LEGAL PLANNING FOR UNMARRIED COMMITTED PARTNERS: EMPIRICAL LESSONS FOR A PREVENTIVE AND THERAPEUTIC APPROACH

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I. INTRODUCTION

Increasing rates of cohabitation among unmarried couples have brought a number of contentious issues to the forefront of American political and corporate decision making. For example, whether to recognize or to prohibit same-sex marriages and whether to extend employment benefits to domestic partners have been common topics in the media in recent years.[1] Much attention has been paid to legal reforms in these areas. However, legal policy changes are likely to be slow to materialize and could either advance or hinder the interests of unmarried committed partners. An approach to the issues facing unmarried committed partners founded in therapeutic jurisprudence and preventive law[2] suggests that

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1. *See, e.g., Democrats Give Health Benefits to Gay Couples*, N.Y. TIMES, May 17, 1997, at 11; David W. Dunlap, *Gay Partners of I.B.M. Workers to Get Benefits*, N.Y. TIMES, Sept. 20, 1996, at B2; David W. Dunlap, *Fearing a Toehold for Gay Marriages, Conservatives Rush to Bar the Door*, N.Y. TIMES, Mar. 6, 1996, at A7 [hereinafter Dunlap, *Fearing a Toehold*].

2. *See* Dennis P. Stolle et al., *Integrating Preventive Law and Therapeutic Jurisprudence: A Law and Psychology Based Approach to Lawyering*, 34 CAL. W. L. REV. 15 (1997).

attorneys can help individuals in nonmarital committed relationships to privately order their affairs in a manner that is both legally effective and therapeutic. The present analysis examines the application of therapeutic jurisprudence and preventive law principles to the issues involved in the long-term property and health care planning of unmarried couples.

Part II of this paper describes, generally, the law affecting the long-term property and health care planning of unmarried committed partners. Attention is also given to some recent policy proposals and reforms that have attempted to alter the law in this area. Part III describes the synthesis of therapeutic jurisprudence and preventive law ("TJ-preventive law") as a framework for analysis of this problem. Part IV presents an empirical study intended to shed light on the long-term planning practices of unmarried committed partners. Finally, Part V applies TJ-preventive law principles to the issues involved in legal planning for unmarried committed partners and offers suggestions for practitioners.

The structure of American families and households is undergoing an important series of interrelated changes. Over the last several decades, rates of marriage among unmarried women have fallen and rates of divorce and nonmarital childbearing have risen.[3] Contemporary young men and women are delaying marriage, delaying childbearing, and having smaller families.[4] In a related trend, the rate of cohabitation among unmarried couples has been rapidly increasing. Approximately 7% of the nation's couples are in unmarried committed relationships,[5] including roughly 1.7 million gay and lesbian couples.[6] Approximately one-fourth of the adult population has cohabited at some time. Younger adults have even higher rates of cohabitation; among those in their early thirties, nearly one-half have cohabited.[7] However, these figures only include heterosexual cohabitation and, therefore, underestimate the level of cohabitation in the country. It is evident that cohabitation has emerged as an important new family form in the United States.

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3. *See* NAT'L CTR. FOR HEALTH STATISTICS, U.S. DEPT. OF HEALTH AND HUMAN SERVICES, MONTHLY VITAL STATISTICS REPORT 3 (July 17, 1997); NAT'L CTR. FOR HEALTH STATISTICS, U.S. DEPT. OF HEALTH AND HUMAN SERVICES, MONTHLY VITAL STATISTICS REPORT 2 (July 14, 1995); Dennis A. Ahlburg & Carol J. De Vita, *New Realities of the American Family*, 47 POPULATION BULL. 1, 11–12, 14–15, 22–23 (1992). During the 1980s and early 1990s, the divorce rate leveled and dropped slightly. NAT'L CTR. FOR HEALTH STATISTICS, U.S. DEPT. OF HEALTH AND HUMAN SERVICES, MONTHLY VITAL STATISTICS REPORT 3 (July 17, 1997). *See* Larry L. Bumpass, *What's Happening to the Family? Interactions Between Demographic and Institutional Change*, 27 DEMOGRAPHY 483 (1990).

4. *See* Ahlburg & DeVita, *supra* note 3, at 12–13, 18–19.

5. *See* ARLENE F. SALUTER, U.S. DEP'T OF COMMERCE, CURRENT POPULATION REPORTS, SERIES P20-484, MARITAL STATUS AND LIVING ARRANGEMENTS: MARCH 1994 xiii (1996).

6. *One-Third of Unmarried Partners Are Gay*, NUMBER NEWS, May 1996, at 1.

7. *See* Larry L. Bumpass & James A. Sweet, *National Estimates of Cohabitation*, 26 DEMOGRAPHY 615, 617–19 (1989).

Public attitudes toward cohabitation have become more accepting in the 1980s[8] and the 1990s.[9] Such attitudes are strongly related to age. Only 20–30% of persons over age seventy find cohabitation acceptable even if the couple does not plan marriage, while three-quarters of persons ages twenty-five to twenty-nine find such an arrangement acceptable.[10] These findings suggest a continuing trend of increasing cohabitation into the future as younger cohorts continue to replace older cohorts in the population.

People live in nonmarital relationships for a variety of reasons. Because same-sex couples are prohibited from marrying, many live in long-term committed partnerships. Whether same-sex couples should have the right to marry is subject to considerable debate, both inside and outside the gay community.[11] Considering the amount of resistance to marriage rights among some gay men and lesbians,[12] it is quite reasonable to conclude that a significant number would choose to live in nonmarital relationships even if marriage were a legal option. In any case, same-sex marriage does not appear to be politically feasible at the current time. A 1998 poll revealed that only 29% of the general public approved of legally sanctioned same-sex marriage.[13] Consistent with these views, Congress recently passed the Defense of Marriage Act, which denies federal recognition of same-sex marriages and allows states to refuse to recognize same-sex marriages authorized in other states.[14]

The rising number of heterosexual cohabitors represents persons who choose not to marry or choose to significantly delay marriage. Cohabitation is more common among those who have been previously married,[15] many of whom presumably hesitate to remarry. Among separated or divorced persons under age thirty-five, approximately two-thirds have cohabited.[16] Cohabitation for the majority of opposite-sex couples tends to be short term, ending in marriage or the

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8. Arland Thorton, *Changing Attitudes Toward Family Issues in the United States*, J. MARRIAGE & FAM. 873, 887 (1989).

9. *See* LARRY L. BUMPASS & JAMES A. SWEET, NSFH WORKING PAPER NO. 65, COHABITATION, MARRIAGE AND UNION STABILITY: PRELIMINARY FINDINGS FROM NSFH2 6 (1995).

10. *Id.*

11. *See, e.g.*, Nitya Duclos, *Some Complicating Thoughts on Same-Sex Marriage*, 1 LAW & SEXUALITY 31 (1991); Mary C. Dunlap, *The Lesbian and Gay Marriage Debate: A Microcosm of Our Hopes and Troubles in the Nineties*, 1 LAW & SEXUALITY 63 (1991); Paula L. Ettelbrick, *Since When is Marriage a Path to Liberation?*, *in* FAMILY AND PERSONAL RELATIONSHIPS 76 (Gloria W. Bird & Michael J. Sporakowski eds., 1997); Nan D. Hunter, *Marriage, Law, and Gender: A Feminist Inquiry*, 1 LAW & SEXUALITY 9 (1991); Rob Claus, Letter to the Editor, *Can a Law Help Ease Pain of Divorce? Gay Marriage Debate*, N.Y. TIMES, July 2, 1997, at A22; Gustav Niebuhr, *Laws Aside, Some in Clergy Quietly Bless Gay 'Marriage'*, N.Y. TIMES, Apr. 17, 1998, at A1.

12. *See, e.g.*, Ettelbrick, *supra* note 11.

13. John Cloud, *For Better or Worse: In Hawaii, a Showdown over Marriage Tests the Limits of Gay Activism*, TIME, Oct. 26, 1998 at 43.

14. 1 U.S.C. § 7 (Supp. 1997); 28 U.S.C.A. § 1738C (West Supp. 1997).

15. Bumpass & Sweet, *supra* note 7, at 619.

16. *Id.*

termination of the relationship.[17] However, for a significant minority, cohabitation is a long-term arrangement. Bumpass, Sweet, and Cherlin found that 20% of cohabiting couples have lived together for five or more years.[18]

II. LEGAL TREATMENT OF UNMARRIED COMMITTED PARTNERS

Because unmarried committed partners are not legally married, they are not entitled to many of the benefits that arise automatically for married partners. For example, the default property rights of married persons in the event of the dissolution of the marriage[19] or in the event that one of the partners dies[20] are statutorily defined. This is not the case for nonmarital partners. While married persons have the option of relying on statutory provisions or of entering into private agreements, nonmarital partners generally must enter into private agreements to define their property rights. Similarly, nonmarital partners must proactively consider their long-term health care if they want to ensure the participation of their partners in their health care decision making. The following sections describe a number of areas in which the rights of unmarried committed partners differ from those of married persons and that raise planning issues unique to nonmarital relationships.

A. Property Division

In every state, marriage entitles each partner in the marriage to statutorily defined property rights. If the marriage results in divorce and the parties do not come to their own agreement regarding the division of their assets, the distribution of property is determined by a court in accordance with state statute.[21] Each state provides for the division of property acquired during the marriage by reference to either the rules of community property or the notion of equitable distribution.[22] These systems of distribution assume that persons who are married act as "economic partners" during the marriage.[23]

In contrast, there are no state statutes that define the property rights of persons living in unmarried committed relationships.[24] The earnings of each party in the relationship and anything purchased with those earnings belong to that party; the partner has no defined statutory rights to that property.[25] Instead, the property

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17. Larry L. Bumpass et al., *The Role of Cohabitation in Declining Rates of Marriage*, 53 J. MARRIAGE & FAM. 913, 919 (1991).

18. *Id.*

19. *See infra* notes 21–41 and accompanying text.

20. *See infra* notes 50–63 and accompanying text.

21. Monica A. Seff, *Cohabitation and the Law*, *in* FAMILIES AND LAW 141, 149 (L.J. McIntyre & M.B. Sussman eds., 1995).

22. Hara Jacobs, *A New Approach for Gay and Lesbian Domestic Partners: Legal Acceptance Through Relational Property Theory*, 1 DUKE J. GENDER L. & POL'Y 159, 161 (1994).

23. David L. Chambers, *What If? The Legal Consequences of Marriage and the Legal Needs of Lesbian and Gay Male Couples*, 95 MICH. L. REV. 447, 478 (1996).

24. Seff, *supra* note 21, at 149.

25. Chambers, *supra* note 23, at 480.

rights of unmarried committed partners have been loosely defined through diffuse and inconsistent court opinions.[26] "Change occurs state by state; thus, change occurs slowly and in piecemeal fashion. Consequently, couples who cohabit rather than marry are likely to find themselves in a position of uncertainty with respect to their legal rights."[27]

Traditionally, courts found cohabitation to be immoral and refused to grant rights to partners in such relationships, even when the parties had an express agreement.[28] Courts often refused to enforce contracts between cohabiting partners "to the extent that they were based on meretricious sexual services (i.e., prostitution)."[29] More recently, however, most courts will enforce express property agreements between unmarried committed partners and some courts will enforce contracts that are implied from the conduct of the partners.[30] While most of the cases have involved opposite-sex couples, a few cases have addressed the property rights of same-sex couples.[31]

One of the earliest and most famous cases that acknowledged the property rights of unmarried committed partners was *Marvin v. Marvin*[32] In Marvin, the parties had lived together for seven years; all the property acquired during this relationship was acquired in the defendant's name. The plaintiff alleged that she and the defendant had orally agreed that they would "share equally" in the property accumulated, that the defendant would support the plaintiff for the rest of her life, that they would hold themselves out as husband and wife, that the plaintiff would give up her entertainment career, and that she would serve as "companion, homemaker, housekeeper and cook" to the defendant.[33]

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26. Jacobs, *supra* note 22, at 159.

27. Seff, *supra* note 21, at 149.

28. Chambers, *supra* note 23, at 480.

29. Seff, *supra* note 21, at 149. *See, e.g.*, Hewitt v. Hewitt, 394 N.E.2d 1204 (Ill. 1979); McCall v. Frampton, 415 N.Y.S.2d 752 (1979).

