

THE EXPRESSIVE FUNCTION OF SUCCESSION LAW AND THE MERITS OF NON-MARITAL INCLUSION

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Internally compromised statutes cannot be seen as flowing from any single coherent scheme of principle; on the contrary, they serve the incompatible aim of a rulebook community, which is to compromise convictions along lines of power. They contradict rather than confirm the commitment necessary to make a large and diverse political society a genuine rather than a bare community: the promise that law will be chosen, changed, developed, and interpreted in an overall principled way.¹

"To be gay and on the 'outside' is less to be denied protections and freedom than it is simply to not count—unanimity and sameness are the law until someone is proven different."²

I. INTRODUCTION

In many instances, facially-discriminatory laws cut twice against their disfavored group. First, such laws separate out the targeted group for inferior treatment. Second, such laws sometimes stigmatize the disfavored group with an inferior status. This stigmatization enables and encourages additional public and private discrimination.

A law that disqualifies gay men and lesbians from adopting children, for example, does far more than infringe their ability to adopt. Such discrimination also serves an expressive function; it expresses the state's judgment that gay men and lesbians are unfit to raise children. It supports the inference, among others, that gay men and lesbians are a danger to the moral and/or physical health of children.

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1. RONALD DWORKIN, *LAW'S EMPIRE* 214 (1986).

2. Sarah Pettit, *Justify Our Love*, in *OUTSIDE THE LAW: NARRATIVES ON JUSTICE IN AMERICA* 130, 133 (Susan Richards Shreve & Porter Shreve eds., 1997).

This expressed judgment and its inferences support further discrimination against gay men and lesbians in areas far removed from the adoption context.³

What is less readily apparent is that facially-neutral laws also can cut twice and can cut as deeply as facially-discriminatory laws. A law that on its face treats two groups equally disadvantages one group relative to the other when the law fails to recognize relevant fundamental differences between the groups.⁴ Such facially-neutral disparate treatment also can serve an expressive function. The state's failure to consider relevant fundamental differences can implicitly express the state's judgment that the disfavored group does not merit positive attention. The law of intestacy and its treatment of same-sex committed partners serves as an example of this phenomenon and is the focus of this Article.

Each state's intestacy statute provides a scheme for distributing an owner's property at her death in the absence of valid alternate arrangements for the distribution of such property made by the property owner during her life.⁵ Such alternate arrangements might include a will and/or will substitutes such as a joint tenancy or an inter vivos trust.

The typical intestacy statute does not distinguish on its face between the inheritance rights of non-gay people and the inheritance rights of gay people. Thus, such "neutral" statutes ignore an important distinction between the lives of gay people and the lives of non-gay people: Gay men and lesbians differ from non-gay people with respect to their core romantic and affectional preferences and, it seems likely therefore, with respect to their donative preferences. When an intestacy statute ignores this fundamental distinction, and the state does not provide for legally recognized same-sex marriage, the intestacy statute discriminates in two ways against gay men and lesbians. First, it denies gay men and lesbians equal donative freedom. Second, such disparate treatment devalues gay men and lesbians and their relationships.

With the distinction in romantic and affectional preferences of gay people and non-gay people in mind, the typical intestacy statute's first cut against gay people becomes apparent on the face of the intestacy statute. In every jurisdiction, the intestacy statute favors the decedent's surviving spouse over other possible inheritors. Where the decedent is survived by her spouse, the typical intestacy statute calls for distribution of the decedent's intestate property to the spouse and the decedent's descendants or, if the decedent left no descendants, to the spouse

3. See, e.g., ANITA BRYANT, *THE ANITA BRYANT STORY: THE SURVIVAL OF OUR NATION'S FAMILIES AND THE THREAT OF MILITANT HOMOSEXUALITY* 145-48 (1977) (urging repeal of a gay civil rights ordinance lest gay people be allowed to serve as role models for children leading to the "recruitment of our children...[to] freshen the ranks" of gay people); Tracy Thompson, *Scouting and New Terrain*, WASH. POST MAGAZINE, Aug. 2, 1998, at W6 (reporting the concerns of parents of Boy Scouts that a gay Scout leader might molest a child or influence the child's sexual identity).

4. See generally MARTHA A. FINEMAN, *THE ILLUSION OF EQUALITY: THE RHETORIC AND REALITY OF DIVORCE REFORM* (1991) (arguing that application of facially-neutral laws to persons in dissimilar circumstances may perpetuate inequality).

5. See, e.g., UNIF. PROBATE CODE §§ 2-101 to -105 (amended 1997).

and the decedent's parents.⁶ The drafters of intestacy statutes justify favoring the surviving spouse by reference to the decedent's imputed donative intent.⁷ The underlying assumption is that the decedent would have provided generously for her surviving spouse had she left a valid plan for the distribution of her estate.⁸

In contrast, intestacy law generally does not favor a decedent's surviving non-marital partner, whether that partner is of the same sex as the decedent or not.⁹ In all but two states, the surviving non-marital partner will not share in the decedent's estate as an intestate heir. Only in Hawaii and New Hampshire may the surviving non-marital partner take a portion of the decedent's intestate estate under certain circumstances.¹⁰

The typical intestacy statute's second cut at gay people—is its discriminatory message—is less obvious from the face of the statute itself. Nevertheless, the expressive function of intestacy law has not escaped notice by those concerned with proposed succession law reforms aimed at securing same-sex equality. Indeed, as the dialogue on same-sex equality under succession law has intensified in recent years among those who teach, write, and practice in the field of donative transfers,¹¹ the discussion has been joined by those who see themselves as engaged in a "cultural war" over gay and lesbian equality.¹² These advocates

6. See, e.g., *id.* §§ 2-102 to -103. If the decedent left neither a spouse nor descendants, most intestacy statutes distribute the decedent's intestate property to her parents and/or siblings or, if the decedent also left no parents or siblings, to her more distant blood relations. See, e.g., *id.* § 2-103; WILLIAM M. MCGOVERN, JR. ET AL., WILLS, TRUSTS AND ESTATES INCLUDING TAXATION AND FUTURE INTERESTS 13-14 (1988).

