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UNTYING THE KNOT:

EXTENDING INTESTACY BENEFITS TO NON-TRADITIONAL FAMILIES BY SEVERING THE LINK TO MARRIAGE

PETER J. HARRINGTON*

INTRODUCTION

“All this talk about equality. The only thing people really have in common is that they are going to die.”¹ Given the inevitability of death, inheritance law should be one area of law where an individual’s property rights are secure regardless of lifestyle. The Uniform Probate Code (“UPC”), the statutory inheritance model used by most states, was developed specifically to protect the succession rights of the “nuclear family.”² More specifically, the intestacy statutes provide a mechanism for distributing a decedent’s estate in the absence of a will by effectuating the presumed donative intent.³ However, numerous changes to the traditional family structure have left the UPC intestacy system antiquated. As a result, the inheritance rights of non-traditional families are vulnerable.⁴

The composition and general principle of what constitutes a family has

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¹ BOB DYLAN, QUOTATIONSBOOK.COM, <http://quotationsbook.com/quote/12700> (last visited Nov. 24, 2009).

² See Aubry Holland, *The Modern Family Unit: Toward a More Inclusive Vision of the Family in Immigration Law*, 96 CAL. L. REV. 1049, 1051 (2008) (defining the nuclear family paradigm); See generally MARY ANN GLENDON, *THE TRANSFORMATION OF FAMILY LAW: STATE, LAW, AND FAMILY IN THE UNITED STATES AND WESTERN EUROPE*, 238–40 (Univ. of Chicago Press 1989) (describing the development of the law of inheritance).

³ See UNIF. PROBATE CODE art. II, pt. 1 gen. cmt. (amended 2006) (stating the share the surviving spouse takes if the decedent dies without a will).

⁴ See GLENDON, *supra* note 2 at 289–90 (describing inheritance law to be a bastion of the legitimate family); RALPH C. BRASHIER, *INHERITANCE LAW AND THE EVOLVING FAMILY*, 2 (Temple Univ. Press 2004) (noting that it is very difficult to establish simple, efficient, and objective inheritance laws that accurately reflect the wide variety of family structures).

been altered drastically over the past half-century.⁵ These changes make it clear that the domination of the nuclear family, consisting of a married, heterosexual couple and their children, is over.⁶ According to the 2000 census, there are approximately eleven million people, both same-sex and opposite-sex couples, living with an unmarried partner in the United States.⁷ This constitutes a seventy-two percent increase from the number of unmarried couples living together in the previous decade.⁸ Additionally, the number of blended families and single parent families has also increased.⁹ If this trend continues, non-traditional family units will soon comprise the majority of households in America.¹⁰

In response to the changes in family structure, the UPC has chosen to selectively accommodate the needs of some non-traditional family groups.¹¹ The UPC has added certain non-traditional groups, to the default intestacy scheme, such as stepchildren and adopted children.¹² However, other groups, for example unmarried opposite-sex couples and same-sex couples, still remain absent from the statutory inheritance hierarchy.¹³ By

⁵ See Mary Louise Fellows et al., *Committed Partners and Inheritance: An Empirical Study*, 16 LAW & INEQ. 1, 2–3 (1998) (stating that there have been dramatic changes in the amount of blended families, single-parent households, and unmarried same-sex and opposite sex couples); Craig W. Christensen, *Legal Ordering of Family Values: The Case of Gay and Lesbian Families*, 18 CARDOZO L. REV. 1299, 1311 (1997) (asserting that there has been a decline in the number of traditional nuclear families).

⁶ See Holland, *supra* note 2, at 1052 (describing the shift from the traditional “nuclear family” to the modern “unitary family,” which also accounts for non-marital couples); see also *Borough of Glassboro v. Vallorosi*, 568 A.2d 888, 895 (N.J. 1990) (finding that behavior, stability, and permanency can be the functional equivalent of a family unit).

⁷ T.P. Gallanis, *Inheritance Rights For Domestic Partners*, 79 TUL. L. REV. 55, 59 (2004) (describing the demographics existent in the variety of living situations of the contemporary family).

⁸ Jennifer Seidman, *Functional Families and Dysfunctional Laws: Committed Partners and Intestate Succession*, 75 U. COLO. L. REV. 211, 215 (2004) (noting the increase in the number of non-traditional family units in the United States).

⁹ See Fellows et al., *supra* note 5, at 2–3 (explaining that single-parent households and blended families are increasing in number); see also Sharon Jayson, *Out-of-Wedlock Births on the Rise Worldwide*, USA TODAY, May 13, 2009, at 10B (citing a study by the National Center for Health Statistics which found that the percentage of babies born to unwed mothers is quickly increasing).

¹⁰ See Seidman, *supra* note 8, at 215 (emphasizing just how prevalent the trend toward the non-traditional family has become); see also Jayson, *supra* note 9, at 10B (quoting a National Center for Health Statistics Study which found that the number of out-of-wedlock births for women ages 20-24 had increased from 52% in 2002 to 60% in 2007, and for women ages 25-29 had increased from 25.3% to 32.2% in the same time frame).

¹¹ UNIF. PROBATE CODE art. II, prefatory note (amended 2006) (revising the traditional intestacy scheme to include stepchildren and adopted children).

¹² *Id.* (noting that stepchildren and adopted children would now be covered by the act).

¹³ See Harry D. Krause & David D. Meyer, *What Family for the 21st Century?*, 50 AM. J. COMP. L. 101, 101 (2002) (noting increased legal protection for nontraditional families, and proposing further methods of protection for these groups); see also Julia Frost Davies, *Two Moms and a Baby: Protecting the Nontraditional Family Through Second Parent Adoptions*, 29 NEW ENG. L. REV. 1055, 1055–56 (1995) (explaining that non-traditional families still face substantial obstacles on the road to gaining legal recognition).

clinging to certain conventional beliefs that are no longer applicable in contemporary society the UPC has compromised the main purpose of its intestacy scheme of presuming a decedent's donative intent.¹⁴

Intestacy statutes become crucial during the distribution of an estate because less than half of American adults claim to have a will.¹⁵ Additionally, about twenty percent of those with a will did not consult a lawyer in its preparation, leaving doubt as to the validity of the will's provisions or general execution.¹⁶ If every person executed a valid will during adulthood, there would no longer be a need for intestacy statutes; however, this is not a practical solution.¹⁷ There are numerous reasons people choose not to make a will, including avoiding the associated cost, a belief that the absence of a will makes it more difficult for creditors to collect debts, or simply a reluctance to accept their own mortality.¹⁸ Others may arrange to distribute their property using non-probate transfers to avoid some of the time spent and costs incurred probating a will.¹⁹ Whatever the reason, people who do not dispose of property through a will or a non-probate will substitute are impliedly accepting intestacy statutes as

¹⁴ See Seidman, *supra* note 8, at 224 (suggesting that the exclusion of non-married committed couples, who have a relationship similar to that of a married couple, will result in their donative intent not being effectuated because they will not be recognized under the UPC); see also Mary Louise Fellows, *In Search of Donative Intent*, 73 IOWA L. REV. 611, 656-58 (1988) (asserting that increased understanding of donative intent should be recognized in state intestacy law).

¹⁵ See Marsha A. Goetting & Peter Martin, *Characteristics of Older Adults with Written Wills*, 22(3) J. FAM. & ECON. ISSUES 243, 243 (2001) (stating that a survey showed that only 39 to 48 percent of adults reported having a will, while 66 percent of the elderly sample, skewed toward the wealthiest individuals, reported having a will); see also Press Release, Martindale-Hubbell Lawyers.com, *Majority of Americans Remain Without Wills* (April 3, 2007), available at <http://www.lawyers.com/~link.aspx?id=910A52BD-D3AC-4A97-8B6E-0044D74249E5&z=z> (asserting that the large number of adult Americans without a will has not fluctuated year-to-year).

¹⁶ See JESSE DUKEMINIER ET AL., *WILLS, TRUSTS, AND ESTATES* 71 (8th ed. 2009) (emphasizing the need for intestacy statutes given the possibility that a flaw in a will could result in property that is unaccounted for in the estate); see also Kelly Greene, *Ask Encore / Focus on Retirement*, WALL ST. J., Feb. 10, 2007, at B2 (noting that do-it-yourself wills, constructed without the help of an attorney, can make sense for some adults but care must still be taken when drawing one out to make sure that it complies with state law).

¹⁷ See UNIF. PROBATE CODE § 2-101 (amended 2008) (stating that any part of the decedent's estate not effectively disposed of by will passes by intestate succession); see also Press Release, Martindale-Hubbell Lawyers.com, *supra* note 15 (finding that the majority of American adults are without wills, and the percentage of minorities without wills is an even higher number).

¹⁸ See DUKEMINIER ET AL., *supra* note 16, at 71-72 (describing the possible reasons why people do not make a will); see also Posting of Greg Herman-Giddens to North Carolina Estate Planning Blog, <http://www.ncestateplanningblog.com/2007/05/articles/estate-planning/survey-finds-over-twothirds-of-americans-lack-a-will> (May 31, 2007, 17:25 EST) (positing that a reason that many parents do not make a will is because they cannot decide on a guardian for their children in the event of the death of both parents).

¹⁹ See DUKEMINIER ET AL., *supra* note 16, at 72 (noting additional burdens that may discourage individuals from making a will); see also Elaine H. Gagliardi, *Remembering The Creditor at Death: Aligning Probate and Nonprobate Transfers*, 41 REAL PROP. PROB. & TR. J. 819, 821 (2007) (discussing recent increased usage of nonprobate transfers).

their default distribution scheme.²⁰

The primary purpose of intestacy statutes is to “provide a distribution of real and personal property that approximates what the decedents would have done if they had made a will.”²¹ The default distribution scheme provides for the surviving spouse above all others.²² If the statute does not bequeath the entire estate to the spouse, or if there is no surviving spouse, the descendant’s heirs (including issue, parents, and siblings) take the remaining property as proscribed by the statute.²³ While the administration of the estate is surely simplified by relying on purely marital and blood relations, the system leaves open the possibility of frustrating the central purpose of intestacy by not truly effectuating the intended distribution of the decedent. As a result, the question remains as to whether, in light of substantial changes to the traditional family structure, omitting unmarried same and opposite sex couples from the intestacy scheme still approximates what the average decedent would want.

The defect in the current intestacy system is obvious when a party who is not in the default distribution scheme appears to be an intended beneficiary. The language of the statute merely creates a method to dispose of property in the absence of a will without consideration for marital status.²⁴ However, all intestacy schemes place extreme emphasis on marital status when the statute attempts to approximate intent.²⁵ As a result, courts have held that cohabitating opposite-sex couples with long-standing relationships cannot receive intestacy benefits because they lack legally recognized marital status.²⁶ Courts have similarly held that same-sex couples in a spousal-type

²⁰ See *DUKEMINIER ET AL.*, *supra* note 16, at 72 (stating that the distribution of property unaccounted for in a will is governed by intestacy law); see also UNIF. PROBATE CODE § 2-101 (amended 2008) (noting that intestate succession rules take hold when there is no will to allow for effective disposal of part or all of an estate).