30. Chambers, *supra* note 23, at 480. *See, e.g.*, Wilcox v. Trautz, 693 N.E.2d 141, 146 (Mass. 1998) ("unmarried cohabitants may lawfully contract concerning property, financial, and other matters relevant to their relationship"); Beal v. Beal, 577 P.2d 507, 510 (Or. 1978) ("[C]ourts, when dealing with the property disputes of a man and a woman who have been living together in a nonmarital domestic relationship, should distribute the property based upon the express or implied intent of those parties."); *In re* Marriage of Lindsey, 678 P.2d 328, 331 (Wash. 1984) ("courts must examine the relationship and make a just and equitable disposition of the property"); Goode v. Goode, 396 S.E.2d 430, 438 (W. Va. 1990) ("[A] court may order a division of property acquired by a man and a woman who are unmarried cohabitants, but who have considered themselves and held themselves out to be husband and wife. Such order may be based upon principles of contract, either express or implied, or upon a constructive trust.").

31. Chambers, *supra* note 23, at 480. *See also* Ireland v. Flanagan, 627 P.2d 496 (Or. App. 1981). *Compare* Jones v. Daly, 122 Cal. App. 3d 500 (1981) (refusing to enforce oral "cohabitatants agreement" between two males because the sexual relationship was inseparable) *with* Whorton v. Dillingham, 202 Cal. App. 3d 447 (1988) (finding oral cohabitants agreement between two males enforceable although the sexual relationship was express part of consideration).

32. 557 P.2d 106 (Cal. 1976).

33. *Id.* at 110.

The court concluded that "courts should enforce express contracts between nonmarital partners except to the extent that the contract is explicitly founded on the consideration of meretricious sexual services."[34] Moreover, the court found that

> [i]n the absence of an express contract, the courts should inquire into the conduct of the parties to determine whether that conduct demonstrates an implied contract, agreement of partnership or joint venture, or some other tacit understanding between the parties. The courts may also employ the doctrine of quantum meruit, or equitable remedies such as constructive or resulting trusts, when warranted by the facts of the case.[35]

The court, thus, recognized the validity of implied contracts and other equitable remedies for protecting the lawful expectations of unmarried committed partners. The court noted that

> although parties to a nonmarital relationship obviously cannot have based any expectations upon the belief that they were married, other expectations and equitable considerations remain. The parties may well expect that property will be divided in accord with the parties' own tacit understanding and that in the absence of such understanding the courts will fairly apportion property accumulated through mutual effort. We need not treat nonmarital partners as putatively married persons in order to apply principles of implied contract, or extend equitable remedies; we need to treat them only as we do any other unmarried persons.[36]

Cases such as Marvin have given unmarried committed partners some property rights in the event of the breakup of the relationship. However, unmarried partners generally do not have clearly defined property rights in the absence of an express agreement.[37] As the court noted in *Goode v. Goode*, the

> evidence [presented at trial] must prove that the parties' nonmarital cohabiting relationship was based upon a valid contract, either expressly or one which may be inferred from the evidence. Similarly, in the absence of a valid contract, a party claiming relief must demonstrate that equitable principles would provide the relief being sought.[38]

Express agreements, often called cohabitation contracts, are agreements between unmarried committed partners that specify the property rights of the partners during and after the relationship and are intended to be legally binding.[39]

Cohabitation contracts are quite flexible and can be tailored to each individual relationship, defining the rights and obligations of each partner.[40] In

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34. *Id.*
35. *Id.*
36. *Id.* at 121.
37. Chambers, *supra* note 23, at 481.
38. Goode v. Goode, 396 S.E.2d 430, 438–39 (W. Va. 1990).
39. Seff, *supra* note 21, at 154.

particular, cohabitation contracts might be useful for couples who are planning for long-term relationships, who wish to make major purchases together, who make decisions that involve one partner moving and/or giving up a job, or who have a relationship that is supported financially by one partner.[41]

Several commentators have suggested points that ought to be included in a cohabitation contract: (1) the rights of each partner to the property and income of the other;[42] (2) the ownership of assets;[43] (3) responsibility for debts;[44] (4) how assets acquired together shall be titled;[45] (5) consideration for the agreement;[46] (6) how property will be divided in the event of a breakup;[47] (7) provisions for the care of children from this and previous relationships;[48] and (8) provisions for the termination of the agreement (for example, death or marriage).[49]

B. Intestate Succession

Unmarried committed partners must also address the issue of their respective property rights upon the death of one partner. The system of property succession in the United States is based on the premise that individuals ought to be able to freely dispose of their property.[50] Accordingly, individuals are largely free, with a few exceptions,[51] to determine who will succeed to their accumulated wealth. The testator determines who shall receive his or her accumulated wealth upon his or her death and makes these wishes known through the execution of a will. However, if a decedent failed to execute a will, the state law of intestate succession governs who shall receive the decedent's property.[52] These laws provide a substitute estate plan for those who have not specifically provided their own plan by executing a valid and enforceable will.

Despite the increasing number of people involved in unmarried committed relationships, intestacy laws currently only recognize marital, blood, or

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40. Adam Chase, *Tax Planning for Same-Sex Couples*, 72 DENV. U. L. REV. 359, 373–74 (1995).

41. Seff, *supra* note 21, at 156.

42. LENORE J. WEITZMAN, THE MARRIAGE CONTRACT: SPOUSES, LOVERS, AND THE LAW 264–65 (1981).

43. *Id.* at 266–67.

44. Raymond C. O'Brien, *Domestic Partnership: Recognition and Responsibility*, 32 SAN DIEGO L. REV. 163, 214 (1995).

45. WEITZMAN, *supra* note 42, at 268–69; Seff, *supra* note 21, at 155.

46. WEITZMAN, *supra* note 42, at 257.

47. *Id.* at 286–90; Seff, *supra* note 21, at 155.

48. WEITZMAN, *supra* note 42, at 279–80; Seff, *supra* note 21, at 155.

49. WEITZMAN, *supra* note 42, at 285; Seff, *supra* note 21, at 155.

50. THOMAS E. ATKINSON, HANDBOOK OF THE LAW OF WILLS 35 (2d ed. 1953).

51. For example, freedom of testation is limited by the spouse's elective share on grounds of public policy. Based on the need to protect spouses against disinheritance, elective share statutes give the surviving spouse the right to take under the decedent's will or to take a statutorily defined share of the decedent's estate. JOHN RITCHIE ET AL., DECEDENTS' ESTATES AND TRUSTS 162–63 (8th ed. 1993).

52. ATKINSON, *supra* note 50, at 60; WILLIAM M. MCGOVERN ET AL., WILLS, TRUSTS, AND ESTATES 2 (1988).

adoptive relationships in defining the heirs of a person who dies intestate.[53] Accordingly, if a decedent is not married to his or her committed partner,[54] that partner is not considered an heir of the decedent.[55] Therefore, a decedent's unmarried committed partner does not receive a share of the decedent's estate under the laws of intestacy.[56] Instead, the decedent's property is distributed to his or her lineal descendants (children, grandchildren, etc.). If the decedent with no surviving spouse is not survived by any lineal descendants, the property passes to the decedent's parents, if either has survived, or to the descendants of the parents.[57]

Married people are protected against disinheritance by their spouses by "elective share" statutes, which permit a surviving spouse to either take what was provided in the decedent's will or elect to take a forced share of the estate

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53. *See, e.g.*, UNIF. PROBATE CODE §§ 2-102, 2-103 (amended 1993). *See also, e.g.*, Peffley-Warner v. Bowen, 778 P.2d 1022 (Wash. 1989).

54. An alternative would be for one of the partners to adopt the other. If such an adoption were allowed, the partners would be entitled to the rights of intestate succession as would a parent and child. *Compare In re* Adoption of Swanson, 623 A.2d 1095 (Del. 1993) (allowing the adoption), *with In re* Adoption of Robert Paul P., 471 N.E.2d 424 (N.Y. 1984) (denying the adoption).

55. Two exceptions are Oregon and New Hampshire. Oregon's intestacy statute, enacted in 1993 and amended in 1995, defines the surviving spouse of a decedent to include some committed partners:

> For purposes of [intestate succession], a person shall be considered the surviving spouse of a decedent under either of the following circumstances:
> (1) The person was legally married to the decedent at the time of the decedent's death.
> (2) The person and the decedent, although not married but capable of entering into a valid contract of marriage under ORS chapter 106, cohabited for a period of at least 10 years, the period ended not earlier than two years before the death of the decedent, and
> (a) During the 10-year period, the person and the decedent mutually assumed marital rights, duties, and obligations;
> (b) During the 10-year period, the person and the decedent held themselves out as husband and wife, and acquired a uniform and general reputation as a husband and wife;
> (c) During at least the last two years of the 10-year period, the person and the decedent were domiciled in this state; and
> (d) Neither the person nor the decedent was legally married to another person at the time of the decedent's death.

OR. REV. STAT. § 112.017 (1995). The statute requires that the parties must have been capable of entering into a valid contract of marriage, excluding same-sex couples, and must have cohabited for at least ten years, excluding those who have not been together this long.

The New Hampshire statute provides: "Persons cohabiting and acknowledging each other as husband and wife, and generally reputed to be such, for the period of 3 years, and until the decease of one of them, shall thereafter be deemed to have been legally married." N.H. REV. STAT. ANN. § 457:39 (1992).

56. Challenges to the exclusion of committed partners as heirs have been unsuccessful. *See, e.g.*, *In re* Petri, N.Y.L.J., Apr. 4, 1994 at 29; *In re* Estate of Cooper, 592 N.Y.S.2d 797 (N.Y. App. Term. 1993).

57. *See, e.g.*, UNIF. PROBATE CODE § 2-103 (amended 1993).

(typically one-third).[58] As in the case of intestacy, unmarried committed partners do not receive the same protection in this area as do spouses; they do not have the right to an elective share of their partner's estate.

Although unmarried committed partners are not generally provided for under state intestacy schemes, a substantial segment of the general public (60–70%) and of committed partners themselves (70–85% of persons with opposite-sex partners; 93–100% of persons with same-sex partners) would give some portion of the estate of a decedent with a committed partner to the partner.[59] A 1992 *Newsweek* poll found that 70% of registered voters approved of inheritance rights for gay "spouses," even though support for gay marriage fell far short of this.[60]

Professor Lawrence Waggoner, a preeminent wills and trusts scholar, has recently suggested that committed partners be allowed to share in their partner's intestate estate.[61] Under the Working Draft of Waggoner's proposal, a committed partner is defined as a person who is an unmarried adult, who would not have been prohibited from marrying the decedent by reason of a blood relationship with the decedent, and who shared a common household with the decedent in a marriage-like relationship.[62] A non-exclusive list of factors for determining whether a relationship was "marriage-like" is provided. These factors include the duration of the relationship, whether the parties intermingled their finances, whether the parties participated in a commitment ceremony, and whether one or both parties named the other as a primary beneficiary of a life insurance policy. The Waggoner Working Draft would apply to both opposite-sex and same-sex committed partners.[63]

In the absence of state law provisions to include unmarried committed partners in intestacy statutes, committed partners must execute wills to protect their testamentary preferences if those preferences include their partners. While it is advisable for married persons to execute wills that give effect to their precise testamentary preferences, for unmarried committed partners, executing a will or engaging in other estate planning techniques (such as obtaining life insurance or jointly owning property) is essential to ensure that property will pass to the partner.

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58. RITCHIE ET AL., *supra* note 51, at 162–63. *See, e.g.*, UNIF. PROBATE CODE, Part 2 (amended 1993).

59. Mary Louise Fellows et al., *Committed Partners and Inheritance: An Empirical Study*, 16 LAW & INEQ. J. 1 (1998). Respondents were presented with a series of hypothetical scenarios in which they were asked how they would divide the property of a decedent among survivors identified in terms of their familial-type relationship with the decedent.

60. *Gays Under Fire*, NEWSWEEK, Sept. 14, 1992, at 35.

61. Lawrence Waggoner, *Waggoner Working Draft: Intestate Share of Committed Partner* (1995) (reproduced in Fellows et al., *supra* note 59, at 92–94) [hereinafter Waggoner, *Working Draft*]. *See also* LAWRENCE W. WAGGONER ET AL., FAMILY PROPERTY LAW: CASES AND MATERIALS ON WILLS, TRUSTS, AND FUTURE INTERESTS (2d ed. 1997); Lawrence W. Waggoner, *Marital Property Rights in Transition*, 59 MO. L. REV. 21 (1994).

62. Waggoner, *Working Draft*, *supra* note 61, at 92.

63. *Id.*

C. Health Care Planning

An additional planning issue that nonmarital partners must face involves the eventuality that one of the partners may become unable to direct his or her own health care. Each state provides statutes that grant health care decision making power to relatives if a person becomes incompetent to make such decisions.[64] If the person is married, these statutes usually designate the person's spouse as the substitute decision maker.[65] However, if the person is not married, a parent, child, or other relative is typically designated as the surrogate decision maker.[66] For example, the Uniform Probate Code specifies the order of preference for those who could be a guardian of an incapacitated person as: the person's spouse or person nominated by will, the person's adult child, and then the person's parent.[67] Statutes designating the incompetent person's spouse as surrogate decision maker are premised on the assumption that the spouse is most likely to know what the person would have wanted and to have the person's best interests in mind.[68] However, the same could likely be said about a person's committed partner as well.

