socially subjective standard of best interests is rife with the risk that what is best for that person is to conform. And, most concerning, "accepted medical practice" and providers are often biased against trans-affirmative treatment.

Statutory language that also risks exposing a transgender elder who is incapacitated to negligence by not maintaining their gender identity includes a Missouri statute that reads: "An attorney in fact who elects to act under a power of attorney is under a duty to act *in the interest* of the principal."<sup>123</sup> That language does not require the agent to follow the wishes and values of the transgender principal regarding the principal's health care. Rather, the agent's subjective assessment of the "interest" of the principal or the medical provider's assessment of that interest could easily result in a failure to obtain or provide transgender affirmative medical care.

The above nonprotective statutory language illustrates the importance of a transgender adult carefully choosing a trans-affirmative health care agent to represent them. Further, written instructions to an agent to make transgender-affirming health care decisions are the best way to protect a transgender person's health care needs. We place excessive and dangerous reliance on an agent's ability and willingness to advocate for a transgender elder in a health care system often biased against transgender persons by not requiring an agent to make decisions based on the principal's wishes. Also dangerous is requiring the agent to merely consider that person's values, while making subjective decisions based on a best interests assessment. Similarly, if the agent is required to merely consider that person's values while making subjective decisions based on a best interests assessment, then there is no actual protection of or deference to the transgender individual's preferences, and the agent is free to substitute their values when making decisions.

### III. PROTECTIVE LEGAL MEASURES UPON INCAPACITY

This Part first provides a brief overview of a typical adult incapacity guardianship proceeding. Second, I describe the complexity and necessity of identifying a suitable guardian for a transgender elder who is incapacitated, and who did not nominate a guardian prior to incapacity. I propose measures courts

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122. N.H. REV. STAT. ANN. § 137-J:6 (West 2015) (emphasis added).

123. MO. ANN. STAT. § 404.714(1) (West 2006) (emphasis added).

can take to identify and appoint a transgender-affirming guardian. Third, I recommend ways courts can monitor the decisions made by the guardian on the transgender elder's behalf to protect the elder's well-being. Finally, I identify contexts that require zealous advocacy by guardians to protect the transgender individuals they serve.

### *A. Brief Overview of an Adult Guardianship Proceeding*

A guardianship involves a court removing an incapacitated person's fundamental civil rights to make their own decisions, such as medical treatment, and to manage their personal and, in some instances, their financial affairs. The individual's rights are transferred to a third party, called a guardian. Because an individual's essential autonomy is involved, considerable due process protection is most often required throughout the proceeding. The due process required varies from state to state based on each state's adult guardianship laws, which are often found in the probate code. The protections typically include a clear and convincing standard of proof, a hearing, notice to the allegedly incapacitated person of the proceeding and the hearing, the right to a jury trial, representation of the individual by counsel, the right to attend all hearings, to examine witnesses, present evidence, and to appeal the court's adjudication of incapacity.

The procedure begins with the filing of a petition or similar pleading, typically by the person seeking to be appointed as guardian, requesting the appointment and stating the nature and degree of the incapacity necessitating a guardianship.<sup>124</sup> An evaluation of capacity by a qualified professional is often required to be submitted to the court to inform it of the allegedly incapacitated person's functioning, abilities, and impairments.<sup>125</sup> The state's laws may provide for the appointment of a court investigator, usually called a court visitor, whose duties might include interviewing the proposed guardian and the allegedly incapacitated individual, reporting to the court on the allegedly incapacitated person's needs, and making a recommendation regarding the suitability of the proposed guardian.<sup>126</sup> At the hearing, the court considers the evidence to determine whether the individual is incapacitated, and, in a majority of states, the individual is represented by counsel.<sup>127</sup> If the court finds that the individual is incapacitated to some or to a full extent, it will appoint a guardian. The court

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124. *See, e.g.*, N.M. STAT. ANN. § 45-5-303(A) (2018). *See generally* A.B.A. COMM'N ON LAW AND AGING, CAPACITY DEFINITION & INITIATION OF GUARDIANSHIP PROCEEDINGS (Aug. 7, 2018), [https://www.americanbar.org/content/dam/aba/administrative/law\\_aging/chartcapacityandinitiation.authcheckdam.pdf](https://www.americanbar.org/content/dam/aba/administrative/law_aging/chartcapacityandinitiation.authcheckdam.pdf) [<https://perma.cc/S7TR-NV4X>].