²¹ *King v. Riffie*, 309 S.E.2d 85, 87–88 (W. Va. 1983).

²² See, e.g., UNIF. PROBATE CODE § 2-102 (amended 2008) (describing the preference for the surviving spouse and the spouse’s statutory estate share).

²³ See, e.g., UNIF. PROBATE CODE § 2-103 (amended 2008) (explaining the intestate succession hierarchy in the absence of a surviving spouse).

²⁴ See E. Gary Spitko, *The Expressive Function of Succession Law and the Merits of Non-Marital Inclusion*, 41 ARIZ. L. REV. 1063, 1064 (1999) (noting that the typical intestacy statute makes no distinction between gay and non-gay individuals); Jennifer Berhorst, *Unmarried Cohabiting Couples: A Proposal for Inheritance Rights Under Missouri Law*, 76 UMKC L. REV. 1131, 1145–47 (explaining how legal recognition of same-sex marriages and civil unions in particular states have allowed for such couples to attain equal legal recognition to married couples with regards to inheritance rights).

²⁵ See, e.g., UNIF. PROBATE CODE § 2-102 (amended 2008) (stating that in the absence of issue the surviving spouse takes the entire estate).

²⁶ See *Peffley-Wamer v. Bowen*, 778 P.2d 1022, 1027 (Wash. 1989) (denying a non-marital surviving partner intestacy benefits because she does not fit under the statutory definition of “surviving spouse”); see also *Hernandez v. Robles*, 855 N.E.2d 1, 7, 9 (N.Y. 2006) (reasoning that any extension of rights in probate and intestacy proceedings to same-sex couples would need to come from the

relationship cannot be considered a surviving spouse for intestacy purposes because they fail to meet the statutory definition.²⁷ Since only a minority of states provide marriage or marriage-equivalent status to same-sex couples, the surviving partner is effectively barred from sharing in the decedent's intestate estate, despite being the likely intended donee.²⁸

This Note does not attempt to argue that states should universally recognize same-sex marriage or any equivalent. Rather, this Note argues that given contemporary family settings, the link between distribution and marriage established at the creation of the UPC intestacy statute is now contrary to the statute's purpose. The Note ultimately concludes that the UPC should be amended by adding "committed partner"²⁹ at the top of the intestacy hierarchy, putting it on the same level as surviving spouse to include the previously disenfranchised groups. Under the new "committed partner" standard a court could ask a surviving partner to establish certain factors, such as holding yourself out to the general public as highly dedicated to one another, intermingling finances, providing continuing substantial financial support, and a shared household to determine the significance of the relationship. Additionally, the universal adoption of a registration procedure for alternative couples would help courts identify a legitimately committed relationship. These procedures would allow both same-sex couples and unmarried opposite-sex couples access to the intestate estate, while more accurately accomplishing the intestacy goal of determining true donative intent.

This article is divided into four main parts. Part I of this article will discuss the history, development, and purposes of intestacy law. It will focus on the link between the distribution scheme and the family setting,

legislature).

²⁷ See *Matter of Cooper*, 187 A.D.2d 128, 129 (denying the decedent's homosexual partner to take in his estate intestate, despite evidence and testimony that the only reason they were not married is because New York State will not issue a marriage license to persons of the same sex); see also *In re Petri*, 211 N.Y.L.J. 29 (1994) (holding that a same-sex partner was not a "surviving spouse" for intestate succession).

²⁸ See Nancy J. Knauer, *Same-Sex Marriage and Federalism*, 17 TEMP. POL. & CIV. RTS. L. REV., 421, 421 (2008) (noting that ten states (California, Connecticut, Hawaii, Maine, Massachusetts, New Hampshire, New Jersey, Oregon, Vermont, and Washington, along with the District of Columbia) give some form of recognition to same-sex couples, and three other states (New Mexico, New York, and Rhode Island) give full-faith and credit to same-sex relationships established in states that allow it); see also Sandra Block, *Unmarried Couples Must Have Wills*, USA TODAY, Oct. 14, 1999, available at <http://www.usatoday.com/money/wealth/saving/msw130.htm> (informing unmarried couples that a living trust may prevent hostile relatives from collecting the deceased partner's assets to the exclusion of the surviving partner).

²⁹ For the purposes of this paper, "committed partner" refers to an individual that has established certain criteria evidencing a level of commitment strong enough to presume the individual was the intended intestate beneficiary.

arguing that given contemporary family settings, the purpose of intestacy law is no longer being met. Part II of this article will discuss the development of laws recognizing same-sex relationships, both by the courts and by state statutes. Part II will compare same-sex relationships to traditional marriages, highlighting the common characteristics of each relationship. This comparison will support the argument that the presumptive intestate beneficiary rose from the traits these relationships are based on, not by the legal status of them. Part III will examine the arguments opposing the extension of surviving spouse benefits beyond the marital relationship and in support of denying intestacy benefits to non-married and same-sex couples. Part IV of this article will propose the adoption of a statute that establishes a list of factors for a court to consider when determining if there is a relationship that should take a superior interest in a testator's estate. The evaluation will focus on same-sex relationships as an example, in an effort to ensure that the intestacy statute is geared toward, and capable of determining, true donative intent.

I. INTESTACY

This section will explore the development and application of intestacy law. Part A of this section will explore the history of intestacy law and discuss the revisions made to the UPC to accommodate contemporary family structures. Part B will discuss the primary and secondary purposes of intestacy policy. This part will also further evaluate the degree to which these purposes are being accomplished and how responsive the current intestate system is to the modern family.

A. *The History of Intestacy Law*

Changes in inheritance law have occurred mainly in response to shifts in social ideologies surrounding the family.³⁰ Prior to the adoption of the UPC in 1969, most states followed the Statute of Distribution of 1670.³¹ Under this succession scheme the surviving spouse was the still the presumptive

³⁰ See Martin L. Fried, *The Uniform Probate Code: Intestate Succession and Related Matters*, 55 ALB. L. REV. 927, 927 (1992) (noting there was criticism of intestacy law prior to the UPC because a surviving spouse took an inadequate share of the intestate estate); see also UNIF. PROBATE CODE art. II, pt. 1 gen. cmt. (amended 2006) (explaining that one of the main purposes of the article is to look at prevalent trends in will execution to determine what someone without a will would likely want).

³¹ See Fried, *supra* note 30, at 927 (discussing the history of inheritance law prior to the development of the UPC); see also Bernard E. Jacob, *An Extended Presence, Interstate Style: First Notes on a Theme From Saenz*, 30 HOFSTRA L. REV. 1133, 1159 (2002) (noting how probate courts in America can trace their lineage back to the Statute of Distribution).

primary beneficiary, but the mandatory share reserved for the spouse was substantially smaller than under the UPC.³² Additionally, the Statute of Distribution scheme did not limit the collateral relatives that could share in the residuary in the absence of a surviving spouse or issue, resulting in difficult administration and inconsistent distribution of the estate.³³

The UPC was created in 1969 to respond to the changes created with the emergence of the nuclear family.³⁴ The purpose of the intestacy provision was to “provide suitable rule and procedures for the person of modest means who relies on the estate plan provided by law,” using predominant patterns in wills at the time to effectuate donative intent.³⁵ While every state has a different probate code to suit their individual needs, most are based at least in part on the UPC.³⁶ Because of the emergence of the nuclear family, the UPC eliminated collateral relatives in cases where there is a surviving spouse or issue. Greater emphasis was especially placed on providing for the surviving spouse. While the UPC only gave the surviving spouse the first \$50,000, plus half of the residuary when there was living issue, some state statutes went further and gave the surviving spouse the entire estate, notwithstanding issue.³⁷ The UPC chose to continue to benefit surviving issue due to the possibility that the spouse may choose to disinherit the children if the spouse remarried.³⁸

When the UPC was revised in 1990, its intestate succession scheme was amended to include several family groups not accounted for in the original

³² See Fried, *supra* note 30, at 927 (stating a surviving spouse was entitled to one-third of the estate with surviving issue and one-half of the estate without issue, with the residuary divided per stirpes); but see UNIF. PROBATE CODE § 2-102 (amended 2008) (stating that a surviving spouse with no issue or parents is entitled to the entire estate).

³³ See Fried, *supra* note 30, at 927–28 (discussing the limitations of the original intestacy scheme).

³⁴ See Holland, *supra* note 2, at 1051 (defining the “nuclear family” as consisting of two heterosexual parents and their children); see also *Anti-Nuclear Reaction*, THE ECONOMIST, Dec. 23, 1999 (charting the emergence of the nuclear family ideal and how it is developed).

³⁵ UNIF. PROBATE CODE art. II, pt. 1 gen. cmt. (amended 2006).

³⁶ See Marissa J. Holob, *Respecting Commitment: A Proposal To Prevent Legal Barriers From Obstructing the Effectuation of Intestate Goals*, 85 CORNELL L. REV. 1492, 1498 (2000) (stating that most states intestacy statutes originate at least in part from the UPC) [hereinafter Holob, *Respecting Commitment*]; see also Cristy G. Lomenzo, *A Goal-Based Approach to Drafting Intestacy Provisions for Heirs Other than Surviving Spouses*, 46 HASTINGS L. J. 941, 943 (1995) (explaining that many individuals rely on state intestate statutes to provide for their post-mortem wishes).

³⁷ See UNIF. PROBATE CODE § 2-102 (amended 2008) (calling for distribution of (i) the entire estate to the surviving spouse if there was no surviving issue or parent of the decedent, (ii) the first \$50,000 and one-half of the balance of the estate if the decedent was survived by a parent or parents or by issue all of whom were issue of the surviving spouse, and (iii) one-half of the estate if one or more of the surviving issue were not issue of the surviving spouse); see also N.Y. EST. POWERS & TR. L. § 5-1.2 (2004) (distributing the entire estate to the surviving spouse regardless of living issue).

³⁸ See Fried, *supra* note 30, at 930 (noting that a survey supported the notion that many people believe that their spouses may be untrustworthy and worry that the spouse may decide to disinherit issue); see also UNIF. PROBATE CODE § 2-103 (amended 2008) (enumerating rules for how the decedent’s descendants are to take in intestacy).

construction.³⁹ The revision also significantly increased the surviving spouse's intestate share.⁴⁰ The inclusion of non-marital children and adopted children evidenced a desire to construct the statute in concert with the donative intent of the contemporary decedent.⁴¹ It is also a strong indication that individuals who can be considered "family" are not a static class, but rather a flexible group that may be altered to fit current family ideologies.⁴²

B. The Purposes of the Intestate System

This section will discuss the purposes of the intestate system and the degree to which those purposes are met in light of the contemporary family structure. Section one will describe the primary purpose of the current intestacy laws. Section two will explore the secondary purposes of intestacy law. Section three will discuss the characteristics that led to the marital presumption in traditional intestacy law. It will also evaluate whether the purposes of the intestate system are being met with respect to unmarried opposite-sex couples and same-sex couples.

a. The Primary Purpose of Intestacy Laws

Intestacy laws generally state that giving effect to the donative intent of the decedent without expressly providing for the distribution of property is their most important function.⁴³ As a result, it is generally accepted that "succession law should reflect the desires of the 'typical person,' both with

³⁹ See UNIF. PROBATE CODE §§ 2-116-118 (amended 2008) (enumerating rules that bring non-marital and adopted children into the intestacy scheme); see also Mary Louise Fellows, *Pride and Prejudice: A Study of Connections*, 7 VA. J. SOC. POL'Y & L. 455, 466 (2000) (stating that the revision to the UPC included provisions that provided for non-marital and adopted children).