7. See Lawrence W. Waggoner, *Marital Property Rights in Transition*, 59 MO. L. REV. 21, 29, 62 (1994).

8. See *id.* at 62.

9. See *id.* at 63; Mary Louise Fellows et al., *Committed Partners and Inheritance: An Empirical Study*, 16 LAW & INEQ. J. 1, 15 (1998).

10. Hawaii allows for intestate inheritance rights to a decedent's registered same-sex partner. See HAW. REV. STAT. ANN. §§ 572C-1 to -7 (Michie Supp. 1997). See also *infra* notes 92-98 and accompanying text (discussing Hawaii's reciprocal beneficiaries statute). New Hampshire provides intestacy rights for unmarried "[p]ersons cohabiting and acknowledging each other as husband and wife, and generally reputed to be such, for the period of three years, and until the decease of one of them..." N.H. REV. STAT. ANN. § 457:39 (1992).

11. See, e.g., Fellows, *supra* note 9; T.P. Gallanis, *Default Rules, Mandatory Rules, and the Movement for Same-Sex Equality*, 60 OHIO ST. L.J. (forthcoming Nov. 1999) (pointing out how the Uniform Probate Code's intestacy provisions discriminate on the basis of sexual orientation and arguing that the movement for same-sex equality should devote more efforts to advocating for reform of default rules that deny equal rights to sexual minorities); Waggoner, *supra* note 7, at 64.

12. See, e.g., Max Vanzi, *Panel OKs Bill That Would Let Gay Couples Adopt*, LOS ANGELES TIMES, Apr. 3, 1997, at A3 (reporting comment by the leader of the Traditional Values Coalition that proposed California legislation extending inter alia inheritance rights to same-sex couples is part of a "homosexual agenda" that, if successful, "will destroy our nation and our civilization"); *Hawaii's Domestic Partners Law a Bust*, WASH. POST, Dec. 25, 1997, at A14 (stating that Hawaii's legislation extending inheritance rights to same-sex couples was not limited to only same-sex couples in order to make the legislation more palatable to conservatives).

have not come to the debate solely because of concern for their particular views on donative freedom. Rather, some social conservatives fear, and advocates for gay and lesbian equality seek, reforms such as extension of intestate inheritance rights to same-sex couples principally for the message that such changes in the law would proclaim to society.¹³

This Article considers the expressive function of same-sex equality within the law governing intestate succession. The message of same-sex equality cannot be measured, however, in isolation from the other merits of same-sex inclusion or exclusion within any particular area of law. For example, if good cause, grounded in the accepted principles of succession law, exists for same-sex exclusion from the intestacy scheme, then one must reevaluate the expressive function of such exclusion. Therefore, this Article first considers the merits of same-sex inclusion within intestacy law.

The model American law governing the transfer of property at death, the Uniform Probate Code, is in accord with all but two American jurisdictions in failing to provide for intestate inheritance rights for a surviving non-marital partner.¹⁴ Article II of the Uniform Probate Code (“Article II” or “1990 Code”), which was first promulgated in 1969 and was extensively revised in 1990, provides the law of intestate succession as well as substantive rules covering the execution and revocation of wills and certain other non-probate instruments.¹⁵

Part II of this Article examines the 1990 Code in an attempt to discover the hierarchy of values upon which it is based. This analysis identifies seven values central to Article II: (1) promotion of donative freedom, (2) desire for simplicity and certainty, (3) de-emphasis of formalism, (4) movement toward the unification of the subsidiary laws of wills and will substitutes, (5) endorsement of the “marital-sharing” theory, (6) responsiveness to the changing nature of “family,” and (7) desire for multi-state uniformity in succession law.

Part II also considers whether the 1990 Code’s denial of intestate inheritance rights to surviving same-sex partners is consistent with these values. This Part evaluates several likely objections to the provision of same-sex partner intestate inheritance rights in light of the values and provisions of the 1990 Code. This Part concludes, particularly in light of empirical evidence reported since the 1990 revisions to Article II, that same-sex exclusion from Article II renders the 1990 Code structurally inconsistent and undermines Article II’s principal goal of promoting donative freedom.¹⁶ Part II urges reform of the 1990 Code to include

13. See Cass R. Sunstein, *On the Expressive Function of Law*, 144 U. PA. L. REV. 2021, 2022 (1996) (“Many people support law because of the statements made by law, and disagreements about law are frequently debates over the expressive content of law.”).

14. See UNIF. PROBATE CODE §§ 2-101 to -103 (amended 1997).

15. See *id.* art. II, prefatory note.

16. Many of this Article’s arguments and conclusions would have equal force with respect to the debate over extension of intestate inheritance rights to mixed-sex non-marital partners. This Article focuses particularly on the position of persons in same-sex couples because they are the non-marital partners in the more perilous position, unable to enter into a legally valid marriage in any state.

same-sex partners within its intestacy provisions in order to better effectuate the values of the 1990 Code.