125. N.M. STAT. ANN. § 45-5-303(D) (2018).

126. *Id.* at (E). *See generally*, A.B.A. COMM'N ON LAW AND AGING, REPRESENTATION AND INVESTIGATION IN GUARDIANSHIP PROCEEDINGS (2018), [https://www.americanbar.org/content/dam/aba/administrative/law\\_aging/chartrepresentationandinvestigation.authcheckdam.pdf](https://www.americanbar.org/content/dam/aba/administrative/law_aging/chartrepresentationandinvestigation.authcheckdam.pdf) [<https://perma.cc/725X-KHKK>].

127. *See generally id.*

may limit the guardian's authority, if it determines that the individual is capable of exercising some rights, guided by the principle that the guardianship should be the least restrictive measure available and to ensure the individual as much autonomy as is safely possible.<sup>128</sup>

### B. Identifying an Allegedly Incapacitated Person as Transgender

If a transgender individual in a guardianship proceeding has lived openly as transgender, that person can be identified to the court as transgender at the start of the process through the initial court pleading which contains identifying information.<sup>129</sup> Alternatively, the disclosure may occur during the process by the transgender individual's voluntary disclosure, gender expression, or through investigation by their counsel or a court investigator.

The court and the counsel's ability to learn of the individual's gender identity may be complicated on several fronts. First, this generation's transgender elders grew up during a time that, due to social stigma and the risk of hostility and a lack of acceptance, they were likely to hide their identities.<sup>130</sup> Second, many elders do not identify or label themselves as transgender even after they transition.<sup>131</sup> But they still have the same needs as those who do identify as transgender for trans-affirmative treatment and medical care. Third, "in the case of dementia, people progressively lose their most recent memories. For a transgender person this could mean only remembering living in another gender, including not remembering having had gender affirmation procedures or surgery."<sup>132</sup> Fourth, courts and attorneys are not likely to ask about or investigate an allegedly incapacitated elder's gender identity because they assume that people conform to societal norms regarding gender identity. And the courts and attorneys may be biased against nonconforming gender identities. "Most transgender people have previously experienced misunderstanding or hostility from . . . the legal system."<sup>133</sup> The NTDS confirmed this disconcerting trend: "12% [of respondents were] denied equal treatment or harassed or disrespected by judges or court officials."<sup>134</sup> Eight percent were denied equal treatment by

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128. See generally A.B.A. COMM'N ON LAW AND AGING, CONDUCT AND FINDINGS OF GUARDIANSHIP PROCEEDINGS (Aug. 7, 2018), [https://www.americanbar.org/content/dam/aba/administrative/law\\_aging/chartconduct.authcheckdam.pdf](https://www.americanbar.org/content/dam/aba/administrative/law_aging/chartconduct.authcheckdam.pdf) [<https://perma.cc/6ZRT-7QHB>]. See also generally A.B.A. COMM'N ON LAW AND AGING, LIMITED GUARDIANSHIP OF THE PERSON AND PROPERTY (2017), [https://www.americanbar.org/content/dam/aba/administrative/law\\_aging/chartlimitedguardianshipoftheresonandproperty.authcheckdam.pdf](https://www.americanbar.org/content/dam/aba/administrative/law_aging/chartlimitedguardianshipoftheresonandproperty.authcheckdam.pdf) [<https://perma.cc/4TX2-WJ8J>].

129. Such as through information gathered and presented in the petition for the appointment of a guardian, the initial pleading that begins the guardianship proceeding.

130. Nancy Knauer, "Gen Silent": *Advocating for LGBT Elders*, 19 ELDER L.J. 289, 291 (2012).

131. WITTEN & EYLER, *supra* note 64, at 200.

132. *Id.*

133. See Catherine Sakimura & Daniel Redman, *A Great Unmet Need: Legal Aid Services for Low-Income Transgender Clients*, 26 MGMT. INFO. EXCHANGE J. 29, 31 (2012).