A few states do include unmarried committed partners among the persons to be considered as a surrogate decision maker in the absence of a specific designation by the patient. For example, New Mexico's health care decision making statute gives priority over everyone other than a spouse to "an individual in a long-term relationship of indefinite duration with the patient in which the individual has demonstrated an actual commitment to the patient similar to the commitment of a spouse and in which the individual and the patient consider themselves to be responsible for each other's well-being."[69] However, most states do not provide for unmarried committed partners to act as surrogate decision makers.

Failure to designate the incompetent person's partner as a surrogate decision maker may be "doubly unfortunate" for persons in homosexual relationships. First, failure to designate the person's partner as the surrogate decision maker may mean that the person to whom he or she is closest will not be making decisions about his or her care. Moreover, because homosexuals are

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64. *See, e.g.*, KY. REV. STAT. ANN. § 311.631 (Michie 1995).

65. *See* Chambers, *supra* note 23, at 454–55.

66. *See id.*

67. UNIF. PROBATE CODE § 5-305(c) (amended 1993).

68. *See* Chambers, *supra* note 23, at 456.

69. N.M. STAT. ANN. § 24-7A-5(B)(2) (Michie 1997). An Arizona Statute provides that, if the patient has not designated an agent and the court has not appointed a guardian for the purpose of making health care decisions, a patient's domestic partner can act as the surrogate decision maker; however, such a person is given a lower priority than a spouse, an adult child, or a parent. ARIZ. REV. STAT. ANN. § 36-3231 (West 1995). Other statutes allow a person who has exhibited special care for the patient and who is familiar with the patient's values to serve as a surrogate decision maker, but only if the listed family members are unavailable. *See, e.g.*, DEL. CODE ANN. tit. 16, § 2507 (1998); ME. REV. STAT. ANN. tit. 18-A, § 5-805 (West 1997).

somewhat more likely to be estranged from their immediate families,[70] it is possible that the person who is designated as the surrogate decision maker is not close to the incompetent person. In addition, the surrogate decision maker may refuse to allow the partner to participate in the decision making or to visit the ill partner.[71]

The extensive litigation involved in the case of Sharon Kowalski[72] provides a vivid example of these dangers. In 1983, Kowalski suffered severe brain injuries as a result of an automobile accident.[73] At the time of the accident she was living with her lesbian partner, but she had not disclosed her sexual orientation or the relationship to her parents. Following the accident, the animosity between Kowalski's parents and her partner resulted in a series of legal battles regarding who would be Kowalski's guardian.[74] Kowalski's partner was prohibited from visiting her for three years and she did not succeed in becoming Kowalski's guardian until more than eight years after Kowalski's accident, even though she was the only person who was willing and able to care for Kowalski outside of an institution.[75]

As in the context of property rights, married persons can choose whether to rely on the statutory designation or to execute a private document designating a substitute decision maker. However, persons in unmarried committed relationships who want their partners to act as their surrogate health care decision makers must make use of private agreements. A durable power of attorney for health care is a mechanism that can be used by unmarried committed partners to maximize the likelihood that their wishes regarding long-term health care will be followed.[76] Using a durable power of attorney for health care, a competent person can appoint another person to make health care decisions in the event that the person becomes unable to direct his or her own care.[77] The power granted to the surrogate decision

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70. *See* KATH WESTON, FAMILIES WE CHOOSE: LESBIANS, GAYS, KINSHIP (1997).

71. *See* Chambers, *supra* note 23, at 457–58.

72. *In re* Guardianship of Kowalski, 478 N.W.2d 790 (Minn. App. 1991); *In re* Guardianship of Kowalski, 392 N.W.2d 310 (Minn. App. 1986); *In re* Guardianship of Kowalski, 382 N.W.2d 861 (Minn. App. 1986).

73. Kowalski was both physically and mentally impaired. She was confined to wheelchair, had difficulty communicating, and had the mental capacity of a child between 4 and 6 years of age. *Kowalski*, 382 N.W.2d 861.

74. *Kowalski*, 478 N.W.2d 790; *Kowalski*, 392 N.W.2d 310; *Kowalski*, 382 N.W.2d 861.

75. *Kowalski*, 478 N.W.2d at 791.

76. Another mechanism by which a competent person can express his or her wishes regarding long-term health care is a living will or advance directive. An advance directive for mental health care might also be considered. *See* Bruce J. Winick, *Advance Directive Instruments for those with Mental Illness*, 51 U. MIAMI L. REV. 57 (1996). *See* Dennis P. Stolle, *Advance Directives, AIDS, and Mental Health: TJ Preventive Law for the HIV-Positive Client*, PSYCHOL. PUB. POL'Y & L. (forthcoming 1999) (discussing advance directives for mental health care in the context of HIV-infection and possible estrangement from family).

77. HAYDEN CURRY ET AL., A LEGAL GUIDE FOR LESBIAN AND GAY COUPLES 4-19 (1993); BARRY R. FURROW ET AL., BIOETHICS: HEALTH CARE LAW AND ETHICS 275 (1991).

maker may be detailed to the extent desired by the individual, but no specific direction is required. When the durable power is in effect, the appointed decision maker has the legal authority to make health care decisions on behalf of the principal and health care providers are required to honor those decisions. Financial durable powers of attorney can also be executed so that one partner has the authority to direct the person's or the couple's finances during the period of the other's incapacity.[78]

All states have provisions for durable powers of attorney. However, not all states have expressly determined whether a durable power of attorney may be used for health care decision making.[79] Approximately one-half of states specifically permit the designation of an individual to make health care decisions, eight states have interpreted their durable power statutes to permit the designation of a health care decision maker, and an additional eight states allow the designation of an individual to make health care decisions other than the withdrawal or withholding of life support.[80]

Thus, through the execution of a durable power of attorney for health care, a person living in an unmarried committed relationship can designate his or her partner as his or her legal health care decision maker. In this way, a person can, if he or she wishes, ensure that the partner, rather than another family member, will be allowed to make health care decisions when and if necessary. In addition, durable power of attorney can help prevent the exclusion of the partner from the health care decision making process and from access to the ill partner.[81]

D. Employment Benefits and Legal Registration

Finally, another issue related to both property and health care planning involves the availability to partners of benefits provided by employers. Generally, the employment benefits provided in both the private and public sectors are extended only to the spouses and dependents of employees. However, a few municipalities and corporations have granted some benefits to the nonmarital committed partners of their employees.[82] These ordinances or corporate rules allow

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78. CURRY ET AL., *supra* note 77, at 4–21.

79. Ann Lorentson Friedman & Rosemary B. Hughes, *AIDS: Legal Tools Helpful for Mental Health Counseling Interventions*, 16 J. MENTAL HEALTH COUNS. 291, 295 (1994).

80. *Id.*

81. *See, e.g.*, CURRY ET AL., *supra* note 77, at 4–2.

82. A number of cities (e.g., Berkeley, CA; Laguna Beach, CA; Los Angeles, CA; San Francisco, CA; Santa Cruz, CA; West Hollywood, CA; Cambridge, MA; Tacoma Park, MD; Ann Arbor, MI; Minneapolis, MN; Ithaca, NY; New York City, NY; Seattle, WA; Madison, WI), one state (Vermont), and a number of businesses and universities (e.g., APA Insurance Trust, Apple Computer, Ben and Jerry's, Columbia University, HBO, IBM, Microsoft Corp., Levi Strauss & Co., Lotus, Princeton University, Stanford University, University of Colorado, University of Iowa, University of Minnesota, the Village Voice, and Walt Disney) offer some benefits to domestic partners. *See* CURRY ET AL., *supra* note 77, at 1-9 to 1-13; Rebecca L. Melton, *Legal Rights of Unmarried Heterosexual and Homosexual Couples and Evolving Definitions of "Family"*, 29 J. FAM. L. 497, 503 (1990–1991); Seff, *supra* note 21, at 157; Sue Spielman & Liz Winfeld, *Domestic Partner*

couples in committed relationships to receive the benefits that are extended to married couples.[83] These benefits typically include access to company events and facilities, bereavement and sick leave, employee assistance and counseling, relocation assistance, and health and dental insurance coverage.[84]

Ordinances or corporate rules granting benefits to domestic partners typically define what it means to be a domestic partner. These requirements often include a minimum time that the partners must have been in the relationship, evidence of financial interdependence, the sharing of a joint residence, relationship boundaries (for example, exclusivity, no close blood relationship, and no current legal marriage), and the naming of the partner as a beneficiary of life insurance or pension plans.[85]

One state has now implemented provisions under which some unmarried committed partners can register as domestic partners in order to receive employment benefits and other legal protections. In 1997, in response to a series of state court decisions,[86] the Hawaii legislature, in a political compromise, passed two bills.[87] These bills proposed an amendment to the Hawaii constitution giving

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Benefits: A Bottom Line Discussion, 4 J. GAY & LESBIAN SOC. SERV. 53, 54–55 (1996) ("[B]etween 1990 and 1994, the number of businesses, universities, and municipalities that have chosen to offer domestic partner benefits inclusive of medical benefits has increased from under 5 to over 130. And the number that offer employee benefits exclusive of medical coverage is close to three times that number." (citation omitted)); Mary Patricia Treuthart, *Adopting a More Realistic Definition of "Family"*, 26 GONZ. L. REV. 91, 100–05 (1990–1991); Jeff Barge, *More Firms Offer Benefits for Gay Couples: Managers Say Fairness Concerns Prompted Change: Low Cost was a Surprise*, A.B.A. J., June 1995, at 34; Kirk Johnson, *Gay Divorce: Few Markers in This Realm*, N.Y. TIMES, Aug. 12, 1994, at A20.

83. Chase, *supra* note 40, at 378.

84. O'Brien, *supra* note 44, at 207. While only 35% of registered voters approved of "legally sanctioned gay marriages" and only 32% approved of adoption rights for gay spouses, 67% approved of health insurance for gay spouses and 58% approved of social security for gay spouses. *Gays Under Fire*, *supra* note 60, at 37. A more recent poll of Californians found that while 60% disapproved of same-sex marriage, nearly two-thirds approved of recognizing the rights of partners to hospital visitation rights, medical power of attorney, and conservatorship; 60% approved of allowing partners to received pension benefits, health benefits, and family leave benefits, and 55% approved of legal domestic partner registration. Philip J. Trounstine, *Californians oppose gay marriage but favor limited legal rights, poll finds*, KNIGHT-RIDDER/TRIB. NEWS SERVICE, Mar. 2, 1997, at 302K2618.

85. O'Brien, *supra* note 44, at 181.

86. In *Baehr v. Lewin*, 852 P.2d 44 (Haw. 1993), the Hawaii Supreme Court held that the state was regulating access to the status of married persons on the basis of sex and that, therefore, the state was required to demonstrate a compelling state interest in accordance with the Equal Protection Clause of the Hawaii Constitution, HAW. CONST. Art I, § 5. On remand in *Baehr v. Mike*, Civ-No. 91-1394, 1996 WL 694235, at *20 (Haw. Cir. Ct. Dec. 3, 1996), the trial court ruled that the state had failed to sustain its burden by demonstrating a compelling state interest. Therefore, the court ruled that the sex-based classification was unconstitutional as violative of equal protection. *Id.* at *22.

87. H.B. No. 117, A Bill for an Act Proposing a Constitutional Amendment Relating to Marriage, 19th Leg., Reg. Sess. (Haw. 1997); H.B. No. 118, Act Relating to

the legislature the power to limit marriage to opposite-sex couples[88] but provided that certain couples could register as "reciprocal beneficiaries."[89] The law "extend[s] certain rights and benefits which are presently available only to married couples to couples composed of two individuals who are legally prohibited from marrying under state law."[90] Included is the right of each "reciprocal beneficiary" to receive a share of the other's intestate estate as would a surviving spouse, to participate in family health coverage, to hospital visitation, to make health care decisions as would a spouse, and to employee benefits such as funeral leave for the death of the reciprocal beneficiary.[91]

Under the Hawaii legislation, reciprocal beneficiaries must be at least eighteen years old; must not be married nor parties to other reciprocal beneficiary relationships; must be legally prohibited from marrying each other under state law; must not consent to the relationship as a result of force, duress, or fraud; and must sign a declaration of a reciprocal beneficiary relationship.[92]

Unlike Waggoner's Working Draft for intestacy, the Hawaii provisions do not apply to opposite-sex unmarried couples because reciprocal beneficiaries must be prohibited from marrying under Hawaii law. However, other unmarried adults, such as siblings, may register as reciprocal beneficiaries under the legislation. The Hawaii legislation and the Waggoner Working Draft also differ in their approach to the determination of whether two people are committed partners. The Waggoner Working Draft provides criteria by which to determine whether or not a couple is sufficiently committed to be included within its provisions. Conversely, the Hawaii legislation allows couples to define themselves as committed partners as long as they meet the stated minimum criteria. Self-definition allows couples to choose whether or not to be registered as committed partners. However, because partners who fail to file have no rights as reciprocal beneficiaries, such a system may miss those committed partners who are not informed about the provisions or who do not have other contacts with the legal system through which they can learn about the option to register.