⁴⁰ See UNIF. PROBATE CODE §2-102 (amended 2008) (awarding the entire estate to the surviving spouse when all of the surviving descendants of the intestate are also the only descendants of the surviving spouse).

⁴¹ See Fellows, *supra* note 39, at 466–67 (arguing that changes in the UPC indicate a desire to effectuate donative intent in light of the contemporary family); see also Spitko, *supra* note 24, at 1074 (noting that the 1990 version of Article II of the UPC had a goal to promote donative intent).

⁴² See Fellows, *supra* note 39, at 466–67 (indicating that the average decedent's desire is to leave his estate to those he considers "family"); see also Emily Rebecca Spann, ed., *Survey of 1995 Alabama Legislation*, 47 ALA. L. REV. 645, 690 (1996) (noting that the definition of "family or household members" has expanded to include those related within the sixth degree of consanguinity, those related by common-law marriage, present and former household members, and a person having a child in common with the plaintiff).

⁴³ See UNIF. PROBATE CODE art. II, pt. 2 gen. cmt. (amended 2008) (noting that there are "few instances in American law where the decedent's testamentary freedom with respect to his or her title-based ownership interests must be curtailed"); see also The Committees on Lesbians and Gay Men in the Profession, Civil Rights, and Sex and Law, with an Addendum by the Committee on Matrimonial Law, *Same-Sex Marriage in New York*, 52 THE RECORD 343, 364 (Apr. 1997) (commenting on the lack of techniques available for the equitable distribution of assets for couples that are not legally married).

regard to protecting expressions of desire and anticipating situations where those expressions are inadequately presented.”⁴⁴ Therefore, the 1990 revision of the UPC sought to reform the intestacy statutes to more accurately reflect contemporary donative intent.⁴⁵

Intestacy laws attempt to effectively honor donative intent by approximating the distribution the decedent would have intended had he or she provided for the distribution of his or her estate.⁴⁶ These approximations are generally centered around the marital relationship.⁴⁷ In the 1990 revision, the drafters of the UPC sought to refine the previous intestacy provisions to reflect modern families.⁴⁸ Among the revisions were provisions for a “multiple-marriage society”⁴⁹ and provisions that provided for children not of direct blood relation.⁵⁰ Because of these revisions, the current intestacy policy is theoretically more suited to effectuate the donative intent of the modern family.

b. The Secondary Purposes of Intestacy Laws

In addition to the primary purpose of effectuating donative intent, the intestacy laws have several implicit secondary purposes.⁵¹ These secondary

⁴⁴ Lawrence H. Averill, Jr., *An Eclectic History and Analysis of the 1990 Uniform Probate Code*, 55 ALB. L. REV. 891, 912 (1992) (discussing generally accepted policies espoused by the 1990 UPC).

⁴⁵ See Spitko, *supra* note 24, at 1068 (stating that the former code provisions were, more often than not, defeating donative intent); see also John H. Langbein & Lawrence W. Waggoner, *Reforming the Law of Gratuitous Transfers: The New Uniform Probate Code*, 55 ALB. L. REV. 871, 874 (1992) (discussing the fact that “[t]he 1990 UPC strives in a variety of places to vindicate transferor’s intent in circumstances in which the former law might have defeated it.”).

⁴⁶ See Spitko, *supra* note 24, at 1070 (detailing that the main purpose of intestacy law is to approximate donative intent); see also Averill, *supra* note 44, at 913 (stating that this approximation scheme “fills in where the decedent has failed to adequately provide for the transfer of assets upon death”).

⁴⁷ See Lawrence W. Waggoner, *Marital Property Rights in Transition*, 59 MO. L. REV. 21, 36–37 (1994) (describing a survey that indicated a preference for giving the majority of the estate to the surviving spouse); see also Olin L. Browder, Jr., *Recent Patterns of Testate Succession in the United States and England*, 67 MICH. L. REV. 1303, 1308 (1969) (noting that “the place of a surviving spouse in family property succession looms larger . . . when no issue survive”).

⁴⁸ See UNIF. PROBATE CODE § 2-101 (amended 2008) (permitting a decedent to expressly exclude or limit the right of an individual or class by will to succeed to property of the decedent passing by intestate succession); see also Spitko, *supra* note 24, at 1070 (detailing that “[i]n creating the 1990 Code, the drafters expressly relied upon empirical studies concerning the distributive preferences of married couples to support the decision to increase the share of the intestate estate that is distributed to a surviving spouse.”).

⁴⁹ Lawrence W. Waggoner, *Spousal Rights in Our Multiple-Marriage Society: The Revised Uniform Probate Code*, 26 REAL PROP. PROB. & TR. J. 683, 688 (1992) (stating that the Uniform Probate Code was developed prior to the multiple-marriage society).

⁵⁰ See UNIF. PROBATE CODE §§ 2-116-118 (amended 2008) (mapping out rules that bring non-marital and adopted children into the intestacy scheme); see also Fellows, *supra* note 39, at 466 (discussing the inclusion of non-marital and adopted children in the revised intestacy scheme).

⁵¹ See Spitko, *supra* note 24, at 1066 (listing seven values that are “central” to the UPC intestacy provisions); see also Lomenzo, *supra* note 36, at 947 (describing the ways in which intestacy

purpose are generally economic, social, or administrative in nature.⁵² Intestacy law implies these secondary purposes in order to further substantiate the rationale for the statutory distribution scheme.⁵³

The distribution scheme is justified first through economic protection of the modern family by supporting the “accumulation of property.”⁵⁴ This economic purpose stems from the idea that the individuals the decedent has been economically tied to in life are also the individuals he would likely want to provide for after death. It is also supported through social protections like “protecting the financially dependent family.”⁵⁵ Through this broad social aim, the UPC illustrates that emphasizing partnerships is a favorable basis for the distribution scheme because it promotes the type of economic and social dependence that is favorable to society.⁵⁶

The final secondary goal of intestacy law is to have a distribution system that is clear, fair, and simple.⁵⁷ Creating a test that hinges on marriage is probably the clearest way to distribute because it establishes a bright line that includes or excludes an individual from the intestate estate. However, the marriage test, which the UPC bases the intestate distribution scheme on, may not be the most simplistic or the fairest.⁵⁸

c. An Evaluation of the Purposes of Intestacy As Applied to Unmarried and Same-Sex Partners.

In light of the emergence of contemporary relationships, maintaining the marital restriction will no longer effectuate donative intent, defeating the

distribution serves society’s interests).

⁵² Seidman, *supra* note 8, at 221 (listing the secondary purposes of intestacy laws); *see generally* Fellows et. al., *supra* note 5, at 12–13 (describing fairness and the promotion of the nuclear family as secondary objectives of intestacy laws).

⁵³ *See* Seidman, *supra* note 8, at 221 (noting the secondary aims offer social, economic, and administrative justifications for intestacy laws); *see generally* Spitko, *supra* note 24, at 1100–01 (discussing how intestacy law not only reflects society’s familial norms but also helps to shape and maintain them).

⁵⁴ Lomenzo, *supra* note 36, at 947 (listing “encourag[ing] the accumulation of property” as a interest created by the intestate distribution system).

⁵⁵ *Id.* (“Serving society’s interests involves creating a pattern of distribution that is designed: ‘(1) to protect the financially dependent family’”).

⁵⁶ *See* UNIF. PROBATE CODE Art. II, prefatory note (amended 2008) (stating that developments in society, including a decline in formalism and the acceptance of a partnership or marital-sharing theory of marriage, led to UPC revisions).

⁵⁷ *See* Lomenzo, *supra* note 36, at 947 (describing the desirable administrative functions of the intestate scheme); *see also* Russell Niles, *Probate Reform in California*, 31 HASTINGS L. J. 185, 200 (1980) (suggesting intestate succession law provides for a distribution that the average decedent probably would have wanted if an intention had been expressed by will).

⁵⁸ *See* UNIF. PROBATE CODE § 2-102 (amended 2008) (favoring the surviving spouse over all others); *see also* Spitko, *supra* note 24, at 1064–65 (stating “[t]he drafters of intestacy statutes justify favoring the surviving spouse by reference to the decedent’s imputed donative intent”).

primary purpose of intestacy law. By continuing to place marital status at the base of the intestate distribution scheme, the UPC assumes that committed partners in marriage-type relationships do not intend to provide for their surviving partner at death.⁵⁹ However, a survey of the donative intent of unmarried partners disproves this assumption.⁶⁰ This survey revealed that a majority of unmarried partners would desire to provide for their surviving partner should they die intestate.⁶¹ Since the current intestacy scheme does not include provisions for unmarried partners, the preferred donative intention of a growing segment of American households is going unfulfilled.

The exclusionary marital restriction similarly frustrates intestacy law's secondary social and economic goals. The UPC encourages these goals through the partnership theory of marriage.⁶² Under the partnership theory of marriage, intestacy law is able to protect the emotional commitment and financial interdependence of devoted couples.⁶³ This argument suggests that it is not the marital status itself, but rather the indicia of the marital relationship that best serve the goals of intestacy law.⁶⁴ It further suggests that while financial interdependence and emotional commitment are generally characteristics of a marital relationship, they are not exclusive to the marital relationship.⁶⁵

Establishing an inheritance preference for the spouse and descendants additionally accomplishes the traditional intestacy goal of protecting the nuclear family.⁶⁶ It also indicates that the average decedent would prefer to

⁵⁹ See Waggoner, *supra* note 47, at 63 (explaining that a "surviving partner [is treated] as no more a natural object of the decedent's bounty than a complete stranger"); see generally Spitko, *supra* note 24, at 1065 (explaining that "intestacy law generally does not favor a decedent's surviving non-marital partner, whether that partner is of the same sex as the decedent or not.").

⁶⁰ See Fellows et al., *supra* note 5, at 36–52 (chronicling the findings of the study regarding distributive preferences).

⁶¹ See *id.* (stating the general donative intentions of unmarried partners).

⁶² See Seidman, *supra* note 8, at 225 (describing the partnership theory of marriage as "two persons contributing equally to the maintenance of a lifelong relationship"); see also Raymond C. O'Brien, *Integrating Marital Property Into a Spouse's Elective Share*, 59 CATH. U. L. REV. 617, 618 (2010) (noting 2008 revisions to the UPC to better implement the economic-partnership theory of marriage).