Part III of this Article considers the expressive function of inclusion reform as well as of the present exclusion of such inheritance rights in light of the existing structure of the 1990 Code. This Part concludes that Article II's failure to provide intestate inheritance rights to a surviving same-sex partner is significant, not only because of the succession rights that it denies to gay men and lesbians, but also because of the expressive function of the 1990 Code. Article II, viewed in the light of the structural inconsistency identified in Part II, appears to endorse the position of those who devalue gay men and lesbians and their committed relationships. Part III urges that, if the 1990 Code is not reformed to provide intestate inheritance rights to same-sex partners, the 1990 Code be amended to explain this exclusion in a manner that lessens Article II's devaluing message.

II. THE VALUES OF THE 1990 PROBATE CODE

Article II does not contain a concise statement of the values or principles that the drafters of the 1990 Code sought to implement through its substantive provisions.¹⁷ Moreover, various provisions of Article II appear on their face to serve contradictory values.¹⁸ However, the drafters did provide sufficient clues to their motivations such that one can construct with some confidence a hierarchy of values that grounds the 1990 Code.

In attempting to uncover these values, one must be cautious lest one conflate possibly happenstance results with motivating principles.¹⁹ Thus, my conclusions regarding the values that ground the 1990 Code are based principally on the drafters' explanations of the policies that the various provisions of Article II seek to serve and the drafters' explanations as to why certain provisions were modified. Such explanations are found in the drafters' comments to Article II.²⁰

17. Article I of the Uniform Probate Code reveals that

"[t]he underlying purposes and policies of this Code are: (1) to simplify and clarify the law concerning the affairs of decedents...; (2) to discover and make effective the intent of a decedent in distribution of his property; (3) to promote a speedy and efficient system for liquidating the estate of the decedent and making distribution to his successors; (4) to facilitate use and enforcement of certain trusts; (5) to make uniform the law among the various jurisdictions."

UNIF. PROBATE CODE § 1-102 (amended 1997).

18. See Lawrence H. Averill, Jr., *An Eclectic History and Analysis of the 1990 Uniform Probate Code*, 55 ALB. L. REV. 891, 911 (1992) (noting the difficulty in stating definitively what policies ground probate laws generally or the 1990 Code more specifically because "[e]ven among ascertainable and accepted policies there are overlaps, conflicts, and inconsistencies").

19. See *id.* ("Tracking policies in probate laws, even the 1990 UPC, may be similar to tracking court decisions concerning rules of will construction. It may be difficult to distinguish between what is a pervasive objective policy and a mere subjective result.").

20. I have tried to avoid making inferences concerning the drafters' motives even when I am reasonably confident that I have correctly inferred such motives. For example, I am reasonably certain that the revised section 2-109, which addresses advancements of an intestate estate, reflects the drafters' desire to promote certainty and

The drafters' catalogue of the external factors that prompted the review of the 1969 Uniform Probate Code provides a framework for this analysis:

In the twenty or so years between the original promulgation of the Code and the 1990 revisions, several developments occurred that prompted the systematic round of review. Three themes were sounded: (1) the decline of formalism in favor of intent-serving policies; (2) the recognition that will substitutes and other inter vivos transfers have so proliferated that they now constitute a major, if not the major, form of wealth transmission; (3) the advent of the multiple-marriage society, resulting in a significant fraction of the population being married more than once and having stepchildren and children by previous marriages and in the acceptance of a partnership or marital-sharing theory of marriage.²¹

A. The Promotion of Donative Freedom

Succession law generally places donative freedom at the apex of its hierarchy of values.²² From this follows the generally accepted principle that "succession law should reflect the desires of the 'typical person,' both with regard to protecting expressions of desire and anticipating situations where those expressions are inadequately presented."²³ For this reason, the drafters of the 1990 Code intended to adopt revisions that would carry out the intent of the donor and replace provisions of the former Uniform Probate Code that the drafters concluded had the effect, more often than not, of defeating donative intent.²⁴

The 1990 Code's revised rules for ademption by extinction illustrate this pattern.²⁵ The common law rule of ademption by extinction, which was codified in the 1969 Uniform Probate Code and remains the majority approach, provides that a specific devise of property is of no effect if that property is not found in the testator's estate at her death.²⁶ This rule is known as the "identity" theory of ademption.²⁷ Thus, under the identity theory, if a testator devises her "house in

reduce litigation in succession law. Section 2-109 alters the common law rule of advancements so that no lifetime gift will be credited as an advancement against an intestate share absent a contemporaneous writing by the donor or a written acknowledgment by the heir evidencing that such a gift was intended to be an advancement. *See* UNIF. PROBATE CODE § 2-109(a) & cmt. (amended 1997). Nevertheless, because the drafters did not expressly state in this section or its accompanying comment that the revisions to this provision were motivated by a desire to promote certainty, I have not relied on this section to support my conclusion that the promotion of certainty in succession law is one of the values underlying the 1990 Code.

21. *Id.* art. II, prefatory note.

22. *See id.* art. II, pt. 2 general cmt. (noting that there are "few instances in American law where the decedent's testamentary freedom with respect to his or her title-based ownership interests must be curtailed").

23. Averill, *supra* note 18, at 912.

24. *See* John H. Langbein & Lawrence W. Waggoner, *Reforming the Law of Gratuitous Transfers: The New Uniform Probate Code*, 55 ALB. L. REV. 871, 874 (1992).

25. *See id.* *See also* UNIF. PROBATE CODE § 2-606(a)(6) (amended 1997).

26. *Id.* § 2-606 cmt.

27. *Id.*

Connecticut" to her favorite niece, but subsequently the testator sells that home and buys a new home in New Hampshire, the niece would have no claim to receive the New Hampshire house under the testator's will.