134. GRANT ET AL., *supra* note 31, at 5.

legal services clinics and six percent were harassed or disrespected.<sup>135</sup> “In the area of judges, courts, and legal services clinics, [male-to-female transgender respondents] reported consistently higher rates of mistreatment than [female-to-male transgender] respondents.”<sup>136</sup> Considering the link between a transgender individual’s welfare and stigma free environments,<sup>137</sup> it is critical that courts are a safe, unbiased environment for a person to reveal themselves, or to be known, as transgender. Fear-based concealment affects transgender persons’ emotional and mental health—already likely compromised by incapacity.

Therefore, as Knauer notes, it is essential to educate adult guardianship courts about nonconforming gender identities.<sup>138</sup> Those courts could then serve a crucial protective role by requiring that the counsel and court visitor inquire into a person facing guardianship’s gender identity. If counsel or the court visitor learns that the person is transgender, the court must then ensure that the person’s best interests are served by appointing a suitable guardian.

### C. *Appointing a Transgender-Affirming Guardian*

As is true with health care agents and care providers, a transgender-affirming guardian is essential to the health and well-being of transgender elders who are incapacitated. “[Transgender] people who receive social support about their gender identity and gender expression have improved [psychological and health] outcomes and quality of life.”<sup>139</sup> As illustrated through George’s story at the beginning of this Article, such support is potentially lifesaving.<sup>140</sup>

If a transgender elder who becomes incapacitated has not expressed in writing a preference regarding who would serve as their guardian, then a court is left to identify and appoint one. State laws typically prioritize family members to serve as guardians, but many also grant the court discretion to act in a person’s best interests in selecting a guardian.<sup>141</sup> Because acceptance rather than stigmatization of transgender individuals is crucial to their health and emotional

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135. *Id.*

136. *Id.* at 133.

137. Fredriksen-Goldsen et al., *supra* note 7, at 497 (“[B]oth discrimination from health care providers and internalized stigma can exacerbate chronic stress . . . . Stigma reduction strategies for health care professionals and improved education about gender identity and aging are essential to reduce stigma and discrimination in health care setting for transgender older adults . . . . [C]reating environments whereby transgender older adults do not possess stigmatized identities and do not feel the need to conceal their gender identity is critically important.”).

138. Knauer, *supra* note 19, at 312.

139. *Guidelines for Psychological Practice*, *supra* note 56, at 846.

140. *See also* Knauer, *supra* note 6, at 14 (“As Dr. Melinda Lantz, chief of geriatric psychiatry at Beth Israel Medical Center in New York explains, closeted older LGBT people face ‘a faster pathway to depression, failure to thrive and even premature death.’”).

141. *See, e.g.*, N.M. STAT. ANN. §§ 45-5-311(B)-(C) (West 2018).

welfare,<sup>142</sup> courts must take steps to ensure that they appoint transgender-affirming guardians.

One way to accomplish this is for statutes to require representation by counsel for allegedly incapacitated adults—especially those, like transgender adults, who are among the most marginalized and vulnerable populations because of their nonconformance to societal norms. A majority of states, thirty-eight, mandate by statute that an allegedly incapacitated adult is entitled to counsel in guardianship proceedings.<sup>143</sup> That counsel serves in one of two different lawyer roles. One role is as a standard zealous advocate—the role lawyers typically assume when representing their client’s position and defending their rights.<sup>144</sup> The other role is as a guardian *ad litem*,<sup>145</sup> whose duties may include presenting their client’s position on guardianship and preferences to the court,<sup>146</sup> reporting to the court on the client’s best interests,<sup>147</sup> advocating for their client’s best interests,<sup>148</sup> and informing the client about their rights and explaining the proceeding.<sup>149</sup>

Some statutes allow the allegedly incapacitated adult to have both a zealous advocate and a court appointed guardian *ad litem*.<sup>150</sup> Because transgender elders face potential stigmatization and bias from the courts and have a potentially higher risk of an allegation, if not a finding, of incapacity, a zealous advocate is necessary. Moreover, I suggest that before a court appoints a guardian *ad litem*, if an alleged incapacitated individual is known to be transgender, or is revealed as such during the proceeding, the court needs to inquire into the proposed counsel’s attitude towards transgender persons, to ensure that attorney is not biased towards those individuals. And that the attorney must educate themselves about how to effectively engage with and represent their transgender client—a requirement for competent representation.<sup>151</sup>

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142. See, e.g., *Guidelines for Psychological Practice*, *supra* note 56, at 835 (“Respecting and supporting TGNC people in authentically articulating their gender identity and gender expression, as well as their lived experience, can improve TGNC people’s health, well-being, and quality of life.”). See also Knauer, *supra* note 6, at 14.