⁶³ See Waggoner, *supra* note 49, at 717–18 (defending the marital presumption as a means for accomplishing the goals of intestacy law); see also O'Brien, *supra* note 62, at 625 (noting steps recently taken to apply economic partnership theory principles to intestacy in the way such principles had already been applied to divorce).

⁶⁴ See Seidman, *supra* note 8, at 225 (arguing that the legal status of a relationship is not as important as the character of that relationship when determining donative intent); see also Waggoner, *supra* note 49, at 717 (explaining that the law of wills is sometimes visualized as a return of contribution concept).

⁶⁵ See Seidman, *supra* note 8, at 225 (stating that some of the lifestyle characteristics of marriage are not exclusively the result of becoming or being married); see also Waggoner *supra* note 49, at 717–18 (discussing how many marriages are based on partnership and teamwork).

⁶⁶ See Seidman, *supra* note 8, at 225 (noting that a secondary goal of intestacy law is the protection

first provide for his immediate family.⁶⁷ However, the UPC has deviated from these traditional views by accounting for second marriages and non-marital children.⁶⁸ The inclusion of these traditionally disqualified family groups in the revised intestate succession scheme suggests that the definition of the nuclear family is flexible. The deliberate modifications to the scheme designed to meet the needs of the contemporary families provides further indication that intestacy was not created to protect a static class of individuals, but rather the family unit.

The New York Court of Appeals and the Appellate Division, in parallel decisions, have signified that the concepts of the marital relationship and being considered a family are mutually exclusive when applied to same-sex couples.⁶⁹ Under New York rent control statutes eviction protection is only provided to family members in “legally recognized family relationships.”⁷⁰ When *Braschi v. Stahl Associates* came before the New York Court of Appeals, same sex relationships were not legally recognizable. However, the Court of Appeals emphasized the rent control statute’s intention instead of the plain meaning of the language.⁷¹ This led the court to hold that the term family should not be restricted to those that have formalized their relationships.⁷² Conversely, in *Estate of Cooper* the New York Appellate Division held that a same-sex partner could not be considered a “surviving spouse” within the meaning of the statute.⁷³ The court chose to focus on the plain language of the surviving spouse provision rather than consider the

of the nuclear family); see also Lomenzo, *supra* note 36, at 947 (stating that one of the goals of intestacy law is to protect the expectations of the direct biological descendants).

⁶⁷ See Seidman, *supra* note 8, at 225–26 (discussing presumptive donative intent within the nuclear family); see also Carolyn R. Glick, *The Spousal Share in Intestate Succession: Stepparents are Getting Shortchanged*, 74 MINN. L. REV. 631, 646 (1990) (explaining that laws that provide for inheritance for biological family members typically are not extended outside of those immediate family members, and do not include individuals such as stepparents).

⁶⁸ See UNIF. PROBATE CODE § 2-117 (amended 2008) (noting that a parent-child relationship exists for the purposes of intestacy regardless of the parents’ marital status).

⁶⁹ See *Braschi v. Stahl Assocs. Co.*, 543 N.E.2d 49, 55 (N.Y. 1989) (holding that a homosexual man’s longtime partner could be considered “family” within the meaning of the statute and could, on remand, be found able to inherit the rent-controlled apartment); see also *In re Estate of Cooper* 592 N.Y.S.2d 797, 799 (App. Div. 1993) (holding that when a person died intestate, the decedent’s homosexual partner could not succeed the decedent’s estate, because the homosexual partner could not be considered a “surviving spouse” under the statute).

⁷⁰ *Braschi*, 543 N.E.2d at 51; see generally, 9 NYCRR 2204.6(d) (2009) (describing New York rent-control eviction procedures that specifically preclude eviction when co-tenant “family” meet enumerated requirements).

⁷¹ *Braschi*, 543 N.E.2d at 52 (stating that statutes are interpreted to “avoid objectionable consequences and to prevent hardship or injustice”).

⁷² *Id.* at 53.

⁷³ *Estate of Cooper*, 592 N.Y.S.2d at 798–99 (stating that for the purposes of intestacy a surviving spouse is a husband or a wife).

nature of the petitioner's relationship with the decedent.⁷⁴ From these two contrasting decisions, the New York courts have argued that while same-sex couples cannot formally marry, the nature of a same-sex relationship may entitle committed partners to be legally considered a family.

This evolution of the term "family" indicates that the secondary goal of intestacy may not be the protection of the nuclear family structure, but the values commonly found in the nuclear family at the time the statute was created.⁷⁵ The *Braschi* court concluded that a family unit "connotes an arrangement, whatever its duration, bearing some indicia of prominence or continuity," specifically highlighting emotional commitment and financial interdependence as defining characteristics.⁷⁶ Consequently, these are the same characteristics of the partnership theory of marriage attributed to devoted couples protected by intestacy law.⁷⁷ While married couples tend to exhibit the characteristics traditionally prized by the intestacy statutes, these characteristics are not exclusive to the marital relationship. Given the UPC's propensity to adapt to changes to the family ideology, it would be logical to suggest that to accomplish its purpose of protecting the family unit the intestacy laws should consider the level of commitment of all relationships, including unmarried and same-sex couples, when deciding who should receive a dominant share of a decedent's estate.

II. RECOGNITION OF NONTRADITIONAL PARTNERS UNDER CURRENT INTESTACY LAW

In 1996 Congress passed the Defense of Marriage Act (DOMA) in response to Hawaii's amendment of its state constitution to include "reciprocal beneficiaries," which made it the first state to extend marriage benefits to same-sex couples.⁷⁸ The Defense of Marriage Act created a federal definition of marriage and allowed states to disregard full-faith and

⁷⁴ *Id.* at 799 (arguing that in the common usage of the term, marriage means the union between persons of the opposite sex).

⁷⁵ Waggoner, *supra* note 49, at 717–18 (stating that emotional commitment and financial interdependence are key characteristics of devoted partners).

⁷⁶ See *Braschi*, 543 N.E.2d at 54 (citing 829 Seventh Ave. Co. v. Reider, 493 N.E.2d 939, 941 (N.Y. 1986), *superseded by statute*, 9 NYCRR 2204.6 (d), *as recognized in* 911 Alwyn Owners Corp. v. Estates of Rosenthal, 157 Misc. 2d 828, 830 (N.Y. Sup. Ct. 1992) (analyzing the term "family unit" under rent-control eviction laws in the context of a grandmother-granddaughter household)).

⁷⁷ See Seidman, *supra* note 8, at 225 (noting that emotional commitment and financial interdependence are values intestacy law seeks to protect and reward); see also Waggoner, *supra* note 49, at 717 (asserting that there is an unspoken marital agreement between partners which results in financial interdependence between spouses).

⁷⁸ HAW. REV. STAT. § 572C-1 (Supp. 2001) (extending certain rights and benefits previously available only to married couples to couples composed of two individuals who are legally prohibited from marrying under Hawaii law).

credit with regard to the recognition of same-sex marriage by another state.⁷⁹ As a result, if a same-sex couple was married in Connecticut, or Massachusetts, where it is legal, the couple cannot expect their marriage to be recognized by the majority of the country if they decide to move to another state.⁸⁰ Additionally, a legally married same-sex couple will not be eligible for over one thousand federal statutory provisions under “which marital status is a factor in determining or receiving benefits, rights, and privileges.”⁸¹ These couples cannot take advantage of these benefits because, despite their relationships exhibiting marriage-like characteristics, they do not fit into the federal definition of marriage.⁸²

The federal definition advances a policy that assumes that the nuclear family is still the prevailing family structure in the United States. By making this assumption the interests of the growing number of nontraditional families has effectively been devalued.⁸³ However, there is growing public support for the reformation of intestacy law due to the ability to sever the link between marriage and intestate succession.⁸⁴ Part A will examine recent attempts by judges and legislatures to extend intestacy rights to same-sex couples. Part B will consider how states have extended succession rights to unmarried opposite-sex couples.

⁷⁹ See 28 U.S.C. § 1738(c) (2006) (granting states the authority not to recognize same-sex marriages performed in states that allow it); see also Larry Kramer, *Same-Sex Marriage, Conflict of Laws, and the Unconstitutional Public Policy Exception*, 106 YALE L.J. 1965 (1997) (stating the Full Faith and Credit concerns raised by DOMA).

⁸⁰ See Knauer, *supra* note 28, at 424 (discussing state regulation of same-sex relationships); see also Kavan Peterson, *50-State Rundown on Gay Marriage Laws*, STATELINE.ORG, Nov. 3, 2004, <http://www.stateline.org/live/ViewPage.action?siteNodeId=136&languageId=1&contentId=15576> (listing the legal status of gay marriage in each of the fifty states).

⁸¹ Letter from Dayna K. Shah, Assoc. Gen. Counsel, U.S. Gen. Accounting Office, to The Honorable Bill Frist, Majority Leader, U.S. Senate (Jan. 23, 2004) (on file with author) (discussing the numerous federal benefits available only to couples in recognized relationships).

⁸² See 1 U.S.C. § 7 (2006) (asserting that “the word ‘marriage’ means only a legal union between one man and one woman as husband and wife, and the word ‘spouse’ refers only to a person of the opposite sex who is a husband or a wife”).

⁸³ See Seidman, *supra* note 8, at 229 (arguing that assuming a prevalence of traditional families exists in the United States leads to the unequal treatment of nontraditional families); see also Cindy Tobisman, *Marriage vs. Domestic Partnership: Will We Ever Protect Lesbians’ Families?*, 12 BERKELEY WOMEN’S L.J. 112, 113 (1997) (discussing the inequities resulting from the law’s tendency to protect families headed by married people).

⁸⁴ See Tobisman, *supra* note 83, at 118 (referencing a 1996 exit poll that showed over half of Americans believed gay and lesbian families should have legal protection and inheritance rights, even though over half also supported the Defense Of Marriage Act); see also Arian Campo-Flores, *A Gay Marriage Surge*, NEWSWEEK, Dec. 5, 2008, <http://www.newsweek.com/id/172399> (article available online only) (discussing a 2008 poll showing that seventy four percent of Americans support inheritance rights for gay domestic partners).