The drafters of the 1990 Code concluded that "[t]he application of the 'identity' theory of ademption has resulted in harsh results in a number of cases, where it was reasonably clear that the testator did not intend to revoke the devise."²⁸ To remedy this perceived shortcoming, the drafters revised the Uniform Probate Code to implement the "intent" theory of ademption.²⁹ Thus, section 2-606 of the 1990 Code now provides that

[a] specific devisee has a right to the specifically devised property in the testator's estate at death and...a pecuniary devise equal to the value as of its date of disposition of other specifically devised property disposed of during the testator's lifetime [if] it is established that ademption would be inconsistent with the testator's [intent].³⁰

The 1990 Code is replete with additional provisions that the Code expressly points out serve to effectuate the decedent's donative intent.³¹ Of these,

28. *Id.*

29. *See id.*

30. *Id.* § 2-606(a).

31. *See, e.g., id.* § 2-104 & cmt. (noting that the requirement that the intestate heir survive the intestate decedent by 120 hours in order to take an intestate share of the estate sometimes "prevents the property from passing to persons not desired by the decedent"); *id.* § 2-106 & cmt. (adopting the per capita at each generation scheme of representation because empirical data suggest it is the preferred method of the typical intestate decedent); *id.* § 2-109 & cmt. ("If the donor intends that any transfer during the donor's lifetime be deducted from the donee's share of his estate, the donor may either execute a will so providing or, if he or she intends to die intestate, charge the gift as an advance by a writing within the present section."); *id.* § 2-301 & cmt. (providing an intestate share for a surviving spouse, under certain circumstances, where the testator married the spouse after execution of the will and the will does not demonstrate an intent to disinherit the spouse, because this "is what the testator would want the spouse to have if he or she had thought about the relationship of his or her old will to the new situation"); *id.* § 2-302 & cmt. (noting that the drafters crafted the provision relating to pretermitted children with an awareness that in certain family circumstances the testator likely intended that her child not take any of her estate); *id.* § 2-503 (validating as a will a document that was not executed with the prescribed testamentary formalities if the court is convinced, by clear and convincing evidence, that the decedent intended the document to be her will); *id.* § 2-503 cmt. ("Section 2-503 means to retain the intent-serving benefits of Section 2-502 formality without inflicting intent-defeating outcomes in cases of harmless error."); *id.* § 2-506 cmt. (noting that the choice of law provisions, which validate a will that was executed in compliance with Article II's formalities or that was in compliance with the law at the time of execution where executed or where the testator was then domiciled or that is in compliance at the time of death with the law where the testator is then domiciled, are intended "to provide a wide opportunity for validation of expectations of testators"); *id.* §§ 2-507(b)-(d) & cmt. (containing several presumptions intended to carry out the testator's intent with respect to the revocation of a will); *id.* § 2-509 & cmt. (containing several presumptions intended to carry out testator's intent with respect to the revival of a will); *id.* § 2-510 (allowing incorporation by reference into a will of an existing document if the will

Article II's intestacy provisions seem most relevant to this Article's inquiry into whether the 1990 Code's failure to provide intestate inheritance rights for same-sex surviving partners is consistent with the values that ground the 1990 Code.

Intestacy statutes generally seek to further the testamentary freedom of those who, for whatever reason, die without exercising their right to provide expressly for the distribution of their property at death.³² These statutes do so by attempting to approximate the distributive scheme that the decedent likely would have chosen had she acted to provide for the distribution of her estate at her death.³³ The 1990 Code's intestacy provisions seek to implement this goal by refining the 1969 Uniform Probate Code's intestacy provisions so that the intestacy scheme reflects the realities of modern families and the wishes of decedents who lived in such families.³⁴ In creating the 1990 Code, the drafters expressly relied upon empirical studies concerning the distributive preferences of married couples to support the decision to increase the share of the intestate estate that is distributed

manifests the testator's intent to do so); *id.* § 2-511 & cmt. (noting that the revisions to provisions on testamentary additions to trusts "are designed to remove obstacles to carrying out the decedent's intention that were contained in the pre-1990 version"); *id.* § 2-513 & cmt. (allowing, "[a]s part of the broader policy of effectuating a testator's intent," incorporation by reference of a document that is not in existence at the execution of the will or a document that is altered after execution of the will, which document may direct how to dispose of the testator's tangible personal property); *id.* § 2-603 & cmt. (noting that the antilapse provision "is a rule of construction, designed to carry out [the testator's] presumed intention"); *id.* § 2-704 (seeking to implement the donor's intent to prevent an inadvertent exercise by the donee of a power of appointment); *id.* § 2-705(b) & cmt. (seeking to effectuate presumed donative intent with respect to a class gift that might be construed to include a biological child of a parent when the child did not live during her minority as part of the parent's household or the household of the parent's parent, brother, sister, spouse, or surviving spouse); *id.* § 2-903 (providing that when a disposition is invalid under the statutory rule against perpetuities, the court may reform the disposition "in the manner that most closely approximates the transferor's manifested plan of distribution and is within the 90 years allowed by" the statutory rule); *id.* art. II, pt. 6 general cmt. (noting that all of the rules of construction contained in Parts 6 and 7 of Article II yield to a finding that the donor had a contrary intent); *id.* art. II, pt. 7 general cmt. (noting that Part 7 of Article II adds several new rules of construction "as desirable means of carrying out common intention").

32. Fellows, *supra* note 9, at 11–12 ("By reflecting probable donative intent of those likely to die without a will, the intestacy statute furthers testamentary freedom because it gives persons the right not to have to execute wills to assure that accumulated wealth passes to their intended takers."). Professor Fellows suggests that intestacy statutes also serve several subsidiary goals; she argues that intestacy statutes seek to promote harmony among expectant takers and respect for the legal system by providing for a property distribution scheme that the expectant takers believe is fair, and seek also to promote the nuclear family. *See id.* at 12–13. Article II provides no express indication that the drafters had these subsidiary goals in mind when they drafted the 1990 Code's intestacy provisions.