143. A.B.A. COMM’N ON LAW AND AGING, *supra* note 115.

144. See, e.g., ALASKA STAT. ANN. 13.26.246 (West 2018); D.C. CODE ANN. 21-2033(b) (West 2018).

145. See, e.g., N.M. STAT. ANN. § 45-1-201(A)(22) (West 2012) (defining a guardian *ad litem* as “a person appointed by the district court to represent and protect the interests of a minor or an incapacitated person in connection with litigation or any other court proceeding.”).

146. N.C. GEN. STAT. ANN. § 35A-1107 (West 2003).

147. See, e.g., 755 ILL. COMP. STAT. 5/11a-10(a) (West 2018); TENN. CODE ANN. 34-1-107(d)(1) (West 2018) (“The guardian ad litem owes a duty to the court to impartially investigate the facts and make a report and recommendations to the court. The guardian ad litem serves as an agent of the court, and is not an advocate for the respondent or any other party.”).

148. NEB. REV. STAT. § 30-2619(b) (West 2013).

149. See, e.g., 755 ILL. COMP. STAT. 5/11a-10(a) (West 2018); MICH. COMP. LAWS ANN. § 700.5305(1) (West 2018); 33 R.I. GEN. LAWS § 33-15-7(c) (West 2017).

150. A.B.A. COMM’N ON LAW AND AGING, *supra* note 115.

151. Cynthia M. Ward & Nelson P. Miller, *The Role of Law Schools in Shaping Culturally Competent Lawyers*, 89 MICH. B. J. 16, 16 (2010) (“With an increasingly diverse potential client base,

In guardianship proceedings, a court visitor, investigator, or court representative are other potential sources for informing an allegedly incapacitated person about the proceeding. The court visitor is also a conduit to the court for that person to express their preferences, including who they wish to serve as their guardian. However, only 14 states require the appointment of a court visitor or similar appointee.<sup>152</sup> It is critical that states require a thorough investigation of the allegedly incapacitated individual's identity and corresponding needs either by a court visitor or a guardian *ad litem*. An inquiry that includes interviewing friends and family and reviewing medical records may be the only way to identify the gender identity of an alleged incapacitated individual.

Some states' adult guardianship laws include a statement of the statute's purpose. For example, some assert that the purpose is "to promote and to protect the well-being of the person" for whom guardianship applies.<sup>153</sup> It is antithetical to that purpose to appoint an anti-transgender biased guardian for a transgender person. To accomplish the statute's purpose, a court must inquire into whether the proposed guardian would promote and protect the transgender elder's gender identity, and, thus, well-being. However, such an inquiry is not required by enough states. By contrast, a state may require merely that the guardian agrees to serve<sup>154</sup> or is "eligible,"<sup>155</sup> hardly a standard that ensures a transgender person's well-being and best interests.

Some statutes, at least according to their language if not in practice, require or appear to require the court to vet the guardian's willingness and intent to protect and promote the incapacitated person's well-being. Those statutes state that the guardian should be "suitable,"<sup>156</sup> "qualified,"<sup>157</sup> or "appropriate"<sup>158</sup> to serve in that role. An anti-transgender biased and non-affirming guardian would be inherently unsuitable, unqualified, and inappropriate to serve a transgender person.

Also, an investigation into a guardian's suitability should not be left to the court's discretion through language merely suggesting that the court may

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lawyers cannot ignore cultural competency. Lawyers must provide competent legal services. Competent service depends on understanding the clients whom lawyers serve." See also MODEL CODE OF PROF'L CONDUCT R. 1.1 (1983) (requiring the provision of "competent" legal services to clients).

152. A.B.A. COMM'N ON LAW AND AGING, *supra* note 115.

153. See, e.g., MONT. CODE ANN. §72-5-306 (West 1981); N.H. REV. STAT. ANN. §464-A:1 (2018). See also N.M. STAT. ANN. § 45-5-301.1 (West 1989) (stating when guardianship is to be used).