Without a doubt, persons in nonmarital committed relationships face difficulties in relation to their long-term planning needs that are not encountered by married couples. In planning for their combined futures, the partners must address a host of interrelated legal and psychological questions. By using an approach to lawyering that combines the perspectives of TJ-preventive law, attorneys who work with clients who are in nonmarital relationships may be better able to provide more effective legal services that are also therapeutic to the clients' psychological well-being.

Unmarried Couples (Reciprocal Beneficiaries) (Haw. 1997), codified at HAW. REV. STAT. ANN. § 572C-1 to § 572C-7 (Michie Supp. 1997).

88. H.B. No. 117.

89. H.B. No. 118.

90. *Id.* § 1.

91. *Id.*

92. *Id.* § 4.

III. THERAPEUTIC JURISPRUDENCE/PREVENTIVE LAW

A. Therapeutic Jurisprudence

Therapeutic jurisprudence is the study of the law as a therapeutic agent.[93] A perspective centered around therapeutic jurisprudence considers how the law might be used to achieve therapeutic objectives.[94] Acknowledging that the law inevitably functions as a therapeutic agent, impacting on the psychological and physical health and well-being of those with whom it comes into contact, therapeutic jurisprudence seeks to engage in systematic study of these effects.[95] To do so, therapeutic jurisprudence seeks to utilize the interdisciplinary perspectives and techniques of legal and policy studies, psychiatry, philosophy, and the behavioral sciences, particularly clinical, social, and experimental psychology, to evaluate the therapeutic and the anti-therapeutic effects of substantive laws, legal procedures, and legal roles.[96] While the therapeutic jurisprudential perspective first emerged in analyses of mental health law,[97] the approach has broadened to include a wide range of legal domains and a focus on the general psychological and physical well-being of ordinary individuals.[98]

A perspective based on therapeutic jurisprudence recognizes that the law can serve any number of potential ends, some of which will inevitably come into conflict.[99] Thus, therapeutic jurisprudence acknowledges the potential for conflict between the use of the law to achieve therapeutic objectives and other values important in the law, such as individual liberty. However, therapeutic jurisprudence "suggests that, other things being equal, positive therapeutic effects are desirable and should generally be a proper aim of law, and that anti-therapeutic effects are undesirable and should be avoided or minimized."[100]

In recent years, there has been increasing interest in a dimension of therapeutic jurisprudence that takes the law as given and explores ways in which existing law might be applied most therapeutically.[101] For any particular state of

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93. David B. Wexler & Robert F. Schopp, *Therapeutic Jurisprudence: A New Approach to Mental Health Law*, *in* HANDBOOK OF PSYCHOLOGY AND LAW 361, 362 (D.K. Kagehiro & W.S. Laufer eds., 1992).

94. *Id.*

95. Stolle et al., *supra* note 2, at 17; David B. Wexler, *Applying the Law Therapeutically*, *in* LAW IN A THERAPEUTIC KEY: DEVELOPMENTS IN THERAPEUTIC JURISPRUDENCE 831 (David B. Wexler & Bruce J. Winick eds., 1996); Bruce J. Winick, *The Jurisprudence of Therapeutic Jurisprudence*, 3 PSYCHOL. PUB. POL'Y & L. 184, 187 (1997).

96. DAVID B. WEXLER, THERAPEUTIC JURISPRUDENCE: THE LAW AS A THERAPEUTIC AGENT (1990); DAVID B. WEXLER & BRUCE J. WINICK, ESSAYS IN THERAPEUTIC JURISPRUDENCE (1991).

97. WEXLER, *supra* note 96, at 4.

98. See the breadth of the topics addressed in LAW IN A THERAPEUTIC KEY: DEVELOPMENTS IN THERAPEUTIC JURISPRUDENCE, *supra* note 95.

99. *See* Robert F. Schopp, *Therapeutic Jurisprudence and Conflicts Among Values in Mental Health Law*, 11 BEHAV. SCI. & L. 31, 31–32 (1993).

100. Winick, *supra* note 95, at 188.

101. Stolle et al., *supra* note 2, at 18. *See also* Rose A. Daly-Rooney, *Designing Reasonable Accomodations Through Co-Worker Participation: Therapeutic Jurisprudence*

the law, there may be a wide degree of latitude for applying the law more therapeutically and less anti-therapeutically.[102] Thus, "[t]he actual legal practice of therapeutic jurisprudence will principally involve lawyers working with clients to apply existing law in a manner likely to promote psychological well-being."[103] In accordance with this approach, we assume that the state of the law as just described will continue. That is, we examine the ways in which lawyers can work with nonmarital partners given that same-sex marriage is not recognized, that the property rights of unmarried couples remain uncertain, that state intestacy laws have not been altered to include unmarried committed partners, that there continue to be few opportunities for legal registration, and that nonmarital partners are generally not statutorily defined surrogate decision makers.[104] Practitioners will be best able to work with unmarried committed partners as clients in this context by engaging in the practice of preventive law.

B. Preventive Law

Preventive law is "a branch of law that endeavors to minimize the risk of litigation or to secure more certainty as to legal rights and duties."[105] Accordingly, the "objective of the lawyer practicing preventive law on behalf of a client is to work with that client in arranging his or her affairs, through the use of legal techniques and documents, in such a way as to maximize the probability of achieving the client's objectives and, in doing so, to minimize legal risks and costs associated with those objectives."[106] A preventive law approach is proactive; it emphasizes planning and prevention and focuses on the "careful private ordering of affairs."[107] In order to appropriately consider the client's long-term interests and how to most effectively protect those interests and avoid future legal problems, a preventive lawyer must make effective use of client intake forms, client

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and the Confidentiality Provision of the Americans with Disabilities Act, 8 J. L. & HEALTH 89 (1993–1994); David Finkelman & Thomas Grisso, *Therapeutic Jurisprudence: From Idea to Application*, *in* LAW IN A THERAPEUTIC KEY: DEVELOPMENTS IN THERAPEUTIC JURISPRUDENCE 587, *supra* note 95; Dennis P. Stolle, *Professional Responsibility in Elder Law: A Synthesis of Preventive Law and Therapeutic Jurisprudence*, 14 BEHAV. SCI. & L. 459 (1996); Wexler, *supra* note 95.

102. Winick, *supra* note 95, at 201.

103. David B. Wexler, Practicing Therapeutic Jurisprudence: Psycholegal Soft Spots and Strategies (1998) (unpublished manuscript, on file with author).

104. Any changes that might occur are likely to occur slowly and could be either favorable or unfavorable to nonmarital partnerships. We have noted several reform efforts beneficial to unmarried committed partners. *See supra* notes 61–63 and accompanying text (describing the Waggoner intestacy working draft), notes 86–92 and accompanying text (describing the Hawaii reciprocal beneficiary legislation). There have also been efforts directed toward reforms such as prohibiting same-sex marriages. *See* Dunlap, *Fearing a Toehold*, *supra* note 1. Indeed, the recently enacted Defense of Marriage Act denies federal recognition of same-sex marriages and permits states to decline to recognize same-sex marriages as well. 1 U.S.C. § 7 (Supp. 1997); 28 U.S.C. § 1738C (Supp. 1997).

105. Stolle et al., *supra* note 2, at 16 (citing Honorable Edward D. Re, *The Lawyer as Counselor and the Prevention of Litigation*, 31 CATH. U. L. REV. 685, 692 (1995)).

106. *Id.* at 33–34.

107. *Id.* at 16. *See also* LOUIS M. BROWN & EDWARD A. DAUER, PERSPECTIVES ON THE LAWYER AS PLANNER (1978).

counseling, and legal check-ups.[108] As described below, a preventive law approach can also provide an opportunity in which to practice therapeutic jurisprudence.

C. Synthesis

Stolle has suggested that good preventive lawyers should be sensitive to the therapeutic and anti-therapeutic effects of the law and legal planning on their clients.[109] Thus, he proposes an integration of therapeutic jurisprudence and preventive law such that attorneys will engage in a systematic application of both preventive law and therapeutic jurisprudence principles.[110] In such an integration of perspectives, preventive law provides the framework—the law office practice—and therapeutic jurisprudence draws on an interdisciplinary approach and provides the objectives—therapeutic outcomes.[111]

Thus, while a client may enter a law office with a particular question or issue, a lawyer working from a TJ-preventive law perspective can use the preventive law tools of client intake and counseling to help the client identify "psycholegal soft spots," for instance, relationships, goals, or psychological and value issues that should be considered when contemplating any legal action or non-action.[112] Then, the practitioner can use preventive legal documents (in the present context these include cohabitation contracts, wills, durable powers of attorney, legal registration, life insurance, etc.) to maximize the likelihood that therapeutic outcomes will result from the transaction.[113]

Stolle frames the TJ-preventive law approach as comprising four stages. First, psycholegal soft spots must be identified. Second, the legal documents or procedures that are most likely to result in therapeutic outcomes must be selected. Third, these preventive legal documents and procedures must be employed to maximize therapeutic outcomes and to minimize anti-therapeutic outcomes. Finally, the attorney and client should engage in on-going legal check-ups so that "unanticipated life changes" are taken into account in reformulating the preventive documents to ensure that they remain legally effective and therapeutic.[114]

The integration of therapeutic jurisprudence and preventive law is growing and has now been applied in a number of legal domains including elder law, HIV/AIDS law, family law, and corporate and business planning law.[115] We propose that long-term property and health care planning, particularly for those

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108. Scott E. Isaacson, *Preventive Law: A Personal Essay*, 9-Oct. UTAH B. J. 14 (1996).

109. Stolle, *supra* note 101, at 469.

110. Stolle et al., *supra* note 2, at 20. Discussion of the integration of therapeutic jurisprudence and preventative law can be found in Stolle, *supra* note 101; Stolle, *supra* note 76; Dennis P. Stolle & David B. Wexler, *Thearpeutic Jurisprudence and Preventative Law: A Combined Concentration to Invigorate the Everyday Practice of Law*, 39 ARIZ. L. REV. 25 (1997).

111. Stolle, *supra* note 76.

112. Stolle et al., *supra* note 2, at 42–43.

113. *Id.* at 25.

114. Stolle, *supra* note 101, at 469.

115. See review in Stolle et al., *supra* note 2, at 20–32.

persons in unmarried committed relationships, is an area that can benefit from a TJ-preventive law approach.

One approach to the complex issues faced by unmarried committed partners is to advocate reform of the law. Such legal reform could range from allowing committed partners to register as reciprocal beneficiaries for limited benefits to allowing same-sex marriage. In this vein, Waggoner and Fellows and her colleagues suggest reform of state intestacy laws to provide for unmarried committed partners.[116] In the absence of legislative or policy reform, however, another approach is for individuals to engage in the private ordering of their own affairs, attempting to address their needs proactively by using a preventive law approach. The preventive law emphasis on planning and prevention through the use of legal instruments can be used to accurately reflect the goals and circumstances of an unmarried committed couple.

Many of the challenges that nonmarital couples will face both during and after their committed relationships are of both legal and psychological importance. During the relationship, the ways in which couples structure their finances, handle joint participation in the rearing of children, and approach possible estrangement from their families can have both legal and psychological repercussions. Similarly, at the end of the relationship, whether it ends by the choice of one or both partners or upon the death of one of the partners, the legal disposition or division of assets can be an emotional process that can become even more difficult if family conflict arises. Health care decision making, likewise, involves the psychological issues surrounding illness and human decision making in the context of legal rights. Some of the therapeutic outcomes that can result from careful legal planning in these areas include acknowledging the relationship, avoiding leaving a partner unprovided for, ensuring that health care decision making power is held by the person that the individual wishes, and avoiding future conflict. Melton notes:

> Property ownership and beneficiary designations are the most valuable estate planning tools that unmarried heterosexual and same-sex couples have at their disposal. A surviving joint owner, or the beneficiary of a life insurance policy or trust, will receive the designated property in the event of death, regardless of the existence or non-existence of a traditional family relationship with the decedent. Same-sex couples can effectuate a legal relationship through such devices as reciprocal wills, naming each other beneficiaries of insurance policies, and executing powers of attorney for one another.[117]

In order to begin providing information to practitioners who may have occasion to encounter unmarried committed partners in their legal practices, we report the results of the following empirical study, which examines the current estate, financial, and health care planning practices of a sample of unmarried committed partners.