33. *See* Averill, *supra* note 18, at 912–13 (noting that intestacy statutes seek to implement the "objective intent" of the average person); Lawrence W. Waggoner, *The Multiple-Marriage Society and Spousal Rights Under the Revised Uniform Probate Code*, 76 IOWA L. REV. 223, 230 (1991) (concluding that the decedent's intent is the "predominant consideration" behind an intestacy statute).

34. *See* UNIF. PROBATE CODE art. II, pt. 1 general cmt. (amended 1997).

to a surviving spouse. These studies suggested that the 1969 Uniform Probate Code's intestacy scheme distributed less of a decedent's property to a surviving spouse than the typical married property owner would prefer.³⁵

By one estimate, there are approximately 3.4 million adult Americans living in same-sex partnerships.³⁶ There has long been anecdotal evidence that gay men and lesbians in committed same-sex relationships generally do not prefer the typical prevailing intestacy scheme—that is, a scheme that distributes their estates to their descendants, parents, siblings, or more distant relations but not to the surviving same-sex partner. For example, gay men and lesbians have occasionally attempted to adopt their partners as their children in order to bring their partners within the existing intestacy scheme, which favors children over ancestors as intestate takers.³⁷ That gay and lesbian property owners would resort to adoption, even though this method has serious drawbacks as an estate planning method, principally that adoption generally is not reversible,³⁸ is evidence of a strong displeasure on the part of some gay men and lesbians with most extant intestacy schemes.

Until recently, however, there has been little empirical evidence concerning the distributive preferences of gay men and lesbians who are in committed same-sex relationships. The lack of such empirical data undermines an argument that the 1990 Code's failure to provide intestate inheritance rights for same-sex surviving partners is inconsistent with Article II's effort to promote donative freedom. Arguably, one should not fault the drafters for failing to promote the donative preferences of gay men and lesbians in committed relationships if those preferences are unknown.³⁹

35. See *id.* § 2-102 cmt. See also *id.* § 2-106 cmt. (stating that empirical studies provide support for the 1990 Code's adoption of the per capita at each generation scheme of representation); *id.* § 2-302 cmt. (stating that the scheme governing the share of the estate awarded, under certain circumstances, to a child born to the testator after she executes her will is supported by empirical evidence).

36. Fellows, *supra* note 9, at 3.

37. See Ralph C. Brashier, *Children and Inheritance in the Nontraditional Family*, 51 UTAH L. REV. 93, 170 n.259 (1996) (citing cases that reach conflicting results as to whether the law allows the adult adoption of a same-sex partner); Adam Chase, *Tax Planning for Same-Sex Couples*, 72 DENV. U. L. REV. 359, 394 (1995) (noting that gay and lesbian couples occasionally resort to adult adoption to avoid the effect of intestacy laws that do not recognize same-sex relationships). The 1990 Code treats adopted children of an intestate decedent equally with biological children of the intestate decedent. See UNIF. PROBATE CODE § 2-114(b) (amended 1997).

38. See, e.g., George James, *More Than \$65 Million for Adopted Duke Daughter*, N.Y. TIMES, Dec. 30, 1995, at 32 (reporting the settlement of claims against the estate of Doris Duke by the woman who Ms. Duke adopted as an adult but later disinherited).

39. Indeed, Professor Lawrence Waggoner, who served as the Reporter for the Drafting Committee to Revise Article II of the Uniform Probate Code, has long supported intestacy rights for both mixed-sex and same-sex unmarried partners. At the time of the 1990 revisions, however, Professor Waggoner believed that the drafters "didn't have enough experience or empirical data to support what would then have been considered a

One can hypothesize reasons why a typical gay man or lesbian in a committed same-sex relationship would have intestate distributive preferences that are dissimilar from those of the typical property owner who is in a marriage or a committed mixed-sex relationship. For example, Professor David Chambers allows for the possibility that gay couples should not be treated in lock-step with non-gay couples, with respect to distribution of property at divorce, if gay men and lesbians are ever permitted to marry:

The evidence [concerning the 'current behavior or expectations of lesbian and gay couples regarding the economic dimensions of their relationships'] leaves open the strong possibility, however, that long-term same-sex couples generally keep more of their resources separate than married opposite-sex couples do—that more are cost 'splitters' rather than 'poolers.' It is also probable that, if permitted to marry, fewer persons in same-sex marriages would become economically dependent on their spouses than occurs among women in opposite-sex marriages today.⁴⁰

Recent empirical evidence suggests, however, that even if gay men and lesbians in same-sex relationships do not mirror the dispositive preferences of married couples, they are not grossly dissimilar in preferring that their partners be provided for under an intestate scheme for the distribution of their estate. This empirical data provides a critical link in showing that the 1990 Code should now be revised to include intestate inheritance rights for same-sex committed partners and, thus, to further Article II's primary value of promoting donative freedom.

Professor Mary Louise Fellows and her colleagues at the University of Minnesota recently reported the findings of their empirical study which assessed the attitudes of both non-gay and gay people in Minnesota concerning the inclusion of committed mixed-sex and same-sex non-marital partners in an intestate scheme of distribution.⁴¹ Professor Fellows and her colleagues designed and administered a telephone survey ("Fellows survey") for the purposes of determining the donative preferences of four groups of Minnesota residents: (1) the public at large, (2) individuals who were presently in a committed but non-marital opposite-sex relationship, (3) men who were presently in a committed relationship with another man, and (4) women who were presently in a committed relationship with another woman.⁴² The Fellows survey focused on whether and to what extent the respondents said they would seek to include a committed partner as an intestate heir under various family situations.⁴³ The project also sought to gather

revolutionary idea." Letter from Professor Lawrence W. Waggoner, Lewis M. Simes Professor of Law, University of Michigan Law School, to Gary Spitko (June 7, 1999).