A. Recent Developments Extending Intestacy Laws to Nontraditional Family Groups

Since the passage of the Defense of Marriage Act, several states have taken steps to extend additional rights, including intestacy rights, to non-traditional couples.⁸⁵ The extension of rights for same-sex couples has occurred on a broad scale. There are currently ten states: California, Connecticut, Hawaii, Maine, Massachusetts, New Hampshire, New Jersey, Oregon, Vermont, and Washington, along with the District of Columbia that recognize same-sex couples to some extent.⁸⁶ Three other states, New Mexico, New York, and Rhode Island, give full-faith and credit to statutorily established same-sex relationships from states that allow it.⁸⁷ However, the majority of states do not have same-sex marriage or a marriage equivalent.⁸⁸ As a result, states passed statutes or state constitutional amendments that specifically forbid recognizing such actions. Therefore, in order to maintain any level of marital benefits, including intestacy benefits, same-sex couples must remain in a state where their relationship is legally recognized.⁸⁹

In 1999, Vermont became the first state since Hawaii to amend its constitution to extend marital rights to same-sex couples.⁹⁰ The Vermont Supreme Court held that the benefits given to traditionally married couples must also extend to same-sex couples.⁹¹ The state legislature responded to the decision in *Baker v. State* by creating civil unions, which grant same-sex couples parallel status to married couples.⁹² The legislation also states

⁸⁵ See, e.g., *Baker v. State*, 744 A.2d 864, 887 (Vt. 1999) (holding the exclusion of same-sex couples from the benefits and protections incident to marriage under state law violated the common benefits clause of the Vermont State Constitution); Christine Vestal, *Calif. Gay Marriage Ruling Sparks New Debate*, STATELINE.ORG, June 12, 2008, <http://www.stateline.org/live/details/story?contentId=310206> (noting advances in gay rights legislation that occurred in many states).

⁸⁶ See Knauer, *supra* note 28, at 425–26 (listing the states that recognize same-sex couples to a certain extent); see also Human Rights Campaign, *Marriage Equality and Other Relationship Recognition Laws*, (Nov. 6, 2009), http://www.hrc.org/documents/Relationship_Recognition_Laws_Map.pdf (providing a color coded map indicating each state's attitude to same sex unions).

⁸⁷ See Knauer, *supra* note 28, at 427–28 (noting states that give full-faith and credit to recognized relationships from other states); see also Human Rights Campaign, *supra* note 86 (detailing the marital rights granted to same sex couples in each state).

⁸⁸ See Knauer, *supra* note 28, at 424 (stating that forty-four states specifically forbid same sex marriage by statute or constitutional provision).

⁸⁹ See *id.* (noting that a same-sex couple married in California or Massachusetts cannot be assured that their marriage will be respected once they move to another state); see also Human Rights Campaign, *supra* note 86 (detailing the marital rights granted to same sex couples in each state).

⁹⁰ *Baker*, 744 A.2d at 887 (holding that Vermont's constitution required Vermont to provide marital benefits to same-sex couples).

⁹¹ *Id.* at 867 (finding the right of same-sex couples to marital benefits in the Common Benefits Clause of the Vermont constitution).

⁹² VT. STAT. ANN. tit. 15, § 1204(a) (2009) (defining civil unions under Vermont state law).

that members of a civil union “shall be included in any definition or use of the terms ‘spouse,’ ‘family,’ ‘immediate family,’ ‘dependent,’ ‘next of kin,’ and other terms that denote the spousal relationship, as those terms are used throughout the law.”⁹³ As a result, same-sex partners are now included in the intestacy provisions in Vermont because they would be considered a “surviving spouse” under this second legislative provision.

Since the decision in *Baker*, other states’ highest courts have similarly held that failing to grant marital benefits to same-sex couples violated the state constitution.⁹⁴ Despite these rulings, the degree of recognition for same-sex couples has varied between states. California legislation recognizing domestic partnerships became effective in 2000.⁹⁵ The statute defines domestic partners as “two adults who have chosen to share one another’s lives in an intimate and committed relationship of mutual caring.”⁹⁶ This law gave same-sex partners extensive marital rights, including the right to a surviving spouse’s intestate share with respect to the decedent’s separate property.⁹⁷ In 2008, the Supreme Court of California extended the status of same-sex couples further by granting them the right to get married.⁹⁸ However, in the 2008 election the voters of California eliminated the right of same-sex couples to marry by passing Proposition 8.⁹⁹ Even though the right to marry was eliminated, the domestic partner statutes remain intact, protecting many rights including the right to a surviving spouse’s intestate share.¹⁰⁰

⁹³ *Id.* § 1204(b).

⁹⁴ See e.g., Knauer, *supra* note 28, at 437–38 (noting that Massachusetts, New Jersey, and California supreme courts have held that each respective state constitution requires that same-sex couples are afforded the same rights and privileges as married couples); see also Goodridge v. Dep’t of Pub. Health, 798 N.E.2d 941, 948–49 (Mass. 2003) (holding that providing the protections and benefits of civil marriage only to heterosexual couples violated the Massachusetts constitution).

⁹⁵ E.g., Gallanis, *supra* note 7, at 67 (discussing California’s state inheritance laws as they apply to domestic partnerships).

⁹⁶ CAL. FAM. CODE § 297(a) (Deering 2009).

⁹⁷ E.g., CAL. PROB. CODE § 6401(c) (Deering 2009) (defining a domestic partner’s right to a surviving spouse’s intestate share); see also Gallanis, *supra* note 7, at 68 (noting that in California a surviving domestic partner does not have a right to community property held by the decedent).

⁹⁸ E.g., *In re Marriage Cases*, 183 P.3d 384, 453 (Cal. 2008) (holding that restricting marriage to a union between a man and a woman is unconstitutional and that marriage must be made available to both opposite-sex and same-sex couples).

⁹⁹ See Cal. Gen. Election 2008 Official Voter Info. Guide, Prop 8: Eliminates Right of Same-Sex Couples to Marry, <http://voterguide.sos.ca.gov/past/2008/title-sum/prop8-title-sum.htm> (last visited Nov. 22, 2009) (proposing that California recognize marriage as between a man and a woman only); Official Declaration of the Vote Results on November 4, 2008, State Ballot Measures, http://www.sos.ca.gov/elections/sov/2008_general/6_official_results_on_statewide%20ballot_measures.pdf (last visited Nov. 22, 2009) (noting the passage of Proposition 8 eliminating the right of same-sex couples to marry).

¹⁰⁰ CAL. FAM. CODE § 297(a) (Deering 2009) (illustrating that the domestic partnership statutes remain intact in California).

Massachusetts went further than any other states had previously gone by becoming the first state to allow same-sex marriage.¹⁰¹ In 2003, the Massachusetts Supreme Judicial Court held that “[l]imiting the protections, benefits, and obligations of civil marriage to opposite-sex couples violates the basic premises of individual liberty and equality under law protected by the Massachusetts Constitution.”¹⁰² The legislature responded to the decision by evaluating whether civil unions, with marital benefits but without the marital label, were a sufficient protection for same-sex couples.¹⁰³ The legislature ultimately concluded that anything short of actual marriage would violate the state constitution.¹⁰⁴ In 2008, Connecticut became the most recent state to allow same-sex marriage, following a similar formula to Massachusetts.¹⁰⁵

B. The Limited Extension of the Benefits to Unmarried Opposite-Sex Couples

The marital right to a spouse’s intestate share has been extended on a much greater scale to same-sex couples than to unmarried opposite-sex couples. Thus far only four states have provided intestacy rights to a surviving partner.¹⁰⁶ The likely rationale behind the extension of benefits to unmarried opposite-sex couples being limited to these four states can be attributed to an opposite sex couple’s choice not to take advantage of an existing right to marry, a right that most same-sex couples do not have.

Vermont allows opposite-sex couples to enter into civil unions, entitling them to almost identical rights as married individuals.¹⁰⁷ The right to inherit from a decedent partner’s intestate estate is among the rights gained

¹⁰¹ See Opinions of the Justices to the Senate, 802 N.E.2d 565, 572 (Mass. 2004) (reviewing Massachusetts’s proposed legislation banning same-sex marriage and concluding that it violated the equal protection and due process requirements of the state’s constitution).

¹⁰² *Goodridge v. Dep’t of Pub. Health*, 798 N.E.2d 941, 968 (Mass. 2003).

¹⁰³ See Gallanis, *supra* note 7, at 72 (stating that “[t]he legislature’s response was to seek an advisory opinion from the court on the question whether civil unions, providing the benefits of marriage without the label, would be sufficient”); Opinion of the Justices to the Senate, 802 N.E.2d at 566 (asking whether “Senate, No. 2175, which prohibits same-sex couples from entering into marriage but allows them to form civil unions with all ‘benefits, protections, rights and responsibilities’ of marriage, compl[ies] with the equal protection and due process requirements of the [state] [c]onstitution”).

¹⁰⁴ Opinion of the Justices to the Senate, 802 N.E.2d at 570 (concluding that allowing civil unions without allowing gay marriage would “maintain[] and foster[] a stigma of exclusion” prohibited by the Massachusetts Constitution).

¹⁰⁵ See *Kerrigan v. Comm’n of Pub. Health*, 957 A.2d 407, 482 (2006) (holding that denying same-sex couples the right to marry would violate the state constitution).

¹⁰⁶ Seidman, *supra* note 8, at 231 (listing Vermont, Hawaii, California, and New Hampshire as the four states that have extended intestate succession benefits to unmarried opposite-sex couples).

¹⁰⁷ VT. STAT. ANN. tit. 15, § 1204 (2009) (outlining the rights given to partners that enter into a civil union).

in a civil union.¹⁰⁸ Hawaii allows opposite-sex couples to qualify as reciprocal beneficiaries, who are treated as spouses for the purposes of intestate succession.¹⁰⁹ Similarly, domestic partnership law in California allows registered partners to qualify for the surviving spouse's intestate share.¹¹⁰ Lastly, New Hampshire grants a surviving spouse's intestate share to a "surviving partner who cohabitated with an intestate decedent of the opposite sex for a minimum of three years."¹¹¹

III. OPPONENTS' ARGUMENTS AGAINST EXTENDING INTESTACY BENEFITS

Most of the arguments against extending intestacy benefits fit into one of two major categories. The first category is the moral arguments, which include a desire to preserve traditional values, religious arguments in fear of the destruction of democracy, and the protection of a cohesive family unit.¹¹² These concerns can primarily be traced back to the influence that the traditional common law marriage has had on the development of the intestacy statutes.¹¹³ The second category of arguments is focused on the difficulty in defining who qualifies as committed partners, which leads to concerns about fraud.¹¹⁴ While over-inclusion is a concern when discussing the expansion of rights to any particular group, criteria could be implemented in order to distinguish roommates, for example, and committed partners. Part A of this section will first discuss the moral arguments and highlight their ties to the concept of the traditional marriage. Part A will then show how intestacy benefits can be removed from the

¹⁰⁸ *Id.* (noting that probate law and procedure, including rules regarding nonprobate transfers, shall apply to those in civil unions as it would to spouses).

¹⁰⁹ See Seidman, *supra* note 8, at 231 (noting that the reciprocal beneficiary scheme provides benefits to persons that are prevented from marrying); HAW. REV. STAT. § 572C-2 (2009) (stating that certain rights and benefits presently available only to married couples should be made available to couples comprised of two individuals who are legally prohibited from marrying one another).

¹¹⁰ CAL. PROB. CODE § 6401 (West Supp. 2003) (describing California's domestic partnership registration system).

¹¹¹ Seidman, *supra* note 8, at 231.