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116. Fellows et al., *supra* note 59, at 89–91; Waggoner, *Working Draft*, *supra* note 61, at 78–80.

117. Melton, *supra* note 82, at 507.

IV. EMPIRICAL STUDY

The present study provides an opportunity to examine the long-term property and health care planning practices of unmarried committed partners in both opposite-sex and same-sex relationships and some of the reasons for those practices.

A. Design and Method

The survey data were collected by the Minnesota Center for Survey Research in the fall of 1996. Telephone surveys were completed by 256 Minnesota residents over the age of 25, including a random sample of the general public (N=87), and samples of persons in opposite-sex committed relationships (N=33), of women in same-sex committed relationships (N=85), and of men in same-sex committed relationships (N=51).[118] The data from the sample of the general public are not discussed in the present paper.

The sample of persons with opposite-sex committed partners was generated by asking general public respondents (generated via random digit dialing) and subsequent respondents in the committed partner samples to provide the name of someone they knew in an unmarried opposite-sex committed relationship. Due to the difficulties in generating a random sample of same-sex committed couples, volunteers were solicited for these samples.[119] Flyers were placed in the Twin Cities in bookstores, cafes, bars, and other businesses that the lesbian, gay, bisexual, and transgender communities support. Advocacy groups throughout the state were also contacted and asked for help in generating names. A few radio stations and newspapers ran community service advertisements about the study. Finally, names were generated by word of mouth as people became aware of the project.

A self-definition of committed relationship was used for eligibility. Not all of the sample respondents in committed relationships were cohabiting with their partner at the time of the survey. Eleven (33.3%) respondents with opposite-sex partners, five (5.9%) female respondents with same-sex partners, and three (6.0%) male respondents with same-sex partners were not living with their partner at the time of the study. Respondents with opposite-sex partners had been in their

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118. More detailed descriptions of the sample can be found in Fellows et al., *supra* note 59, and in Monica K. Johnson & Jennifer K. Robbennolt, *Using Social Science to Inform the Law of Intestacy: The Case of Unmarried Committed Partners*, 22 LAW & HUM. BEHAV. 479 (1998).

119. Relative to the population of the United States, few persons are in same-sex relationships. In addition, very few persons are willing to identify themselves as lesbian, gay, bisexual, or transgender to a poller over the phone due to fear of discrimination. Therefore, random digit dialing is not a feasible means of identifying potential respondents. In one national phone survey, for example, it took 1650 calls to Kansas, a total of 55 hours of dialing, before pollers found the first person willing to identify himself or herself to a poller as being gay or lesbian. *See* Chambers, *supra* note 23, at 449 (citing Larry Hatfield, *Methods of Polling*, S.F. EXAMINER, June 5, 1989, at A20).

current relationships for an average of 5.5 years. Respondents with same-sex partners had been in their current relationships for an average of 8.5 years.

Interviewers indicated that they were calling from the University of Minnesota and told respondents that they were conducting a study regarding attitudes about inheritance rights of couples who are living together without being married. They used a standardized questionnaire to conduct the interviews and recorded responses directly. Information was gathered regarding respondents' personal relationships, wealth accumulation, estate planning instruments, and children. Demographic information was also gathered on all respondents.[120]

B. Findings

1. Written Agreements

In the present study, interviewers asked respondents whether they had entered into written property agreements with their partners. Approximately 29% of the sample (48 respondents) had executed formal written property agreements with their partners. One of the primary reasons given for entering into a written agreement was to make the partners' understandings and wishes explicit in order to avoid later problems. As one participant responded, a written agreement was necessary "to establish some sense of order." In addition, participants cited the need to legally protect their partner given current law. Another commonly cited reason for entering into a written agreement was that one or both partners did not trust their respective families or felt a need to protect the other partner. This particularly concerned many people in unmarried committed relationships who did not have the support of their families.[121] Finally, a few participants indicated that their written agreements were prompted by a major transition affecting the committed relationship.[122]

Twenty percent of the sample (33 respondents) indicated that they had considered entering into a written agreement with their partners but had decided against it. When asked why they decided not to enter into a written agreement, approximately one-half of these respondents indicated that they had not had time to make these arrangements or had otherwise "not gotten around to it." One person indicated that the couple was still thinking about entering into a contract but had not yet made a decision. These responses cannot be considered actual rejections of having written property agreements. Perhaps many of these respondents would enter into written agreements with their partners if the process was facilitated in some way.

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120. In addition, respondents were presented with a series of hypothetical scenarios in which they were asked to divide the property of the decedent among survivors identified in terms of their familial-type relationship with the decedent. These results are reported in Fellows et al., *supra* note 59, and in Johnson & Robbennolt, *supra* note 118.

121. *See supra* notes 70–75 and accompanying text.

122. One example of such a transition is the purchase of a house or the decision to have a child.

Among those who had considered but decided against entering into a written agreement, the reasons varied. Several people indicated that such an agreement was not needed because they had faith in their relationship, trusted their partner, or were very clear with each other about property ownership. Along these lines, several respondents indicated that they had decided not to enter a written agreement because they did not foresee the relationship ending. Comparing a written agreement to a prenuptial agreement, one of these respondents explained that one only entered into these types of agreements if one planned to break up. One gay man who had been in his current relationship for twenty-one years explained, "Our lawyer advised it, but after so many years, it didn't seem relevant." Two respondents explained that they intended to execute written agreements after they had been in their relationships longer. One respondent indicated that his or her partner did not want a written agreement. Finally, one respondent indicated that a lawyer had advised against it since each party had a will.

The remaining 52% of the sample (88 respondents) had never considered executing a written agreement with their partners. It is possible that many of these people had not yet encountered any of the events that typically trigger consideration of an agreement, such as the joint purchase of a home or a relocation. It is also possible that the need for an agreement had not been suggested to them by an attorney or other trusted source. It may be less common for a partner in a committed unmarried relationship to initiate consideration of an agreement than for an event or outside suggestion to raise the issue.

In a series of analyses, we sought to outline some of the characteristics of respondents who had written agreements, wills, and other legal arrangements with their partners. We considered a number of socio-demographic factors, including gender, age, estate size, education, and personal income. We also considered a number of characteristics of the respondents' current relationship. These factors include whether the couple had held a commitment ceremony or exchanged a symbol of the relationship (for example, rings); the duration of the relationship; whether the couple made joint charitable gifts; whether the couple was financially interdependent as measured by having a joint bank account, joint investment, or joint credit card; whether the couple had joint ownership of a pet, a motor vehicle, or a home; and whether a child (either the respondent's or the partner's) lived in the household (for at least two months during the year). In the tables, we present only the data for those characteristics that significantly predicted having a written agreement, will, or other legal arrangement.[123]

123. Many of these socio-demographic and relationship characteristics are correlated with one another (e.g., age and estate size). Due to limitations in sample size for the groups of interest, the statistical tests (2) reported in the following sections do not correct for this collinearity. Thus, we do not identify the unique contribution of each variable.

Table 1

Significant Predictors of Having a Written Agreement Regarding Property[124]

	All Respondents	Total N
Age		
25–34	13.6	44
35–44	31.0	71
45+	40.0	50
	$\chi^2(2)=8.73$**	
	$\gamma=.39$	
Estate Size		
<$50,000	12.1	33
$50,000–100,000	26.5	34
$100,000–200,000	37.2	43
$200,000–400,000	40.0	30
$400,000+	33.3	18
	$\chi^2(4)=8.62$*	
	$\gamma=.30$	
Education		
< college degree	12.5	24
college degree	26.1	46
> college degree	34.7	95
	$\chi^2(2)=5.39$*	
	$\gamma=.33$	
Ceremony/exchange symbol		
No	14.9	67
Yes	38.8	98
	$\chi^2(1)=11.63$****	
	$\gamma=.57$	
Financial Interdependence		
No	13.6	44
Yes	34.7	121
	$\chi^2(1)=7.68$***	
	$\gamma=.54$	
Joint Ownership of Home		
No	17.8	73
Yes	38.5	91
	$\chi^2(1)=8.63$***	
	$\gamma=.49$	
Length of Relationship		
0–4 years	19.6	51
5+ years	33.3	114
	$\chi^2(1)=3.37$*	
	$\gamma=.34$	
Child in Household		
No	33.1	130
Yes	14.3	35
	$\chi^2(1)=5.24$**	
	$\gamma=-.50$	

*p<.10 **p<.05 ***p<.01 ****p<.001

124. Table 1 is based on 165 respondents. Information about the respondent's estate size is missing for seven respondents, and information about whether the respondent jointly owned a home with his or her partner is missing for one respondent.

Several of the demographic and relationship characteristics were associated with whether respondents had entered written agreements with their partners.[125] Due to the small number of respondents who had entered into written agreements, the sample groups are considered together for this analysis. Age and education were both positively associated with having a written agreement; older and more highly educated people were more likely to have written agreements. Estate size also had a significant positive effect; those persons with an estate of less than $50,000 were particularly unlikely to have written agreements. Although income was positively associated with having a written agreement, this relationship did not achieve statistical significance.

Similarly, several of the relationship characteristics were related to having a written agreement. Having held a commitment ceremony or exchanged a symbol of the relationship was strongly related to having a written agreement; those engaging in such activities were more likely to have agreements. Similarly, the duration of the relationship was also positively related to having a written agreement; those who had been in their relationships for a longer period were more likely to have written agreements. Financial interdependence and joint ownership of a home were both related to having a written agreement; financially interdependent couples were more likely to have formal agreements, as were those who jointly owned a home. This is consistent with the respondents' stated reasons for having written agreements, including the need to financially protect a partner and the purchase of a home as prompting the execution of a written agreement. Finally, having a child who lived in the household was negatively related to having a written agreement; those who had a child living in the household were less likely to have entered into written agreements with their partners.[126]

Extensive information was gathered on the nature of the written agreements.[127] Just over one-half (52.1%) of the agreements had a provision for dividing property if the relationship were to end. Of these, most contained a provision regarding the home. It was also quite common for these agreements to contain a provision for the division of other mutually owned property. Less frequently, these agreements contained provisions regarding pension and retirement benefits and separately owned property. Most of the agreements (91.7%) addressed the division of property in the event of the death of one of the partners. Again, nearly all of these agreements included a provision for the disposition of the home. Just under one-half (41.7%) contained provisions regarding pensions or retirement benefits, the partners' separate property, and mutually owned property.

125. *See* Table 1.

126. Gender was not related to whether respondents had written agreements. In addition, there were no significant effects of having made joint charitable gifts, jointly owning a motor vehicle, or jointly owning a pet.

127. *See* Table 2.

Table 2
Summary of Written Agreement Provisions

	% of Agreements	(N)
Total Number of Written Agreements		48
Contains Provisions Regarding the Division Of Property if the Relationship Ends	52.1	25
Home	43.8	21
Mutually Owned Property	33.3	16
Separate Property	25.0	12
Pension	8.3	4
Contains Provisions Regarding the Division Of Property at One Partner's Death	91.7	44
Home	81.3	39
Mutually Owned Property	39.6	19
Separate Property	41.7	20
Pension	41.7	20
Property Brought to the Relationship is:		
Separate	34.0	16
Mutually Owned	55.3	26
Don't Know	10.6	5
Property Acquired During the Relationship is:		
Separate	6.4	3
Mutually Owned	76.6	36
Don't Know	17.0	8
Property Acquired as Gift or Inheritance is:		
Separate	42.9	6
Mutually Owned	57.1	8
Don't Know	0.0	0
Support and Maintenance During Relationship	25.0	12
Support and Maintenance After Relationship Ends	35.4	17
Support and Maintenance of Children	10.4	5
Support and Maintenance of Other Relative	4.2	2
Other Provisions	31.3	15

Slightly over one-half (54.2%) of the agreements designated that property brought to the relationship would become mutually owned by both partners. One-third of the agreements designated that property brought to the relationship would remain separately owned by each partner. The few remaining respondents did not know the terms of their agreement on this matter. With respect to property acquired during the relationship, three-quarters (75.0%) of the agreements designated that this be mutually owned. Only 6.4% of agreements designated that property acquired during the relationship remain the separate property of each partner, and the remaining few respondents did not know the terms of their agreement on this matter. Less than one-third of the written agreements addressed the issue of property that was received as a gift or inheritance during the relationship. Those agreements addressing this situation were approximately equally likely to designated such property as the separate property of the partner who received it (N=6) as to designated it as mutually owned by both partners (N=8).