40. 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, 471-72 (1996).

41. See generally Fellows, *supra* note 9 *passim*. For a description of the methodology of the Fellows empirical survey, see *id.* at 31-35.

42. See *id.* at 9.

43. See *id.* For reasons that are not explained in Professor Fellows' report of her project, the Fellows survey asked the respondents to distribute the intestate property of a third party rather than their own property. See *id.* at 43. Professor Fellows asserts that "it seems reasonable to assume that their responses reflect their own distributive intent." *Id.*

information on characteristics of committed partnerships so as to help in the task of statutorily defining a "committed partner" for the purposes of intestate distribution.⁴⁴

The Fellows survey produced several findings that are of interest here. First, a large majority of the respondents in each of the four groups surveyed expressed the preference that committed partners be included as heirs in the intestate scheme of distribution.⁴⁵ Gay men and lesbians in same-sex relationships, as compared to the other two groups, demonstrated greater generosity with respect to such inclusion.⁴⁶ Second, a majority of respondents in each group expressed the preference that the inheritance statute treat same-sex and mixed-sex committed couples consistently.⁴⁷

For example, given the hypothetical scenario that the decedent was survived only by her parents and her other-sex committed partner, 64.7% of respondents in a same-sex relationship would give the surviving partner the entire intestate estate.⁴⁸ Fewer than one percent (0.8%) of respondents in a same-sex relationship would give the partner less than 50% of the decedent's estate.⁴⁹ When this hypothetical scenario was altered so that the decedent was survived by her same-sex committed partner, the distributive preferences of those in a same-sex committed relationship were largely unchanged.⁵⁰ Almost ninety-five percent of the respondents in a committed same-sex relationship gave the same responses.⁵¹

The Fellows survey found that gay men and lesbians in committed relationships were similarly enthusiastic about including the surviving partner, whether of the same sex as the decedent or of the other sex, in the intestate distribution of the decedent's estate when the hypothetical decedent was survived by only her partner and her siblings, or was survived by only her partner and her child under the age of eighteen. Given the hypothetical that the decedent was survived only by a mixed-sex committed partner and siblings, 68.7% of the respondents in a same-sex relationship would give the partner the entire estate. Ninety-eight and one-half percent of such respondents would give the surviving partner at least half the estate.⁵² Given the hypothetical that the decedent was survived by her child under age eighteen and her mixed-sex committed partner who has no children, 79.4% of the respondents in a same-sex relationship would

44. *Id.* at 9. *See also infra* notes 123–150 and accompanying text (discussing the 1990 Code's preference for simplicity and certainty and the challenge of defining who would take an intestate share as a committed partner).

45. *See Fellows, supra* note 9, at 89.

46. *See id.*

47. *See id.* The Fellows survey also found that "[c]ommitted relationships for purposes of an inheritance law can be identified through easily observable attributes and those attributes are shown to be associated with a preference for having a partner share in a decedent's estate." *Id.* Finally, the Fellows survey found that a majority of the respondents consistently included the decedent's partner's child in the decedent's intestate estate. *See id.*

48. *See id.* at 37–41.

49. *See id.* at 41.

50. *See id.* at 39.

51. *See id.* at 39 n.193.

52. *See id.* at 41–43.

give the partner at least one-half of the intestate estate.⁵³ When those respondents who were in a same-sex relationship were asked whether they would give more, less, or the same amount to a surviving committed partner of the same sex as the decedent in such fact situations, nearly all indicated that they would give the same amount.⁵⁴

In sum, the Fellows survey suggests that the 1990 Code would better promote donative intent if it were revised to provide a generous intestate share of the estate for the decedent's surviving same-sex partner.

One might argue, however, that Article II's failure to provide intestate inheritance rights to surviving same-sex partners is not significantly inconsistent with Article II's goal of promoting donative intent, even if property owners in committed same-sex relationships generally do not wish to have their estates distributed according to the intestacy scheme provided in Article II. Because such persons remain free to execute a will or to utilize other non-probate means of passing property at their death to the persons of their choosing, the argument goes, the 1990 Code's failure to include intestate inheritance rights for same-sex committed partners is of little importance. Such an argument is unpersuasive for several reasons.

The 1990 Code contains numerous provisions that serve to effectuate the donative freedom of those who do not effectively express their donative intent.⁵⁵ Article II's intestacy provision is a lost opportunity to promote the donative freedom of gay men and lesbians who do not make a will for whatever reason.⁵⁶

53. See *id.* at 47-49.

54. See *id.* at 39 n.193, 42 & n.202, 48 & n.227 (indicating that 94.8% of respondents in a same-sex relationship would not change their distribution with respect to the former fact situation and 99.2% of respondents in a same-sex relationship would not change their distribution with respect to the latter fact situation).