154. See, e.g., N.H. REV. STAT. ANN. § 464-A:10 (2009).

155. See, e.g., TEX. EST. CODE ANN. § 1101.101(a)(2)(B) (West 2015). However, Texas statute requires the court to consider the best interests of the person for whom guardianship is necessary, which should result in an inquiry into the suitability of the proposed guardian. TEX. EST. CODE ANN. § 1101.101(a)(1)(B) (West 2015).

156. See, e.g., N.M. STAT. ANN. § 45-5-304(C)(5) (West 2009). See also WASH. REV. CODE ANN. § 11.88.020(1), (1)(f) (West 2011).

157. See, e.g., COLO. REV. STAT. ANN. § 15-14-310(H)(3) (West 2014).

158. See, e.g., TENN. CODE ANN. § 34-1-107(d)(2)(D) (West 2013) (requiring the guardian *ad litem* to determine whether the proposed guardian is "appropriate" to be appointed.).

consider it. Instead, there must be a procedural provision requiring that inquiry. Evidence of a guardian's suitability should be a required finding by the court at the hearing on the appointment of the guardian. A finding establishes that evidence must be presented and assessed, and a critical burden of proof met. Typically, the evidentiary standard in guardianship proceedings is clear and convincing.<sup>159</sup> That standard already pertains to required findings by the court that a person is indeed incapacitated, and that a guardianship is necessary. Under New Mexico's adult guardianship statute, for example, the court is required to find that the proposed guardian is both qualified and suitable.<sup>160</sup> Because no less than the physical, emotional, and mental health of a transgender individual is at stake, the court should be required by law, through a finding, to appoint a transgender-affirming guardian.

If their role is investigative, a guardian *ad litem* or a court visitor may be in the best position to inquire into and make a recommendation to the court regarding a proposed guardian's suitability. Some states do require such an investigation and recommendation by one or both of those court appointees.<sup>161</sup> However, most states do not provide for such appointees. Therefore, the burden falls on the court or the allegedly incapacitated person's counsel to conduct a sufficient inquiry. Guardianship law reform efforts should press legislatures to adopt a required finding regarding a proposed guardian's suitability, if not already mandated by the state's laws. Arkansas' guardianship statute is an example of expressly requiring proof of a guardian's suitability, stating that before a court appoints a guardian it "must be satisfied that," among other things, "the person to be appointed guardian is qualified and suitable to act as such."<sup>162</sup>

Evidence of suitability should include the proposed guardian's willingness and intent to (1) learn about transgender identity, needs, vulnerabilities, including the harmful effects of stigma and increased risk of suicide attempts; (2) make gender identity-affirming decisions on behalf of the person under guardianship, such as obtaining transgender-specific health and mental health care; (3) support and enable the maintenance of the person's gender expression, such as by providing gender-congruent clothing and enabling access to gender-affirming grooming services; and (4) educate and advocate for transgender-affirming care by medical and institutional providers. The court's inquiry into whether the proposed guardian is suitable to serve must include whether the guardian intends to advocate for their well-being, including the ongoing maintenance of their gender identity and expression.

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159. A.B.A. COMM'N ON LAW AND AGING, *supra* note 115.

160. N.M. STAT. ANN. § 45-5-304(C)(5) (West 2009).

161. *See, e.g.*, Idaho Code Ann. §§ 15-5-315(1)-(2); NEB. REV. STAT. ANN. § 30-2619.03(4); N.M. STAT. ANN. § 45-5-303(E); N.D. CENT. CODE ANN. § 30.1-28-03(6)(i)(2).

162. ARK. CODE ANN. § 28-65-210(3) (West 2018). *See also* N.M. STAT. ANN. 1§ 45-5-304(C)(5) (West 2009) (findings required by the court to appoint a guardian include that "the proposed guardian is both qualified and suitable.").

If a court finds that the guardian does not intend to defend the person under guardianship's gender identity and meet their corresponding needs, then the appointment should be denied and an alternative guardian must be identified and appointed.<sup>163</sup> Regardless, but especially if no suitable alternative guardian is available, through its order appointing the guardian<sup>164</sup> the court should include language requiring the guardian to educate themselves about transgender identity, needs, and vulnerabilities.<sup>165</sup> The court should also order the guardian to make transgender-affirming decisions, such as transgender-specific health care decisions. The guardian can refer to the World Professional Association for Transgender Health standards of care,<sup>166</sup> and identify transgender-safe and -affirming health care providers (such as through a local transgender advocacy group's referral lists). If an institutional placement is necessary, the guardian must determine that any proposed institution is transgender safe and affirming before placement. Alternatively, the guardian must advocate for staff and providers to be trained in culturally responsive transgender care.