¹¹² See Holob, *supra* note 36 at 1509 (listing some of the arguments that opponents to intestacy rights for unmarried couples make); see also Jamie M. Gher, *Polygamy and Same-Sex Marriage – Allies or Adversaries Within the Same-Sex Marriage Movement*, 14 WM. & MARY J. WOMEN & L. 559, 566 (2008) (noting fear of destruction of democracy as reasons for not extending marital benefits to same-sex couples).

¹¹³ See Seidman, *supra* note 8, at 234 (illustrating the decreasing influence of the common law marriage); see also Lynn D. Wardle, *Deconstructing Family: A Critique of the American Law Institute's "Domestic Partners" Proposal*, 2001 BYU L. REV. 1189, 1221 (2001) (stating that the majority of states have abolished common law marriage).

¹¹⁴ See Holob, *supra* note 36, at 1515 (addressing the concern about defining who qualifies as a committed partner); Rebecca L. Melton, *Legal Rights of Unmarried Heterosexual and Homosexual Couples and Evolving Definitions of "Family,"* 29 J. FAM. L. 497, 516–17 (1991) (noting that the new definition of family may lead to abuse).

concept of marriage, making these arguments irrelevant. Part B will then discuss the concerns over clearly defining who qualifies as a committed partner. This section will then argue there are a number of measures that could be implemented in order to ensure that intestacy benefits are only extended to those that were in legitimate relationships.

A. Moral Arguments Against the Extension of Intestacy Benefits

The opponents of gay marriage shamelessly proclaim, “marriage is between a man and a woman, as God and nature intended.”¹¹⁵ These individuals oppose extending marital benefits to same-sex couples based on their religious beliefs and moral convictions.¹¹⁶ In advancing this belief opponents are seeking to protect “traditional values” and often argue that a homosexual lifestyle is unhealthy and immoral.¹¹⁷ In order to safeguard against the supposed degradation of society, states have included language indicating moral opposition to same-sex marriage in their statutes forbidding the institution.¹¹⁸ Tennessee, for example, focuses its argument on the necessity for strict maintenance of the traditional institution of marriage, while Michigan argues that marital benefits need to be protected for future generations, implicitly suggesting that the extension of marriage to same-sex couples would eventually erode the institution entirely.¹¹⁹ While states may go about shaping their arguments in significantly different manners, at the root of them all is a moral opposition to recognizing couples outside of the traditional definition of marriage.

¹¹⁵ S.J. Barrett, Note, *For the Sake of the Children: A New Approach to Securing Same-Sex Marriage Rights?*, 73 BROOK. L. REV. 695, 721 (2008).

¹¹⁶ See *id.* at 721 (discussing the basis for the opponents’ arguments against extending marital benefits to same-sex couples); see also Eugene Volokh, *Same-Sex Marriage and Slippery Slopes*, 5 DUKEMINIER AWARDS 1, 2 (2006) (showing that rules of employment and landlord-tenant law could change because of the recognition of gay marriage.).

¹¹⁷ See Knauer, *supra* note 28, at 58 (stating that opponents of same-sex marriage believe that any recognition of same-sex relationships encourages homosexuality and abandons individuals who are trapped in the unhealthy and immoral lifestyle).

¹¹⁸ See e.g., Jeffery A. Redding, *Slicing the American Pie: Federalism and Personal Law*, 40 N.Y.U. J. INT’L L. & POL. 941, 980 (2008) (comparing states’ different approaches and motives to statutory banning of same-sex marriage); James W. Paulsen, *The Significance of Lawrence v. Texas*, 41 HOUSTON LAW. 32, 37 n.59 (2004) (stating that the majority in *Lawrence* noted that Texas attempted to pass rational basis review by asserting a legitimate state interest in the promotion of morality).

¹¹⁹ See TENN. CONST. art. XI, § 18 (discussing how “[t]he historical institution and legal contract solemnizing the relationship of one (1) man and one (1) woman shall be the only legally recognized marital contract in this state. Any policy or law or judicial interpretation, purporting to define marriage as anything other than the historical institution and legal contract between one (1) man and one (1) woman, is contrary to the public policy of this state and shall be void and unenforceable in Tennessee.”); MICH. CONST. art. I, § 25 (detailing that “[t]o secure and preserve the benefits of marriage for our society and for future generations of children, the union of one man and one woman in marriage shall be the only agreement recognized as a marriage or similar union for any purpose.”).

Some opponents put a similar argument forth that recognizing same-sex couples with equal status to married couples, and extending them marital benefits, will cause a “slippery slope” that will result in the forced recognition of other morally undesirable institutions.¹²⁰ Opponents argue that recognition of same-sex marriage will invariably lead to the legalization of bigamy, “adult incest, prostitution, masturbation, adultery, fornication, bestiality, and obscenity.”¹²¹ The flaw in this argument is that there are no significant similarities between a same-sex couple and a polygamist couple, other than the fact that both are non-traditional family settings. Polygamy is a patriarchal and fundamentalist Christian institution, while same-sex couples are generally two consensual adults in a monogamous relationship, much like a traditional heterosexual couple.¹²²

Opponents further argue that legitimizing same-sex marriage by extending marital benefits to same sex couples would be a waste of judicial economy and destroy democracy.¹²³ They argue that the amount of resources, judicial or otherwise, that same-sex marriage advocates have used is a waste because the changes that they seek only benefit a limited segment of the community.¹²⁴ This argument has little merit given the increase in the number of non-traditional families in the last decade.¹²⁵ At one time the homosexual population of this country may have been insignificant enough to ignore, but it is not a disappearing trend, so it seems foolish to argue that it is a waste of resources to advance the interests of a steadily increasing segment of the population. Additionally, opponents argue that gay rights advocates are destroying democracy by promoting

¹²⁰ See Gher, *supra* note 112, at 562 (noting that opponents of civil marriage for homosexuals often invoke the “slippery slope” argument).

¹²¹ *Lawrence v. Texas*, 539 U.S. 558, 590 (2003) (Scalia, J., dissenting).

¹²² See e.g., Gher, *supra* note 112, at 562 (contrasting the differences between same-sex couples and other relationships condemned by opponents under the “slippery slope” argument); Volokh, *supra* note 116, at 2 (providing an example of how allowing gay marriage could lead down a slippery slope which would lead to recognition of polygamy).

¹²³ See e.g., Gher, *supra* note 112, at 563 (noting that some argue the same-sex marriage movement is a waste of resources because any gains only help a small segment of the community); Amy L. Brandzel, *Queering Citizenship? Same-Sex Marriage and the State*, 11.2 GLQ: J. LESBIAN & GAY STUD. 171, 188 (2005) (stating “[o]thers have argued that committing . . . a vast array of resources to same-sex marriage is problematic, since only a few stand to benefit from it.”).

¹²⁴ See e.g., Gher, *supra* note 112, at 563 (discussing that “others consider the same-sex marriage movement as assimilationist and a wasteful use of resources for a cause that benefits only a portion of the community”); Brandzel, *supra* note 123, at 188 (detailing that “[i]n effect, advocating for same-sex marriage has distracted the GLBT movement from more important and immediate issues, such as organizing for antidiscrimination laws and economic restructuring.”).

¹²⁵ See Seidman, *supra* note 8, at 215 (noting that the number of non-traditional families has increased seventy-two percent in the last decade); see also Alternatives to Marriage Project, <http://www.unmarried.org/statistics.html> (last visited Jan. 5, 2010) (providing graphical data indicating the percentage of unmarried Americans).

ideals contrary to the federal definition of marriage and states' individual rights to further define marriage.¹²⁶ While state legislators may appear to be defending democracy when they strike down same-sex marriage amendments, in reality their opposition is likely not due to the desire to protect the power reserved to the state to define marriage, but rather it is a moral opposition with no rational basis.

The last moral argument offered by opponents is that it is in a child's best interest to be raised in a home with traditional parents.¹²⁷ They argue that "dual gender parents provide the ideal family structure for children because mothers and fathers bring unique, complementary skills to childrearing."¹²⁸ Mothers and fathers interact with children differently and opponents argue that only having parents of one sex would be harmful to the child's overall development.¹²⁹ To further advance this argument opponents attempt to make comparisons between same-sex parents and single parents, citing deficiencies of children only exposed to one sex.¹³⁰ These arguments are fundamentally flawed due to the entire nature of the relationship. It would seem that same-sex parents would compare more closely with traditional parents than with a single parent. A child with one parent can experience deficiencies due to economic and time constraints placed on a single parent as opposed to a two-parent household.¹³¹

¹²⁶ See Gher, *supra* note 112, at 565 (describing the steps legislators have taken to prevent recognition of same-sex marriage); see also Barbara J. Cox, *The Lesbian Wife: Same-Sex Marriage as an Expression of Radical and Plural Democracy*, 33 CAL. W. L. REV. 155, 155 (1997) (stating that there is a "barrage of legislative expressions of 'democracy' that would prevent recognition of marriages by same-sex couples").

¹²⁷ See Richard E. Redding, *It's Really About Sex: Same-Sex Marriage, Lesbian Parenting, and the Psychology of Disgust*, 15 DUKE J. GENDER L. & POL'Y 127, 129 (2008) (discussing the argument that the purpose of marriage is childrearing and children are harmed or disadvantaged when raised by homosexual parents); see also *In re J.S. & C.*, 324 A.2d. 90, 97 (N.J. Sup. Ct. Ch. Div. 1974) (holding that a homosexual father's visitation rights should extend only to daytime hours because unrestricted visitation would not be in the best interests of the children).

¹²⁸ Redding, *supra* note 127, at 165–66.

¹²⁹ See *id.* at 166 (arguing that children need opposite-gender parents for gender role development and socialization); see also LifeSiteNews.com, *Same-Sex Parenting is Harmful to Children*, <http://www.lifesitenews.com/ldn/2004/apr/040428c.html> (last visited Nov. 24, 2009) (citing a study that found various reasons why same-sex parenting is detrimental to the well being of children).

¹³⁰ See Redding, *supra* note 127, at 166–167 (stating that "research shows that children do best when raised in two-parent families as opposed to single-parent families."); see also ReligiousTolerance.org, *Same-sex Marriage: How Do Children Fare in Families Led by Same-Sex Parents?*, http://www.religioustolerance.org/hom_mar13.htm (last visited Nov. 24, 2009) (noting that studies of children raised by heterosexual couples were not applicable to same-sex marriage, because those studies "compare families with opposite-sex parents to single-parent families, not with those headed by same-sex parents").

¹³¹ See Redding, *supra* note 127, at 170–71 (discussing that children of single parents are often harmed because of only having one income); ReligiousTolerance.org, *supra* note 130 (stating that "[o]f course, many—perhaps most—children in single-parent families will be disadvantaged because of poverty, and the lack of a second parent to give the children more care and attention than one parent can provide.").