55. See, e.g., UNIF. PROBATE CODE §§ 2-101 to -108 (amended 1997) (intestacy provisions); *id.* § 2-301 (provision for spouse unintentionally omitted from pre-marital will); *id.* § 2-302 (provision for pretermitted children); *id.* § 2-503 (granting courts the power to dispense with formalities for execution of a will); *id.* § 2-506 (choice of law provision intended "to provide a wide opportunity for validation of expectations of testators"); *id.* § 2-603 (antilapse provision); *id.* § 2-604(b) (abrogating the common law "no-residue-of-a-residue" rule); *id.* § 2-606 (adopting intent theory of ademption); *id.* § 2-702 (simultaneous death provision); *id.* § 2-804 (revocation-upon-divorce provision); *id.* § 2-903 (allowing for judicial reformation of a donative transfer that violates the statutory rule against perpetuities). See also Mark L. Ascher, *The 1990 Uniform Probate Code: Older and Better, or More like the Internal Revenue Code?*, 77 MINN. L. REV. 639, 648 (1993) ("It is obvious that one of the revisers' goals throughout their work is to 'idiot-proof' the UPC. They have constantly tried to change the UPC in ways that make estate planning expertise less compulsory for those who plan estates without regard to their own competence."); Mary Louise Fellows, *Traveling the Road of Probate Reform: Finding the Way to Your Will (A Response to Professor Ascher)*, 77 MINN. L. REV. 659, 666 (1993) ("For the UPC, the issue is how best can the state further the testator's *unattested* intent in light of a contingency event that the testator failed to contemplate when executing her or his will." (emphasis added)).

56. See Chambers, *supra* note 40, at 457 ("[G]ay men and lesbians who are in committed relationships need these protections [intestacy and designation of partner as

Thus, Article II's failure to promote the unexpressed donative intent of those gay men and lesbians who die intestate is a glaring inconsistency.

Second, inclusion of committed same-sex partners within the intestacy scheme would preempt strike suits by disgruntled blood relations that undermine the donative intent of those gay men and lesbians who die fully testate. There is some evidence that gay men and lesbians who exercise their donative freedom to execute a will or non-probate means to transfer their estate to their same-sex partner at their death are more likely than those in a non-gay relationship to have their donative intent disregarded by the trier of fact in a challenge to their estate plan.⁵⁷ There are both benign and pernicious explanations for this phenomenon.⁵⁸ The trier of fact who is unfamiliar with gay and lesbian relationships and perhaps does not value such relationships is more likely to search for an explanation other than true donative intent, such as undue influence or lack of mental capacity, to explain that which she does not understand.⁵⁹ To be less generous, the trier of fact who is offended by a provision for a same-sex partner may use doctrines such as undue influence or lack of mental capacity to strike down the provision despite the trier of fact's certainty that such a provision did represent the true donative intent of the decedent.⁶⁰ Under existing succession law, the decedent's probate property then would be distributed according to an intestate distribution scheme that favors her blood relations and wholly excludes her surviving committed partner.

A revised Article II that provides intestate inheritance rights to a surviving same-sex partner would promote the donative freedom not only of gay men and lesbians in same-sex relationships who die intestate, but also of those who die fully testate. By making the committed partner an intestate heir, a revised Article II would reduce the incentive of blood relations to challenge the decedent's estate plan, because the blood relations would have little or nothing to gain through obtaining a declaration that the decedent died intestate. Simultaneously, such reform would reduce the opportunity and incentive of the trier of fact to redistribute the decedent's property in accordance with the trier of fact's own values by utilizing an intestate scheme of distribution that excludes the decedent's surviving committed partner.⁶¹

preferred decision-maker for an incompetent partner] for the same reasons that heterosexual persons need them. Like most heterosexuals, most gay men and lesbians are reluctant to think about their mortality and procrastinate about remote contingencies.”)

57. See generally Melanie B. Leslie, *The Myth of Testamentary Freedom*, 38 ARIZ. L. REV. 235, 258–68 (1996); Jeffrey A. Schoenblum, *Will Contests—An Empirical Study*, 22 REAL PROP., PROB. & TR. J. 607, 647–50 (1987); Jeffrey G. Sherman, *Undue Influence and the Homosexual Testator*, 42 PITT. L. REV. 225, 230 (1981).

58. See E. Gary Spitko, *Gone But Not Conforming: Protecting the Abhorrent Testator from Majoritarian Cultural Norms Through Minority-Culture Arbitration*, 49 CASE W. RES. L. REV. 275, 278–85 (1999).

59. See *id.* at 278–81.

60. See *id.* at 281–85.

61. See Fellows, *supra* note 9, at 22–23 (“Recognition of the partner as an heir also has the benefit of providing more security to the couple's private arrangements, because contestants will have less to gain if they contest wills, will substitutes or other

Thus, provision of intestate inheritance rights for a committed same-sex surviving partner would further Article II's primary value of promoting donative freedom. This Article turns now to the question of whether provision of such inheritance rights might seriously undermine the subsidiary values upon which the 1990 Code is grounded.

B. A Desire for Simplicity and Certainty

A second value that grounds the 1990 Code, and which some might suggest militates against modification of the 1990 Code's intestacy scheme to provide for distribution to a surviving committed same-sex partner, is a desire for simplicity and certainty in succession law. The drafters of the 1990 Code sought to set forth provisions that were simple in their application and, thus, would promote certainty in estate planning.⁶²

For example, one such provision in which this desire for simplicity and certainty affected the substantive content of the 1990 Code is section 2-202, which determines the "elective-share percentage" of the augmented estate that must be made available to a surviving spouse who elects a "forced share" of her spouse's estate.⁶³ In general, an elective share statute is intended to protect a surviving spouse from intentional disinheritance by the decedent spouse. Thus, the elective share is one of the very few instances in which American succession law expressly subjugates the principle of donative freedom to another value. In this instance, the value is that of recognizing that both partners in a marriage have contributed to the family wealth, regardless of how that wealth is titled, and therefore, both partners in the marriage have a claim to some of the family wealth.⁶⁴ Thus, even in an instance in which the decedent spouse has expressly disinherited her surviving spouse, the surviving spouse is entitled under an elective share statute to a certain portion of the decedent spouse's estate.⁶⁵

The drafters of the 1990 Code considered adopting an equitable distribution system similar to that used in divorce law as the basis for the elective

contractual arrangements based on assertions of undue influence."); Waggoner, *supra* note 7, at 82 n.148.