Written agreements also addressed a number of other issues. One-fourth of the agreements outlined general duties of support and maintenance between the partners during the relationship and 35.4% outlined these responsibilities for the period following the termination of the relationship. Only seven agreements (14.6%) provided for the support and maintenance of children (N=5) or other family members (N=2) during the relationship, after the termination of the relationship, or after the death of one partner.

Respondents were asked to explain any other provisions in the written agreement that had not been covered. Fifteen respondents indicated that their agreement included other provisions. Six agreements designated a health care decision maker (in all but one case this was the partner) and four agreements established the partner as having a general power of attorney. Three agreements established who would get the pet(s), two named other guardians for children in the event of death, and one established joint custody and minor guardianship for a child due in several weeks.[128]

2. Wills

Interviewers asked respondents whether they had a will and whether they had updated their will since their committed relationship began. Among respondents with opposite-sex partners, one-third had wills and only 40% of those had updated their will since their committed relationship began. Respondents with same-sex partners were more likely to have wills; 60% (81 respondents) had wills, and most (87.7%) had updated their will since their committed relationship began. Of those respondents who had wills, respondents with same-sex partners were also more likely to designate their partner as a beneficiary in their will. Over 90% of respondents with same-sex partners (77 respondents) included their partner as an heir; 40% of respondents with opposite-sex partners (4 respondents) did so.

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128. Four additional provisions were mentioned by one respondent each: living will provisions, making the partner responsible for funeral arrangements, forgiving business partnership debts, and requiring notice to terminate the agreement.

The rate of testacy among opposite-sex partners appears to be similar to that found for the general population in previous studies. The proportion of intestate decedents has varied across studies, with estimates ranging from 21% to 46%.[129] In previous telephone surveys, 46% to 49% of respondents had wills at the time of the interview.[130] However, the rate of testacy among same-sex couples in this sample appears to exceed even the highest estimates from the general population.

Interviewers also asked respondents a series of questions designed to test respondents' knowledge of common-law marriage and intestacy laws. The interviewers asked respondents with opposite-sex partners whether common-law marriages were recognized in their jurisdiction (Minnesota) and whether they believed they were in a common-law marriage. Although common-law marriages are not legally recognized in the jurisdiction, over two-thirds of the respondents did not know this—30% (9 respondents) indicated that they believed that common-law marriages were recognized and 36.7% (11 respondents) indicated that they did not know. However, only one person who believed common-law marriages were possible, mistakenly believed she was currently in one. Thus, it is unlikely that these respondents were relying on common-law marriage to define their respective property rights.

Respondents were also asked whether they knew who would inherit their property if they died without a will. The majority of respondents in each sample indicated that they knew who would inherit their property.[131] Many of these respondents, however, mistakenly believed that their partner would be among their heirs.[132] In a similar study based on interviews of married persons, only 44.6% of respondents who thought they knew who would inherit their property if they died without a will were correct or nearly so.[133]

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129. Olin L. Browder, Jr., *Recent Patterns of Testate Succession in the United States and England*, 67 MICH. L. REV. 1303, 1306 (1969); Contemporary Studies Project, *A Comparison of Iowans' Dispositive Preferences with Selected Provisions of the Iowa and Uniform Probate Codes*, 63 IOWA L. REV. 1041, 1070–76 (1978); Allison Dunham, *The Method, Process and Frequency of Wealth Transmission at Death*, 30 U. CHI. L. REV. 241, 246–47 (1963); John R. Price, *The Transmission of Wealth at Death in a Community Property Jurisdiction*, 50 WASH. L. REV. 277, 297 (1975).

130. Contemporary Studies Project, *supra* note 129, at 1070; Rita J. Simon et al., *Public Versus Statutory Choice of Heirs: A Study of Public Attitudes About Property Distribution at Death*, 58 SOC. FORCES 1263, 1264 (1980).

131. 60% of respondents with opposite-sex partners (18 respondents) responded that they knew who would inherit their property; 72.8% of respondents with same-sex partners (99 respondents) similarly responded.

132. 33.3% of respondents with opposite-sex partners (6 respondents) and 45.5% of respondents with same-sex partners (45 respondents) mistakenly believed that their partner would be among their heirs. This provides a minimum indication of error in respondents' knowledge of intestacy laws. Aside from naming their partner, respondents gave other incorrect answers of various kinds.

133. Mary Louise Fellows et al., *Public Attitudes About Property Distribution at Death and Intestate Succession Laws in the United States*, 1978 AM. B. FOUND. RES. J. 319, 340.

Table 3
Significant Predictors of Naming Partner as Beneficiary in Will

Respondents Who Had Wills (N=91)		
	% Naming Partner	Total N
Gender		
Male	77.8	36
Female	96.4	55
	$\chi^2(1)=7.70$***	
	$\gamma=.77$	
Education		
< College Degree	66.7	9
College Degree	81.8	22
> College Degree	95.0	60
	$\chi^2(2)=6.88$**	
	$\gamma=.65$	
Ceremony/Exchange Symbol		
No	74.2	31
Yes	96.7	60
	$\chi^2(1)=10.08$***	
	$\gamma=.82$	
Make Joint Charitable Gifts		
No	76.2	21
Yes	92.9	70
	$\chi^2(1)=3.95$**	
	$\gamma=.60$	
Financial Interdependence		
No	70.6	17
Yes	93.2	74
	$\chi^2(1)=5.83$**	
	$\gamma=.70$	
Joint Ownership of a Motor Vehicle		
No	79.2	48
Yes	100.0	43
	$\chi^2(1)=13.90$****	
	$\gamma=1.00$	
Joint Ownership of Home		
No	73.5	34
Yes	98.2	57
	$\chi^2(1)=13.66$****	
	$\gamma=.91$	
Length of Relationship		
0–4 Years	79.2	24
5+ Years	92.5	67
	$\chi^2(1)=2.89$*	
	$\gamma=.53$	

*p<.10 **p<.05 ***p<.01 ****p<.001

Respondents with wills were less likely to mistakenly believe that their partner would inherit their property if they died intestate. For the total sample, 34 of 73 persons without wills (47%) and 17 of 89 persons with wills (19%) mistakenly thought their partner would inherit their estate under the laws of intestate succession.[134] Limiting the comparison to only those respondents who claimed to "know" who would inherit their estate, 34 of 52 persons without wills (65%) and 17 of 65 persons with wills (26%) thought their partner would inherit their estate.[135] Thus, knowledge of intestacy laws and testacy appear to coincide. Accordingly, many people in unmarried committed partnerships without wills may not recognize the need under existing laws to specifically designate their partner as the beneficiary of their property if they so desire.

As shown in Table 3, several demographic and relationship characteristics are related to whether or not the respondent included the partner as an heir in his or her will. Again, only the significant effects are presented. Women in the sample were significantly more likely than men to include their partners as heirs in their wills. In fact, all but two women who had wills named their partners as beneficiaries. Respondents with higher levels of education were also more likely to include their partners in their wills. With respect to relationship characteristics, having held a commitment ceremony or exchanged a symbol of the relationship (for example, rings) was strongly related to including the partner as a beneficiary. Current financial ties between the partners also predicted the content of their wills. Respondents in relationships in which they made joint charitable gifts, were financially interdependent, jointly owned a motor vehicle, or jointly owned a home were more likely to name their partners as beneficiaries. Finally, respondents who had been in their relationships for five or more years were more likely to have included their partners in their wills.[136]

3. Life Insurance

One widely used estate planning device is life insurance. An insured who names his or her committed partner as the beneficiary of his or her life insurance policy can accomplish a transfer of wealth to the partner at the death of the insured.[137] Respondents were asked whether they had life insurance and whether their partners were named as beneficiaries of those policies. Over three-quarters of

134. $\chi^2(1)=18.08$, $p<.001$.

135. $\chi^2(1)=14.03$, $p<.001$.

136. A number of demographic and relationship characteristics were not significantly related to whether or not the partner was named as a beneficiary and are thus not presented in Table 3. Estate size, income, age, joint ownership of a pet, and having a child in the household were not associated with naming the partner as a beneficiary in a will.

137. Chase, *supra* note 40, at 388. In most instances, one partner cannot buy life insurance on the life of his or her partner. An alternative is for each partner to buy a life insurance policy on his or her own life and to name the other partner as the beneficiary. Seff, *supra* note 21, at 157.

Table 4

Significant Predictors of Having Named Partner as a Beneficiary of Life Insurance[138]

	Respondents with Opposite-Sex Partners		Respondents with Same-Sex Partners	
	% with life insurance to partner	Total N	% with life insurance to partner	Total N
Education				
< college degree	12.5	8	--	--
college degree	60.0	5	82.1	39
> college degree	60.0	10	92.5	67
	$\chi^2(2)=5.27$*		$\chi^2(1)=2.59$	
	$\gamma=.61$		$\gamma=.46$	
Ceremony/Exchange Symbol				
No	33.3	15	77.1	35
Yes	62.5	8	94.4	71
	$\chi^2(1)=1.81$		$\chi^2(1)=6.46$**	
	$\gamma=.54$		$\gamma=.66$	
Make Joint Charitable Gifts				
No	18.2	11	85.2	27
Yes	66.7	12	89.9	79
	$\chi^2(1)=5.78$**		$\chi^2(1)=0.42$	
	$\gamma=.80$		$\gamma=.21$	
Financial Interdependence				
No	26.7	15	85.0	20
Yes	75.0	8	89.5	86
	$\chi^2(1)=5.10$**		$\chi^2(1)=0.31$	
	$\gamma=.78$		$\gamma=.20$	
Joint Ownership of Motor Vehicle				
No	42.1	19	82.5	57
Yes	50.0	4	95.9	49
	$\chi^2(1)=0.08$		$\chi^2(1)=5.22$**	
	$\gamma=.16$		$\gamma=.67$	
Joint Ownership of Home				
No	27.8	18	83.3	36
Yes	100.0	4	91.4	70
	$\chi^2(1)=8.50$***		$\chi^2(1)=1.48$	
	$\gamma=1.00$		$\gamma=.36$	

*p<.10 **p<.05 ***p<.01 *p<.001

138. Table 4 is based on the 23 respondents with opposite-sex partners and the 106 respondents with same-sex partners who had life insurance. For one respondent with an opposite-sex partner, information about joint home ownership is missing.

the respondents had life insurance policies.[139] In addition, respondents with same-sex partners were considerably more likely to include their partner as a beneficiary.[140]

Only one demographic characteristic of respondents was significantly related to whether those with life insurance named their partner as a beneficiary.[141] Among respondents with opposite-sex partners, those with at least a college degree were much more likely to have included their partner as a beneficiary. In addition, several characteristics of the relationship were significantly related to whether the partner was named as a beneficiary. Financial interdependence, making joint charitable gifts, and joint ownership of a home were significant predictors of whether the partner was named as a beneficiary among respondents with opposite-sex partners. For respondents with same-sex partners, having held a commitment ceremony or exchanged a symbol of the relationship and joint ownership of a motor vehicle each had a significant positive relationship with whether the partner was named as a beneficiary.[142]

4. Health Care Decision Making

Respondents were asked to indicate whether they had named their partner as a surrogate health care decision maker.[143] Designating a partner as one's health care decision maker was much more common among respondents with same-sex partners than among respondents with opposite-sex partners.[144] Because respondents were only asked whether they had named their partner as their health care decision maker, this does not reflect the total number of people who had made arrangements for a health care decision maker.

Among respondents with opposite-sex partners, women were much more likely to have named their partners as their surrogate health care decision makers.[145] The only other demographic characteristic that significantly predicted whether the partner was named as a health care decision maker was income, and again, this was only for respondents with opposite-sex partners and the data did not show a clear linear trend. However, a number of relationship characteristics predicted whether the partner was named as a health care decision maker. For respondents with opposite-sex partners, those who made joint charitable gifts were substantially more likely to have made this arrangement. Financial home were also

139. 76.7% of respondents with opposite-sex partners (23 respondents) and 78.5% of respondents with same-sex partners (106 respondents) had life insurance policies.

140. Of those with life insurance policies, 43.5% of respondents with opposite-sex partners (10 respondents) and 88.7% of respondents with same-sex partners (94 respondents) designated their partner as a beneficiary.

141. *See* Table 4.

142. The duration of the relationship, having a child in the household, and joint ownership of a pet did not have significant effects for either group.

143. It should be noted that respondents were not asked whether they had named someone other than their partner as their surrogate health care decision maker.

144. 26.7% of respondents with opposite-sex partners (8 respondents) and 71.1% of respondents with same-sex partners (96 respondents) designated their partner as their surrogate health care decision maker.

145. *See* Table 5.