Additionally, it is shown that often in a homosexual relationship both parents will assume the masculine and feminine roles, countering the notion that gender role development will be hindered by same-sex parents.¹³²

The argument that being raised by same-sex couples may benefit children is irrelevant except to say the children will most certainly be harmed if intestacy benefits are not given to their same-sex parents. Following the surviving spouse, the UPC identifies children as the next takers in the intestacy chain.¹³³ Often times in a domestic partnership, like a traditional marriage, one partner is the primary or sole breadwinner, while the other partner and children, if any, rely on this income for support.¹³⁴ If the breadwinning spouse were to die with no legal relationship with either the partner or the child, it would leave both parties without support. Since current intestacy laws do not recognize unmarried relationships, this wealth would be treated separately from the partnership, and the child would be without sufficient financial support.¹³⁵ By denying recognition of the relationship for intestacy purposes, a dependent partner and child are being effectively denied the means to be financially stable following a partner's death. This result seems to run contrary to the intestacy statute's secondary goal of protecting the financially dependent family.¹³⁶

In reality, all of the moral goals for denying the extension of intestacy rights to non-traditional families are all inescapably tied to the preservation of marriage as a primary goal, rather than to effectuating the intentions of

¹³² See Redding, *supra* note 127, at 175 (arguing hindered gender role development occurs because gays and lesbians tend to be more androgynous than heterosexuals); Lawrence A. Kurdek & J. Patrick Schmitt, *Interaction of Sex Role Self-Concept With Relationship Quality and Relationship Beliefs in Married, Heterosexual Cohabiting, Gay, and Lesbian Couples*, 51 J. PERSONALITY & SOC. PSYCHOL. 365, 365 (1986) (reporting results of a study finding that lesbian partners are more masculine than heterosexual female partners).

¹³³ UNIF. PROBATE CODE § 2-103 (amended 2008) (explaining the instate succession hierarchy in the absence of a surviving spouse).

¹³⁴ See Holob, *supra* note 36, at 1511 (discussing the similar marital roles that same-sex and opposite-sex couples have); see also Lisa K. Jepsen & Christopher A. Jepsen, *An Empirical Analysis of Same-sex and Opposite-sex Couples: Do 'Likes' Still Like 'Likes' in the '90s?* NW. U. INST. FOR POL. RES., Working Paper No. 99-5, 14 (1999) (pointing out that "if we believe that the head and partner designations capture some of the gender-role effect discussed for opposite-sex couples, then we might expect the heads of households to be older, have more education, earn more money, and work more hours within the same-sex couples.").

¹³⁵ See Waggoner, *supra* note 47, at 63 (stating that current probate law treats surviving members of unmarried couples "as having contributed nothing to the decedent's wealth"); see also Holob, *supra* note 36, at 1494-95 (recognizing that "domestic partners do not enjoy the same rights as married couples [] in the realm of intestacy laws).

¹³⁶ See Lomenzo, *supra* note 36, at 947 (discussing the secondary goals of the intestacy statutes); Seidman, *supra* note 8, at 221 (listing the social aim of "'protecting the financially dependent family'" as a secondary goal of intestacy policies).

the decedent.¹³⁷ This link is the fundamental flaw of all the opponents who argue a need to protect the values behind the traditional institution of marriage because intestacy rights can be separated from the institution of marriage. The UPC lists the surviving spouse as the primary taker in an intestate estate because the spouse is the person most heterosexuals would first desire to financially support upon death.¹³⁸ However, since under current federal and most state definitions a same-sex couple cannot have a surviving spouse, it would seem likely that their donative interests would be treated differently than heterosexual couples.¹³⁹

The UPC lists the approximation of the decedent's donative intent as its primary purpose.¹⁴⁰ No portion of the intestacy statute ever discusses the "preservation of the traditional marital relationship" as one of its goals.¹⁴¹ A secondary purpose of intestacy is to protect the family unit, which may or may not include a spouse.¹⁴² Even the UPC has indicated through its revisions that "family" is an evolving concept.¹⁴³ There are many configurations of people that do not fall under the traditional definition of a "family," but that share many of the same characteristics. In order to best effectuate the decedent's donative intent, how a family acts should be evaluated rather than who are its members. Arguing that the probate codes should only protect the traditional family protects an antiquated view of family and completely ignores the ever-growing population of non-

¹³⁷ Holob, *supra* note 36, at 1515 (stating that some opponents to extending intestacy rights to domestic partners believe that there is no benefit to the state from a homosexual union and that the state must protect the tradition of marriage between two individuals of the opposite sex); *see also* Seidman, *supra* note 8, at 222 (detailing that "the revised UPC accepts the partnership theory of marriage, which minimizes the symbolic significance of marriage and emphasizes substantive characteristics of emotional and economic partnerships.").

¹³⁸ UNIF. PROBATE CODE § 2-102 (amended 2008) (listing the surviving spouse as the primary taker).

¹³⁹ *See In re Petri*, 4/4/94 N.Y.L.J. 29 (1994) (holding that a same-sex partner was not a "surviving spouse" for intestate succession); *see also* N.Y. EST. POWERS & TR. L. § 5-1.2 (McKinney 2004) (listing the statutory definition of surviving spouse as a husband and a wife).

¹⁴⁰ UNIF. PROBATE CODE Art. II, pt. 1 gen. cmt. (amended 2008) (describing the most important theme as "the decline of formalism in favor of intent-serving policies").

¹⁴¹ *See generally* Averill, *supra* note 44, at 891-926 (discussing the contents of the intestacy statutes).

¹⁴² *See* Lomenzo, *supra* note 36, at 956-57 (noting that in order to have a fair pattern of distribution among surviving family members there must be a pattern that recipients believe is fair and thus does not produce disharmony within the surviving family members nor disdain for the legal system); *see* *Sec. Pacific Bank Wash. v. Chang*, 80 F.3d 1412, 1416 (9th Cir. 1996) (noting that "[i]n dicta discussing how the court would act if it were to view the matter 'strictly from the standpoint of public policy,' the *Sawada* court observed: 'If we were to select between a public policy favoring the creditors of one of the spouses and one favoring the interests of the family unit, we would not hesitate to choose the latter.'") (quoting *Sawada v. Endo* 57 Haw. 608, 616-17 (1977)).

¹⁴³ *See* Fellows, *supra* note 39, at n.49 (noting that in the 1990 revision the UPC included previously excluded groups into the intestate succession scheme).

traditional groups in this country.¹⁴⁴

B. The Difficulty in Distinguishing Committed Partner Relationships

The second major argument that opponents have against extending intestacy benefits to same-sex couples is that it is difficult to determine who is actually a committed partner.¹⁴⁵ The main difficulty here is the fear of being over-inclusive or under-inclusive. For example, it is necessary to distinguish between two people who are in a committed relationship as opposed to two people who are merely roommates. Proponents have suggested that the duration of the relationship should be a key consideration in determining the legitimacy of a relationship.¹⁴⁶ However, difficulty arises when trying to determine how long you would have to live with someone before you are deemed to be committed partners. Additionally, opponents argue that sharing a household is not dispositive of a donative intent toward that person.¹⁴⁷ Opponents argue that a scheme based on these distinctions gives rise to the possibility of fraud.¹⁴⁸

The argument that it is impossible to determine who is a committed couple lacks a great deal of merit. Numerous private corporations have developed methods for determining the validity of non-traditional relationships for the purposes of insurance and other employee benefits.¹⁴⁹

¹⁴⁴ See Holob, *supra* note 36, at 1510 (stating that “[b]ecause many of these groups act as families, they should not be denied the benefits that probate codes extend to traditional families.”); T. P. Gallanis, *Aging and the Nontraditional Family*, 32 U. MEM. L. REV. 607, 608 (2002) (noting that there are a “growing number of couples living together in domestic partnerships.”).

¹⁴⁵ See Holob, *supra* note 36, at 1515 (declaring that “[a]nother major argument against extending intestacy rights to committed partners is that it is exceedingly difficult to define who qualifies as a committed partner.”).

¹⁴⁶ See *id.* (arguing that the duration of the relationship should be one of the factors considered when determining the existence of a committed partnership); see *Califano v. Boles*, 443 U.S. 282, 285 n.3 (1979) (construing *Weinberger v. Salfi*, 422 U.S. 749 (1975)) (stating that duration-of-relationship requirements exist “for receipt of mother’s or child’s insurance benefits.”).

¹⁴⁷ See Holob, *supra* note 36, at 1515 (noting the possibility that two people could share a household and not want the other to inherit their estate); *but see* E. Gary Spitko, *An Accrual/Multi-Factor Approach to Intestate Inheritance Rights for Unmarried Committed Partners*, 81 OR L. REV. 255, 270 (2002) (discussing how a “survey found that a substantial majority of the respondents in each respondent group—those living in a committed non-marital partnership, as well as a substantial majority of the general public—would prefer that a surviving committed partner take as an heir a portion of the decedent partner’s intestate estate.”).

¹⁴⁸ See Marie A. Failinger, *A Peace Proposal For the Same-Sex Marriage Wars: Restoring the Household to its Proper Place*, 10 WM. & MARY J. WOMEN & L. 195, 253 (2004) (discussing the state’s concern about distinguishing a “real” household from a “fraudulent” household); *see also* Craig A. Bowman & Blake M. Cornish, *A More Perfect Union: A Legal and Social Analysis of Domestic Partnership Ordinances*, 92 COLUM. L. REV. 1164, 1181 (1992) (concluding that states have a strong interest in preventing fraud in the context of regulating domestic relations).

¹⁴⁹ See Holob, *supra* note 36, at 1516 (noting that “[i]ndividuals in domestic partnerships can try to protect their interests through private agreements, wills, and will substitutes.”); *see also* James Herbie DiFonzo, *Toward a Unified Field Theory of the Family: The American Law Institute’s Principles of the*

Additionally, all states could institute a registration process for these relationships, much like California has done with domestic partnerships, and Vermont has done with civil unions.¹⁵⁰ A process where couples must self identify prevents the fear of being over-inclusive and reduces the possibility of fraud. Registration is also beneficial because it requires couples to make a formal recognition of their relationships; much in the same way states require a marriage license for heterosexual couples. Alternatively, states could adopt a system that operates much the same way that federal public benefits programs operate.¹⁵¹

The federal government has had a great deal of success in administering public economic benefits programs using the household as the model to prove legitimacy.¹⁵² These programs have recognized that non-traditional family groups do function as “an economic unit” and as such have demonstrated a need for protection to ensure financial security.¹⁵³ Opponents argue the difficulty with this system is that the definition of “household” may change rapidly, making eligibility requirements difficult.¹⁵⁴ If states were to develop a definition of committed partners for the extension of intestacy benefits that included non-traditional couples, then there would likely not be the same issues concerning rapid changes to the definition to deal with. In the past the UPC has been flexible in accommodating previously excluded groups when it felt that its current statutes were not accomplishing their respective purposes.¹⁵⁵ Additionally,

Law of Family Dissolution, 2001 B.Y.U.L. REV. 923, 925 n.9 (2001) (stating that “[t]his article examines the central concerns of the ALI Principles . . . including the changed calculus of child support . . . the increased role of private agreements in family law . . . and the practical equivalence of domestic partnerships to marriages”).