#### *D. Ongoing Monitoring of the Guardianship by the Court*

Guardianship procedure reform efforts emphasize the need for courts to continually monitor the welfare of the person under guardianship and the actions of the guardian. "The court should monitor the well-being of the person . . . on an ongoing basis, including, but not limited to: . . . ensuring the well-being of the person . . . improving the performance of the guardian, and enforcing the terms of the guardianship order."<sup>167</sup> A majority of state laws require a guardian to complete and file an annual report with the court, which maintains supervisory jurisdiction over adult guardianship cases.<sup>168</sup> The reports typically require the guardian to describe the health status and welfare of the person under

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163. Most state statutes have a provision prioritizing those who can be appointed as a guardian, including those closely related by blood or marriage. However, such statutes typically allow the court the discretion to appoint someone with a lesser priority based on various factors, including the allegedly incapacitated person's best interests. *See e.g.*, MINN. STAT. ANN. § 524.5-309(b) (West 2010); MONT. CODE ANN. § 72-5-312(3) (West 2009); NEB. REV. STAT. § 30-2627(c) (West 2015). Nancy Knauer has described well the LGBT-specific concerns regarding statutory provisions prioritizing who is eligible to be appointed as guardian. Knauer, *supra* note 19, at 300; 308-309.

164. Hurme & Wood, *supra* note 112, at 1200 ("[T]he court should issue orders that . . . maximize the person's right to self-determination and autonomy." However, courts should go further, and issue orders that maximize the person's right to have their identity and dignity defended.).

165. *Id.* ("[T]he court . . . should ensure that guardians, court and court staff, evaluators, and others involved in the guardianship process receive sufficient ongoing, multifaceted education to achieve the highest quality of guardianship possible.").

166. STANDARDS OF CARE, *supra* note 1.

167. Hurme & Wood, *supra* note 112, at 1200.

168. A.B.A. COMM'N ON LAW AND AGING, MONITORING FOLLOWING GUARDIANSHIP PROCEEDINGS (Aug. 7, 2018), [https://www.americanbar.org/content/dam/aba/administrative/law\\_aging/chartmonitoring.authcheckdam.pdf](https://www.americanbar.org/content/dam/aba/administrative/law_aging/chartmonitoring.authcheckdam.pdf) [<https://perma.cc/G9RC-HUR7>]. *See also* CAL. PROB. CODE §§ 1850(a)(1)-(2) (West 2011) (going further by requiring a direct court review six months after a guardian's appointment and annually thereafter.).

guardianship and major decisions, such as medical and placement, made on their behalf. The reports are intended to allow the court to monitor the welfare of the person under guardianship.

Statutes should go further to protect an incapacitated individual's self-determination and known preferences by requiring that the reports to the court include occurrences when the guardian has, for example, accessed transgender-specific health care on the incapacitated person's behalf. Possible additions may include a sworn statement that the guardian made decisions, when possible, according to the person's known preferences and in a gender-identity-affirming manner. The guardian could also be required to alert the court if the guardian encounters barriers, such as the denial of services, to transgender-specific, affirming health care or respectful institutional care. The court could then, for example, appoint a guardian *ad litem* to advocate for the person under guardianship.

Notably, Florida recently passed legislation that includes a provision suspending the decision-making authority of an agent appointed by an adult prior to incapacity through a power of attorney if it is proved during the guardianship proceeding that "[t]he agent's decisions are not in accord with the alleged incapacitated person's known desires."<sup>169</sup> Similar statutory provisions should be enacted to provide for the suspension of an appointed guardian's authority upon a finding that the guardian has not made transgender-affirming decisions in accord with the person under guardianship's known preferences. The court could then either remove the guardian and transfer the guardianship to another person or hold the guardian accountable to make decisions that conform to the transgender person's preferences, such as through a detailed court order or by setting ongoing status hearings to monitor the guardian's conduct.