Table 5
Significant Predictors of having Named Partner as Health Care Decision Maker[146]

	Respondents with Opposite-Sex Partners		Respondents with Same-Sex Partners	
	% named partner	Total N	% named partner	Total N
Gender				
Male	7.7	13	65.3	49
Female	41.2	17	78.0	82
	$\chi^2(1)=4.71$**		$\chi^2(1)=2.50$	
	$\gamma=.79$		$\gamma=.31$	
Income				
<$20,000	42.9	7	58.8	17
$20,000–30,000	22.2	9	78.9	19
$30,000–40,000	60.0	5	68.4	38
$40,000–50,000	--		77.3	22
$50,000+	0.0	6	79.4	34
	$\chi^2(3)=6.99$*		$\chi^2(4)=3.30$	
	$\gamma=-.32$		$\gamma=.18$	
Own Pet Together				
No	29.4	17	57.1	35
Yes	23.1	13	79.2	96
	$\chi^2(1)=0.15$		$\chi^2(1)=6.01$**	
	$\gamma=-.16$		$\gamma=.48$	
Make Joint Charitable Gifts				
No	5.9	17	60.0	30
Yes	53.8	13	77.2	101
	$\chi^2(1)=9.24$***		$\chi^2(1)=3.22$*	
	$\gamma=.90$		$\gamma=.39$	
Financial Interdependence				
No	17.6	17	57.7	26
Yes	38.5	13	77.1	105
	$\chi^2(1)=1.63$		$\chi^2(1)=3.76$*	
	$\gamma=.49$		$\gamma=.42$	
Joint Ownership of Motor Vehicle				
No	20.8	24	63.2	76
Yes	50.0	6	87.3	55
	$\chi^2(1)=1.91$		$\chi^2(1)=10.11$***	
	$\gamma=.58$		$\gamma=.60$	
Joint Ownership of Home				
No	21.7	23	64.6	48
Yes	50.0	6	78.3	83
	$\chi^2(1)=1.76$		$\chi^2(1)=2.87$*	
	$\gamma=.57$		$\gamma=.33$	
Length of Relationship				
0–4 years	29.4	17	51.5	33
5+ years	23.1	13	80.6	98
	$\chi^2(1)=0.15$		$\chi^2(1)=9.96$***	
	$\gamma=-.16$		$\gamma=.59$	

*p<.10 **p<.05 ***p<.01 ****p<.001

146. Table 5 is based on 30 respondents with opposite-sex partners and 131 respondents with same-sex partners. Information about income is missing for three respondents with opposite-sex partners and for one respondent with a same-sex partner. Information about joint home ownership is missing for one respondent with an opposite sex partner.

moderately associated with naming the partner as health care decision maker but did not achieve statistical significance. For respondents with same-sex partners, owning a pet together, making joint charitable gifts, financial interdependence, and joint ownership of a motor vehicle or a home significantly predicted naming a partner as a surrogate health care decision maker. Long term relationships (five or more years) were also significantly predictive of whether the partner was named as a health care decision maker.[147]

5. Legal Registration

A number of the respondents in same-sex relationships lived in a municipality that allows domestic partner registration (Minneapolis). Approximately one-third (36.3%; 29 respondents) of those who were eligible to register their partnership had done so.

None of the demographic characteristics significantly predicted domestic partner registration. However, several characteristics of respondents' relationships were important predictors.[148] Respondents who had held a commitment ceremony or had exchanged a symbol of their relationship were twice as likely to have registered their partnership with the city. It is likely that many of these couples held their ceremony in conjunction with domestic partnership registration. Joint ownership of a home, a motor vehicle, and a pet were each significant predictors of domestic partner registration. Both the duration of the relationship and financial interdependence were moderately associated with registering the partnership, but neither achieved statistical significance.[149]

6. Association Among Legal Options

It is possible that once an unmarried committed couple has made contact with the legal system in relation to executing any one of these legal instruments (for example, a will), they are more likely to also use other legal instruments to order their affairs. This could be because they have made contact with a legal professional who can counsel them about additional measures that can be taken to prevent future legal difficulties or because they have independently decided to take advantage of multiple opportunities for planning. Combining the information gathered on each of the legal options described above, it is possible to determine the extent to which respondents with any one of these options have also taken advantage of the other options. This may provide a rough indication of the extent to which preventive law is already actively being practiced and of the degree to which there is room for improvement.

147. The effects of having held a commitment ceremony, exchanging a symbol of the relationship, and having a child live in the household were not significant for either group.

148. *See* Table 6.

149. The effects of having a child in the household and of making joint charitable gifts were not significantly associated with registration.

Table 6

Significant Predictors of Domestic Partner Registration

Eligible Respondents with Same-Sex Partners (N=83)		
	% registered	Total N
Ceremony/Exchange Symbol		
No	20.0	25
Yes	4.1	58
	$\chi^2(1)=3.72$*	
	$\gamma=.48$	
Own Pet Together		
No	14.3	21
Yes	41.9	62
	$\chi^2(1)=5.86$**	
	$\gamma=.63$	
Joint Ownership of Motor Vehicle		
No	22.2	45
Yes	50.0	38
	$\chi^2(1)=7.06$***	
	$\gamma=.56$	
Joint Ownership of Home		
No	20.7	29
Yes	42.6	54
	$\chi^2(1)=4.17$**	
	$\gamma=.48$	

*p<.10 **p<.05 ***p<.01 ****p<.001

The use of each legal instrument was significantly related to the use of the other instruments.[150] For example, respondents who had executed wills were more likely to also have made use of other planning documents, such as written agreements, than were respondents who had not executed wills. Of the instruments examined in this study, three are more likely to involve some contact with an attorney: wills, cohabitation agreements, and health care decision maker designations. Over one-half (51.5%; 17 respondents) of respondents with opposite-sex partners and 79.4% of respondents with same-sex partners (108 respondents) had executed at least one of these.

V. DISCUSSION

Unmarried committed partners invariably encounter a myriad of interrelated legal and psychological issues as they weave their way through the

150. p<.05. There was one general exception: domestic registration was not significantly related to any of the other options, most likely because fewer respondents were eligible to exercise this legal option.

intricacies of their intimate relationships and intertwined emotional and financial lives. Particularly because they must navigate a system that generally does not offer legal recognition of their relationships, long-term planning for such couples is at once increasingly necessary and fraught with pitfalls. The situations nonmarital partners face both during and after the relationship are clearly of both psychological and legal importance. Each of these situations can be addressed in a therapeutic manner as an attorney engaged in the practice of preventive law helps the partners to recognize and plan for those issues that are relevant to their circumstances.

Chase notes that a well-planned nonmarital relationship ought to include plans for how to handle the cohabitation, the couple's finances and property ownership (including insurance and pensions), the parties' parenting roles, medical emergencies and periods of incapacity, and the eventual termination of the relationship either through dissolution or death.[151] Working through each of these issues allows the partners to clarify their expectations about the relationship and to communicate those expectations to each other.[152] Identifying and solving problems before they arise can provide a guide for future interactions, reduce the anxiety and anger that may arise if the issues are not addressed, and increase the predictability and stability of the relationship itself.[153]

In particular, planning for the termination of the relationship, either as a result of the death of one partner or the dissolution of the relationship, is important. The termination of a committed relationship is inevitably emotionally difficult whether the couple is married or cohabiting. A study of gay and lesbian couples who separated found that, similar to opposite-sex couples, the parties experienced strong emotional responses to the break-up.[154] These emotions including loneliness, relief from conflict, and personal growth.[155] Partners also experienced happiness, confusion, independence, anger, guilt, helplessness, and nervousness.[156] Respondents who had been in long-term relationships and who had been in relationships in which the parties pooled their finances had more difficult periods of psychological adjustment.[157] This is likely due to the greater emotional investment in longer-term relationships and to the difficulties inherent in sorting out finances following a separation. Pooling finances may be one indication of the commitment to the relationship. One study of gay and lesbian couples found that couples who did not pool their finances were more likely to separate than were couples who did pool their finances.[158] Thus, ending a relationship in which the

151. Chase, *supra* note 40, at 373.

152. WEITZMAN, *supra* note 42, at 232–33.

153. *Id.* at 232–37.

154. Lawrence A. Kurdek, *The Dissolution of Gay and Lesbian Couples*, 8 J. SOC. & PERS. REL. 265, 273, 275 (1991). *See also* LESBIANS AND GAYS IN COUPLES AND FAMILIES: A HANDBOOK FOR THERAPISTS (Joan Laird & Robert-Jay Green eds., 1996).

155. Kurdek, *supra* note 154, at 273.

156. *Id.* at 271.

157. Letitia Anne Peplau et al., *Gay and Lesbian Relationships*, *in* THE LIVES OF LESBIANS, GAYS, AND BISEXUALS: CHILDREN TO ADULTS 250, 264 (Ritch C. Savin-Williams & Kenneth M. Cohen eds., 1996) (citing Kurdek, *supra* note 154).

158. *Id.* at 263 (citing P. BLUMSTEIN & P. SCHWARTZ, AMERICAN COUPLES: MONEY, WORK, SEX (1983)).

parties' finances have been intertwined may be more difficult, not only because of the financial decisions that must be made, but also because the relationship was more deeply committed at one time. In addition, one of the most common problems encountered by partners who separated was financial stress.[159]

Not only is the end of a committed relationship fraught with psychological, financial, and potential legal issues, but in the absence of a legal marriage, there is no clear procedure that provides a formal end to the relationship. Formal legal procedures are provided to structure the dissolution of a marriage, and while still difficult for the parties, the rules are at least somewhat defined. In contrast, nonmarital partners do not have clear boundaries to guide them legally or emotionally. As described above, the property rights of unmarried partners upon the termination of the relationship are unclear and piecemeal.[160] Moreover, because there is no formal or legal end to the relationship, such as a divorce decree, the parties may not experience a clear psychological end to the relationship. One commentator noted:

> Because gay people cannot be legally married anywhere in the United States, there is, for starters, no access to divorce court.
>
> As a result, every gay settlement is different, a cobbled agreement that can involve some combination of negotiation or mediation in court.
>
> "I used to say, 'Why do we want to get married? It doesn't work for straight people,'" said [an attorney] who specializes in gay and lesbian issues. "But now I say we should care: They have the privilege of divorce and we don't. We're left out there to twirl around in pain."[161]

Similarly, termination of the relationship due to the death of one partner is an emotional time for the surviving partner and for the rest of the decedent's family. Conflict over issues of health care decision making prior to the death and inheritance rights and funeral arrangements following the death only compound the partner's and the family's suffering.

A practitioner operating from a TJ-preventive law perspective can provide services to unmarried couples that, although not eliminating the psychological distress inherent in these situations, can reduce the anti-therapeutic effects of many of these possible outcomes. Indeed, some of the actions that can be encouraged and facilitated by the lawyer, such as clarifying and embodying expectations in a formal agreement, can be therapeutic for the couple and help to prevent future conflict. Helping the partners to recognize and make decisions regarding their relative rights to and obligations for their individual and separate property, income, assets, and debts during and after the relationship may assist the couple in communicating about, planning for, and ultimately avoiding future problems.

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159. Kurdek, *supra* note 154, at 273.
160. *See supra* notes 21–41 and accompanying text.
161. Johnson, *supra* note 82, at A20.

Clearly, there are opportunities for TJ-preventive law to operate in this context. Only 29% of unmarried committed partners in the present study had written agreements regarding their property. The majority of respondents (52%) had not even considered the utility of having an agreement with their partner. This is consistent with what attorneys see in practice. One family law specialist noted: "I see very bright educated people who entered into their relationship with only very vague ideas about the rights accrued when and if the relationship ends.... They're stunned when they find they can't walk into divorce court like any other citizen."[162] An attorney acting in a TJ-preventive lawyering role can educate clients about their rights and responsibilities in the relationship and about what legal protections they do and do not have. Further, the attorney can suggest the possibility of formalizing an agreement.

Twenty percent of the respondents in the present study had considered whether to have a written agreement and decided against it. Although some of these partners may have fully considered this option and made a decision not to execute an agreement, others gave reasons such as procrastination or that they were not planning to end the relationship. Practitioners can encourage the client not to delay drafting an agreement and can explain the benefits of a written agreement, even for couples who are committed to a long-term relationship. Moreover, even among those who did have written property agreements, almost one-half (48%) did not have provisions for property division at the end of the relationship and more than one half (64.6%) did not have provisions for maintenance and support. Again, most couples do not expect the relationship to end, but a sensitive practitioner concerned about the overall well-being of the clients can articulate both the benefits of including such provisions in an agreement and the lack of protection that can occur in the absence of such provisions.[163]

Assisting the couple to draft wills and take advantage of other estate planning techniques, though forcing the couple to confront their own mortality, helps to ensure that their testamentary preferences are known and effectuated. Clearly stated preferences can help to reduce conflict upon the death of one of the partners, particularly potential conflict between the surviving partner and the decedent's family. A practitioner operating from a TJ-preventive law perspective can help clients avoid potential disputes over estate distribution, funeral arrangements, and other decisions surrounding the death. Minimizing conflict at the time of death will ultimately be therapeutic for the surviving partner and both partners may secure peace of mind knowing that they have taken steps to prevent such discord. Many respondents did not have wills and many of those who were testate had not updated their wills to reflect their committed relationships. As with other written agreements, previous studies have found that "laziness" is the reason most people do not execute wills.[164] Effective practitioners might be able to

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162. *Id.*

163. *See* WEITZMAN, *supra* note 42, at 241 ("[T]he positive advantages of open and honest communication facilitated by precontract negotiations would seem to more than offset the temporary jolt that comes from anticipating a grim possibility.").