¹⁵⁰ See Seidman, *supra* note 8, at 231 (describing the procedures that certain states have in place to recognize non-traditional relationships); see, e.g., CAL. FAM. CODE §297.5 (Deering 2009) (enumerating that registered domestic partners shall have equal rights as spouses).

¹⁵¹ See Failing, *supra* note 148, at 264–65 (noting that a particular set of cases, “so-called ‘public benefits’ legal regimes, should not be any different [than an intestacy regime], for they also involve government regulation and involvement in the economic situation of the household.”); see also Roger D. Colton, *Supportive Housing Facilities As “Low-Income Residential” Customers For Energy Efficient Purposes*, 7 J. AFFORDABLE HOUSING AND COMMUNITY DEV. L. 406, 408 (1998) (explaining that income eligibility for public benefits programs is based on a figure determined by reference to where the federal poverty level stands at that point in time).

¹⁵² *Id.* at 265 (discussing how the federal Food Stamp and energy assistance programs have adopted the household as their eligibility unit); See e.g. AARP.org, Help for Grandparents Raising Grandchildren, http://www.aarp.org/families/grandparents/raising_grandchild/public_benefits_programs_can_help_grandparents.html (last visited Nov. 24, 2009) (stating “the amount of help you get [from the Food Stamp Program] depends on the income of everyone in your household.”).

¹⁵³ Failing, *supra* 148, at 65 (noting that to define a household the government looks to cost-sharing and encourages unrelated groups to pool economic resources to reduce their overall needs).

¹⁵⁴ *Id.* at 266 (discussing the problem with using “the household” as the legal model for the distribution of benefits).

¹⁵⁵ UNIF. PROBATE CODE ART. II, prefatory note (amended 2008) (noting a 1990 revision to the

a statute could be established that lists certain factors for courts to examine to determine whether a couple is committed, and as a result qualifies for intestacy benefits. This Note will analyze and advocate for the adoption of such a statutory evaluation in the next Part.

IV. IMPLEMENTING A STATUTORY PROCEDURE EXTENDING INHERITANCE RIGHTS TO COMMITTED PARTNERS

In order to extend inheritance rights to committed partners the statutes governing these rights could be amended, or an entirely new set of statutes applicable to committed partners could be implemented. While amending the current statutes may have symbolic value because it would integrate a same-sex relationship with the marital relationship, it would not provide the same degree of flexibility as creating a new statute would.¹⁵⁶ Writing an entirely new statute also seems more appropriate given that the needs of committed partners are not exactly the same as traditional couples.

The intestacy statutes are primarily influenced by history and tradition.¹⁵⁷ However, since the purpose of intestacy is to effectuate donative intent, the new statutes should be drawn as a comprehensive scheme that is able to meet the needs of contemporary families.¹⁵⁸ This Note suggests that legislatures adopt an intestate succession scheme that defines qualifying partners using certain criteria. To establish these criteria this Note will use the New York court's definition of family as a model. Using the definition of family as a model would be consistent with how the intestacy statutes have been amended in the past by the UPC, and additionally will provide the best means of effectuating donative intent. This section will lay out the test for identifying qualifying committed

traditional intestacy scheme included step-children and adopted children).

¹⁵⁶ See Holob, *supra* note 36, at 1518 (noting that by creating a new statute only applicable to committed partners, drafters would be able to determine whether other inheritance rights, like elective share, should also be extended); see also Hubert J. Barnhardt, III, *Let the Legislatures Define the Family: Why Default Statutes Should Be Used to Eliminate Potential Confusion*, 40 EMORY L.J. 571, 577 (1991) (discussing the advantages and disadvantages of redefining "family" through legislative means).

¹⁵⁷ See Fellows et al., *supra* note 5, at 11 (highlighting that "[t]he UPC pattern of distribution inevitably is a product of the tradition and history that has influenced other intestacy statutes."); see also Holob, *supra* note 36, at 1496-99 (presenting the history and development of intestacy laws from Roman times to the contemporary United States).

¹⁵⁸ See Seidman, *supra* note 8, at 233 (stating that the primary purpose of the intestacy statute is to effectuate donative intent, and that the UPC should develop a scheme that accommodates the needs of contemporary modern families to achieve this goal); see generally Lee-ford Tritt, *Sperms and Estates: An Unadulterated Functionally Based Approach to Parent-Child Property Succession*, 62 SMU L. REV. 367, 380-81 (2009) (identifying that in addition to furthering donative intent, the prominent goal of intestacy statutes, there are other goals that should be considered such as administrative efficiency).

partners. This section will then apply the test to illustrate its effectiveness in extending succession benefits to committed partners.

A. Adding Committed Partners into the Intestacy Statutes

The laws of New York provide a perfect starting point for adding committed partners into the intestacy scheme and accomplishing the purpose of donative intent. The UPC has previously been flexible with its definition of “family,” accounting for groups previously excluded from the intestacy statutes in order to accomplish the purposes of the state. Likewise New York courts have provided a functional definition of “family” used in the rent control statutes that can be applied when considering the succession rights of committed partners. The judiciary has stated “the term family . . . should not be rigidly restricted to those people who have formalized their relationship by obtaining, for instance, a marriage certificate or an adoption order.”¹⁵⁹ The court additionally stated that the focus should be on the “reality of family life” and not the legal definitions of these institutions.¹⁶⁰ The court held that a decedent’s homosexual partner had the right to avoid eviction from his partner’s rent controlled apartment because the two had a familial relationship.¹⁶¹

From the ruling in *Braschi* it appears that the New York courts are implying that focusing on the concept of family, rather than a legally defined relationship, will lead to true donative intent. In defining family this decision highlighted three key characteristics that legitimized a relationship as committed.¹⁶² A shared residence, the intermingling of finances, and holding themselves out as a committed couple should be the criteria used to evaluate whether a non-traditional couple qualifies as a committed couple, and as a result should be granted surviving spouse level intestacy benefits.

By establishing that parties shared a household, it indicates the level of commitment the parties have to each other. Individuals that share a home have to frequently interact and share household responsibilities much in the same way married couples do. The living arrangement being for a life-term is significant to prevent against fraud. It would be very easy to merely have a roommate and establish these criteria, but a roommate arrangement

¹⁵⁹ *Braschi v. Stahl Assocs. Co.*, 543 N.E.2d 49, 53 (N.Y. 1989).

¹⁶⁰ *Id.*

¹⁶¹ *Id.* (ruling that “the term family . . . should not be rigidly restricted to those people who have formalized their relationship by obtaining, for instance, a marriage certificate or an adoption order.”).

¹⁶² *Id.* at 55 (noting that a shared residence, shared financial obligations, and public awareness of the relationship were each factors the court considered when evaluating the relationship).

is generally temporary. To establish that the intention of the relationship was for a life-term the individual would have to show some extrinsic evidence indicating the intention of the arrangement was permanent. Co-signing a mortgage and living at that same residence for a number of years, for example, could accomplish this. On the other hand, renting the residence and splitting the payments from separate accounts would appear insufficient because this would indicate something more like a roommate relationship or other less substantial commitment. Having a mortgage to a residence in one partner's name and letting the other live rent-free may be insufficient, but this would have to be balanced against the contributions the other partner makes. These alternative contributions could be financial or intangible and may depend on the other partner's financial situation, or how long the other partner has been providing economic support.

Financial interdependence is the second factor that must be established to gain the status of a committed partnership. Outside of emotional support, financial support is the main indicator of dependency in a devoted relationship like a marriage. In this type of situation, the individuals work to be able to contribute to the relationship as a whole rather than just on their individual pursuits. Financial interdependence may be the key factor for establishing whether an individual should be able to take a superior share intestate. Evidence of financial support could include joint checking or other bank accounts or being listed as the beneficiary on a partner's life insurance policy. Financial interdependence does not necessarily mean that each partner must contribute equally, because even in traditional marriages there is often a primarily breadwinner. Financial interdependence should focus on whether the partners share obligations and use a common pool of resources to satisfy those obligations. The test must fail if an individual cannot establish that the decedent was unwilling to support them financially in life because then it is unlikely they would have wanted to support them following their death as well.

The last factor that must be established is that the couple must have held themselves out to the general public as being devoted to each other in life. The *Braschi* decision turned on the fact that everyone in the apartment building where the couple lived and their families knew they were in a committed relationship and the decedent would have considered his partner family.¹⁶³ There are numerous more deliberate ways than just looking to public perception to see if it establishes the "holding out" criteria. Many states offer a domestic partner registry or a similar public record for

¹⁶³ *Id.* (explaining why noneviction protection was appropriate under the facts of the case).

partners to make their relationship public. Having a formal system that would allow for couples to register their relationship would likely be the strongest evidence for establishing a committed relationship. By registering their relationship with the state, partners would be making an affirmative public statement of their commitment. Having the relationship on public record would also be an effective method in preventing fraud. It is unlikely that uncommitted couples would go through the trouble of establishing residency together and a financial relationship, and then register that relationship just for the sake of intestacy benefit. A registry is not the only way to hold a relationship out to the public, but it provides the clearest signal. Overall public perception, like in *Braschi*, could be enough to establish a commitment, but it would likely be up to the discretion of the court to evaluate.

In this evaluation no one factor should be dispositive, but rather the degree of significance of each criterion should be balanced against one another. For example, a couple that has shared a residence for a number of years, where one partner pays all of the bills while the other maintains the home and his partner's personal affairs may qualify. The one partner may not be able to contribute financially, so instead he contributes to the relationship in a less tangible way. In determining whether the relationship constitutes a committed partnership the court should weigh all three criteria and evaluate the totality of the circumstances. If a committed partnership is established, then spousal level intestacy benefits should be established, because it is likely the decedent's donative intent would be effectuated by providing for his partner.

CONCLUSION

The definition of what constitutes a family has changed a great deal over the last fifty years. Despite the shift from the nuclear family to a more contemporary setting, the intestacy laws of most states have failed to accommodate these more contemporary settings, especially with regard to same-sex partners. Given this change, the intestacy statutes' primary purpose of effectuating donative intent is being compromised with respect to these excluded groups. By adopting the proposed statute to determine the legitimacy of a committed partnership, states' laws would more accurately reflect changing family structures with respect to intestate succession. Additionally, the statute would satisfy the primary and secondary goals of traditional intestacy policy.

While opponents' fears over the destruction of marriage and the

possibility of fraud are important state interests, they are not practical concerns when it comes to intestacy policy. Due to its goal of effectuating donative intent, the concept of succession can be completely divorced from the institution of marriage. By adopting the proposed statute no state would have to reform its marriage laws to allow for the recognition of same-sex marriage. Likewise, no state would have to give individual recognition to homosexual couples at all because the committed partnership test, while providing a benefit to homosexual couples, does not target that particular relationship specifically. States would be adopting a uniform measure that could be applied to all committed partners. Most importantly this test would allow for the intestacy statutes to carry out their original purpose, which is effectuating the decedent's donative intent.