### *E. Advocacy by the Guardian*

As discussed above, anti-transgender bias by medical and institutional providers requires that the guardian be a zealous advocate for the transgender person who is incapacitated—and so is presumably unable to advocate adequately for themselves. The guardian should be aware that "LGBT older adults who came of age before the gay liberation movement of the 1970s have lived largely in the context of extremely hostile social, medical and mental health systems, making self-advocacy within aging services agencies or institutional settings overwhelmingly difficult for many of these elders."<sup>170</sup> However, the guardian must also respect and protect a transgender person's wish for privacy,

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169. FLA. STAT. ANN. § 744.3203 (West 2015).

170. GRANT, *supra* note 22, at 16.

if expressed or known, and not “out” them regarding their gender identity unless it is necessary for their health and welfare.

Under the standards of practice required of guardians by the National Guardianship Association, guardians must “identify and advocate for the person’s goals, needs, and preferences.”<sup>171</sup> Transgender incapacitated adults have ongoing health care needs. For example as noted, discontinuing hormone treatment can be harmful to the health of those who have taken hormones long term.<sup>172</sup> Moreover, “[c]ollaboration across disciplines can be crucial when working with [transgender and gender nonconforming] people because of the potential interplay of biological, psychological, and social factors in diagnosis and treatment.”<sup>173</sup> Accordingly, a guardian should advocate for and coordinate trans-affirmative care across disciplines to best meet the person under guardianship’s needs.

Because a majority of transgender people have to teach their medical providers about transgender-specific care, the guardian must first educate themselves in order to educate the providers about those needs. Next, because transgender individuals are at risk of being refused care and many have experienced discrimination by care providers, guardians must advocate for access to treatment, and for respectful and nondiscriminatory care by providers. That means, for example, attending all medical appointments and regularly monitoring the care by institutional providers, such as by participating in treatment team meetings and reviewing the institution’s records on the resident.

Further, to address the fears of transgender adults when contemplating institutionalization, state laws dictating the duties of a court-appointed guardian should include a provision like the progressive and protective measure recently passed in Florida which requires a guardian to “[a]dvocate on behalf of the ward in institutional and other residential settings ....”<sup>174</sup> That advocacy should include that institutional staff be trained regarding knowledge and understanding of transgender persons and caring for them effectively.<sup>175</sup> Guardians must exhibit heightened scrutiny and protectiveness when serving transgender persons of

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171. NAT’L GUARDIANSHIP ASS’N, STANDARDS OF PRACTICE 7 (4th ed. 2013), <https://www.guardianship.org/wp-content/uploads/2017/07/NGA-Standards-with-Summit-Revisions-2017.pdf> [<https://perma.cc/9GE6-YW8M>].

172. INST. OF MED., *supra* note 77, at 265.

173. *Guidelines for Psychological Practice*, *supra* note 56, at 850 (internal citations omitted).

174. FLA. STAT. ANN. § 744.361(13)(i) (West 2015). Other states should follow Florida’s lead by recognizing that guardians have a duty to advocate on behalf of their protected persons (including those who are transgender) in institutional settings. Until more states enact similar advocacy measures, transgender persons in those settings are at risk of harm due to bias.

175. Transgender advocacy groups and resource centers, such as the Transgender Resource Center of New Mexico, offer free transgender cultural competency or literacy trainings to organizations and groups and the Transgender Training Institute. Additionally, online trainings are available from various national transgender advocacy organizations such as webinars by the *Transgender Health*, NAT’L LGBT HEALTH CTR. (2018), <https://www.lgbthealtheducation.org/topic/transgender-health/> [<https://perma.cc/XSM2-J776>].

color because they are most at risk of discrimination and mistreatment by institutional care providers.

### CONCLUSION

Transgender elders who are incapacitated are particularly vulnerable to harm if a non-transgender-affirming guardian is appointed to make decisions for them. Before the courts become involved, transgender individuals can take steps, described in this Article, to protect themselves from an unsuitable surrogate. If a court becomes involved, it can help to ensure that a transgender person is served by a surrogate who will protect their health, welfare, and identity. Courts can, therefore, address the realistic and profoundly disturbing concern of many aging transgender individuals who fear becoming dependent and being denied dignity, respect and, for some, losing the will to live.