164. Rita J. Simon et al., *Public Opinion About Property Distribution at Death*, 5 MARRIAGE & FAM. REV. 25, 27 (1982).

encourage their clients, particularly those in unmarried committed relationships, to execute wills and to do so in a timely fashion.

Similarly, discussing the naming of a surrogate health care decision maker by executing a durable power of attorney for health care is an important service that practitioners can provide to clients in committed relationships. As described above, partners, not automatically considered as surrogate decision makers under most state statutes, have been excluded from health care decisions regarding their partners and have been denied the right to visit their partners.[165] The practitioner can suggest the benefits of naming a health care decision maker and can use the durable power of attorney for health care to designate a substitute decision maker. One study of gay men with AIDS found that making arrangements for advance directives gave the men a sense of accomplishment and control and that thinking about advance directives did not cause them to lose all hope.[166] Thus, raising the issue of planning for death was not anti-therapeutic for this sample and the act of taking control had therapeutic effects.

In serving clients who are in unmarried committed relationships, the attorney must be aware of the potential for conflicts of interest between the partners and should discuss these potential conflicts with the clients.[167] For example, if a wide disparity exists in the financial assets brought by the partners to the relationship, the legal interest in protecting the financial assets of the wealthier partner may conflict with the legal interest of securing support for the less financially secure partner. Further, if one partner has greater resources (education, financial assets, etc.) than the other, that partner may have greater bargaining power.[168] Similarly, when considering the therapeutic and anti-therapeutic consequences of a particular course of legal action, the attorney and the couple

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165. *See supra* notes 64–81 and accompanying text.

166. Jill Littrell et al., *Negotiating Advance Directives for Persons with AIDS*, 23 SOC. WORK HEALTH CARE 43, 47–48, 55 (1996).

167. Rule 1.7 of the Model Rules of Professional Conduct provides:

> (a) A lawyer shall not represent a client if the representation of that client will be directly adverse to another client, unless:
>
> (1) the lawyer reasonably believes the representation will not adversely affect the relationship with the other client; and
>
> (2) each client consents after consultation.
>
> (b) A lawyer shall not represent a client if the representation of that client may be materially limited by the lawyer's responsibilities to another client or to a third person, or by the lawyer's own interests, unless:
>
> (1) the lawyer reasonably believes the representation will not be adversely affected; and
>
> (2) the client consents after consultation. When representation of multiple clients in a single matter is undertaken, the consultation shall include explanation of the implications of the common representation and the advantages and risks involved.

MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.7 (1995).

168. Peplau, *supra* note 157, at 255–56. Indeed, some suggest that each partner should be represented by independent counsel. *See, e.g.*, Mike McCurley, *Same-Sex Cohabitation Agreements*, *in* PREMARITAL AND MARITAL CONTRACTS: A LAWYER'S GUIDE TO DRAFTING AND NEGOTIATING ENFORCEABLE MARITAL AND COHABITATION AGREEMENTS 195, 207 (Edward A. Winer & Lewis Becker eds., 1993).

must consider *for whom* the result is therapeutic or anti-therapeutic.[169] The legal and therapeutic interests of the two individuals and of the couple may not always coincide. Thus, attention should be paid to both the legal and therapeutic interests of each partner and of the partnership, particularly when there is inequity in the power held by the partners in the relationship.[170] Coinciding and divergent interests should be considered when selecting and using any of the preventive law instruments discussed here.

The preventive law technique of engaging in annual legal check-ups can be effective in relation to each of the potential estate planning tools.[171] A legal check-up provides the attorney an opportunity to update the clients about developments in the law and provides the clients with an opportunity to update the attorney about changes that have taken place in their lives. For example, the attorney could alert the couple if the possibility for legal registration as domestic partners became available. Two respondents in the instant study indicated that they had considered entering into a written property agreement but that they had not been in the relationship long enough. A lawyer could discuss the possibility of executing an agreement with the clients and, if they decide to wait until the relationship is sufficiently developed, could consult with the clients at a later date to formalize an agreement.

Similarly, a large number of respondents had not updated their wills since their relationships began. Unfortunately, the data do not indicate whether these respondents had considered updating their wills and chosen not to or had not entertained the possibility of an update. Nonetheless, the fact that substantial numbers of opposite-sex partners and some same-sex partners had not updated their wills since they began their relationships suggests that a lawyer operating from a TJ-preventive law perspective could help the clients respond effectively to life changes. The lawyer can ensure that the client is aware of the effects of including the partner in his or her will and can help the client effectuate his or her testamentary preferences, whether or not those preferences include the partner as a beneficiary. The data do not indicate how many of the respondents had updated their designation of a health care decision maker but presumably some had not. Thus, as with wills, the lawyer can help clients ensure that their wishes regarding the participation of their partners in their health care are expressed and followed.

In order for a TJ-preventive law approach to be successful in the estate planning context, as well as in other areas, the practitioner must have some kind of

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169. David B. Wexler, *Reflection on the Scope of Therapeutic Jurisprudence*, *in* LAW IN A THERAPEUTIC KEY: DEVELOPMENTS IN THERAPEUTIC JURISPRUDENCE, *supra* note 95, at 815–16 (noting that there may be "a clash whereby a legal rule is therapeutic for one person or participant and anti-therapeutic for another").

170. *See generally* Elizabeth Kingdom, *Cohabitation Contracts and Equality*, 18 INT'L J. SOC. L. 287 (1990) [hereinafter Kingdom, *Cohabitation Contracts and Equality*]; Elizabeth Kingdom, *Cohabitation Contracts: A Socialist-Feminist Issue*, 15 J. L. & SOC'Y 77 (1988).

171. Stolle notes that this type of ongoing consultation with existing clients does not constitute an improper solicitation of business. Stolle, *supra* note 76. *See also* Louis M. Brown, *The Scheme: Maximize Opportunities, Minimize Future Legal Trouble*, 6 PREVENTIVE L. REP. 17, 19 (1987).

contact with the client. That is, before a lawyer can make use of the preventive law tools of client intake, client counseling, and the legalcheck-up, the client and the lawyer must have some initial professional interaction. Many of the respondents in the present study likely had made some contact with an attorney. Of respondents with opposite-sex partners, one-third had wills and 26.7% had named their partner as their health care decision maker. Of respondents with same-sex partners, 60% had wills and 71.1% had named their partner as their health care decision maker. Overall, 29% of respondents had written property agreements. Over one-half of each group[172] had executed at least one of these three instruments. However, while having any one of the instruments made it more likely that the respondent also had another, only 18.3% of the sample reported having all three. Thus, even those committed partners who have made contact with the legal system and have begun to engage in long-term planning may not have comprehensive protection. The practice of TJ-preventive law can help to fill these gaps using client counseling to appraise the full range of the partners' planning needs. Accordingly, the practitioner can introduce a couple who came into the office for wills to the possible range of other planning tools, such as written agreements and durable powers of attorney for health care.

It appears that persons in same-sex committed relationships are more likely to have made contact with the system than are those in opposite-sex committed relationships. Same-sex respondents were more likely to have wills, to have updated those wills, and to have designated their partners as their substitute decision makers than were opposite-sex respondents. Several possible reasons for these differences exist. First, opposite-sex nonmarital partners have the option of marrying. Some may have rejected the institution of marriage, while others may not feel that their relationship has risen to the level of commitment required for marriage. In contrast, same-sex partners cannot be joined by a legally recognized marriage. Thus, it is possible that greater numbers of same-sex couples are in "marriage-like" committed relationships than are opposite-sex couples. Second, a great deal of political activism and education have surrounded the issues of gay marriage and gay rights in general.[173] Thus, same-sex partners may be more aware of the lack of legal protections for nonmarital partners and the resulting necessity for private arrangements.

However, it is likely that some percentage of both groups have not made contact with an attorney or with the legal system in relation to their committed relationships. Some of these may consult an attorney for assistance in matters not ostensibly related to their relationship, such as the purchase of a home or other property. The lawyer can then use client intake and interviewing techniques to ascertain whether to suggest the exploration of estate planning issues. Other individuals may not have occasion to have any direct contact with the legal system.

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172. 51.4% of respondents with opposite-sex partners and 79.4% of respondents with same-sex partners had executed at least one of the above instruments.

173. *See, e.g.*, CURRY ET AL., *supra* note 77; LAMBDA LEGAL DEFENSE AND EDUCATION FUND, INC., AIDS LEGAL GUIDE (Abby R. Rubenfeld ed., 2d ed. 1987); MARK S. SENAK, HIV, AIDS, AND THE LAW: A GUIDE TO OUR RIGHTS AND CHALLENGES (1996); Paula L. Ettelbrick, *Legal Issues in Health Care for Lesbians and Gay Men*, 5 J. GAY & LESBIAN SOC. SERV. 93 (1996).

Lawyers should, therefore, engage in general community education activities related to these issues.

In particular, the results of the present study indicate that people who are younger, less educated, and with smaller estates are less likely to have cohabitation contracts with their partners. Therefore, education activities specifically targeted at these groups might be particularly effective. Because younger people and those with smaller estates are also less likely to have wills,[174] efforts to educate these groups about the importance of long-term financial and health care planning are likely to provide benefits to a wide range of people, in addition to those who are in committed partnerships. Moreover, the results of the current study indicate that a substantial number of persons in nonmarital committed relationships hold mistaken beliefs about common-law marriage and about who would inherit their property if they died intestate. Importantly, those without wills were most likely to hold these mistaken beliefs. Helping to educate nonmarital couples about their rights and the need for careful planning could become an important extension of the practice of TJ-preventive law.

We have applied the perspective of TJ-preventive law to the issues involved in the long-term planning and protection of unmarried committed partners. Consistent with this perspective, we have attempted to demonstrate the differences in the way the law treats married and unmarried partners as well as the ways in which the conscientious practice of TJ-preventive law can maximize the therapeutic potential of estate planning and minimize the possibility for future conflict between the partners and with third-parties. However, this approach should be used in conjunction with efforts aimed at legal reform. Fellows and her colleagues noted that "[a]lthough persons in committed relationships can protect their respective interests under current law through private agreements, the protections fall short of the predictability and enforceability provided to persons who are married."[175] Previous research has demonstrated that even people who are aware of the ramifications of failing to engage in long-term planning are reluctant to consider the issues involved (for instance, death or the break-up of the relationship) or are lazy about taking action.[176] This is one justification for statutory protection for spouses in these areas: to fill the gaps that occur when the parties do not plan sufficiently. Moreover, statutory protections can address issues of power and inequality between the partners that may be stumbling blocks to the sufficient private ordering of affairs.[177]

VI. CONCLUSION

In recent years, increasing numbers of people are living in unmarried committed partnerships. Whether they live in these relationships because they choose to or because the option of legal marriage is not available to them, differences in the legal treatment of married and unmarried partners make long-term financial and health care planning of the utmost importance. Both during and

174. Johnson & Robbennolt, *supra* note 118, at 484.
175. Fellows et al., *supra* note 59, at 18.
176. Chambers, *supra* note 23, at 457; Fellows et al., *supra* note 133, at 339.
177. *See* Kingdom, *Cohabitation Contracts and Equality*, *supra* note 170.

after the relationship, the financial and health care issues faced by nonmarital partners have important legal and psychological facets. Legal practitioners can assist clients who are in unmarried committed relationships in using the appropriate preventive law tools, such as contracts, wills, and durable powers of attorney, to meet their legal needs and to promote their psychological well-being.

The data presented here suggest that a notable number of people in unmarried committed partnerships have not engaged in beneficial legal planning. Moreover, many of those who have taken some steps toward planning for their long-term future, still may not be thoroughly prepared. The perspective of TJ-preventive law suggests that practitioners should educate those who could profit from legal planning about the need for and benefits of estate and health care planning. Moreover, practitioners should use client counseling and legal check-ups to maximize the likelihood that their clients are advised about the most appropriate preventive strategies. Ultimately, the practitioner can use the instruments of preventive law to help persons in unmarried committed relationships navigate the uncertainties in their legal environment and to execute legally effective documents that will maximize the therapeutic potential of long-term planning and minimize the possibility for future conflict and litigation.