By making a same- or opposite-sex de facto partner an heir, and hence a natural object of the decedent's bounty, the above statute would likely deter actions contesting the validity of a decedent's will that devises property to his or her partner and reduce the success rate of those actions that are brought.

Id.

62. See, e.g., UNIF. PROBATE CODE art. II, pt. 9 general cmt. (amended 1997) (stating that the statutory rule against perpetuities adopts a permissible vesting period of 90 years rather than an "actual-measuring-lives" approach because of the "difficulties and costs" associated with the latter approach). See also Fellows, *supra* note 55, at 660 ("[T]wo of the primary goals of probate reform are to reduce litigation and to facilitate estate planning....").

63. See UNIF. PROBATE CODE art. II, pt. 2 general cmt. (amended 1997). See also *id.* § 2-202.

64. See *id.* art. II, pt. 2 general cmt.

65. See *id.* § 2-202.

share portion to which a surviving spouse would be entitled.⁶⁶ The drafters also considered adopting a community property system for allocating at death the ownership of marital property.⁶⁷ Because of the complexity of these options, however, the drafters rejected them in favor of an accrual-type elective share under which the portion of the property at issue to which the surviving spouse is entitled will increase with the length of the marriage.⁶⁸ The drafters explained:

Because ease of administration and predictability of result are prized features of the probate system, the redesigned elective share implements the marital-property theory by means of a mechanically determined approximation system, which can be called an accrual-type elective share. Under the accrual-type elective share, there is no need to identify which of the couple's property was earned during the marriage and which was acquired prior to the marriage or acquired during the marriage by gift or inheritance.⁶⁹

One might argue against an intestate provision for a surviving same-sex partner due to the preference for simplicity and certainty. One argument that derives from this preference is based on the observation that an intestacy statute seeks to give effect to the objective intent of the typical intestate decedent; therefore, unavoidably, there will always be intestate decedents for whom the intestacy scheme provided by the statute is unsuitable.⁷⁰ The 1990 Code, however, varies its intestacy distributions in response to a variety of family circumstances in which intestate decedents might have been living at their death. A second argument from simplicity and certainty is grounded in the concerns over difficulties in qualifying an individual as the "committed partner" of the decedent. The drafters, however, could set forth a registration system for committed partners, a predominantly objective multi-factor approach, or a combination of these two systems that would better promote donative freedom and would not undermine the drafter's attempts to promote certainty and simplicity within Article II.

1. The 1990 Code Recognizes Multiple Typical Intestate Decedents

From the reality that an intestacy statute cannot give effect to the donative intent of every intestate decedent arises the fallacy that an intestacy statute necessarily provides one scheme of distribution based on the attributed intention of the typical intestate decedent.⁷¹ The 1990 Code's intestacy provisions themselves

66. See Lawrence W. Waggoner, *Spousal Rights in Our Multiple-Marriage Society: The Revised Uniform Probate Code*, 26 REAL PROP. PROB. & TR. J. 683, 725 (1992).

67. See *id.*

68. See UNIF. PROBATE CODE § 2-202 (amended 1997); *id.* art. II, pt. 2 general cmt.

69. *Id.* art. II, pt. 2 general cmt. See also *id.* § 2-202.

70. See Waggoner, *supra* note 7, at 29 ("People whose individuated intention differs from common intention must assume the responsibility of making a will; otherwise, their property will be distributed, by default, according to common intention or, more accurately, according to intention as attributed to them by the state legislature.")

71. See Frederick R. Schneider, *Recommendations for Improving Kentucky's Inheritance Laws*, 22 N. KY. L. REV. 317, 317 (1995) ("Of necessity, intestate succession

refute this assertion. Article II's intestacy provisions do not purport to reflect the presumed intent of one typical intestate decedent. Rather, the provisions purport to reflect the presumed intents of many, indeed thirteen, typical intestate decedents who died in a variety of family circumstances.

Section 2-102, which governs the intestate share of the surviving spouse, reflects the attributed intent of six typical intestate decedents and provides that the surviving spouse's share of the intestate property is as follows: all of the intestate property if the decedent (Intestate 1) left no descendants and no parents;⁷² all of the intestate property if all of the intestate's (Intestate 2) descendants are also descendants of the intestate's spouse ("mutual descendants") and the surviving spouse has no descendants who are not descendants of both the decedent and the surviving spouse ("non-mutual descendants");⁷³ a lump sum, suggested to be \$200,000, plus three-fourths of the balance of the intestate property, if the intestate (Intestate 3) left a parent or parents but no descendants;⁷⁴ a smaller lump sum, suggested to be \$150,000, plus one-half of the balance of the intestate property, if all of the intestate's (Intestate 4) surviving descendants are mutual descendants but the surviving spouse has non-mutual descendants;⁷⁵ a lump sum, suggested to be \$100,000, plus one-half of the balance of the intestate property, if the intestate (Intestate 5) left non-mutual descendants.⁷⁶ Section 2-102A provides for the intestate distribution of property of a decedent (Intestate 6) who died domiciled in a community property state and left a surviving spouse: "The one-half of community property belonging to the decedent passes to the [surviving spouse] as the intestate share."⁷⁷

The drafters intended for these multiple provisions to implement a "conduit" theory of property transmission.⁷⁸ The conduit theory is premised on the notion that a typical decedent with surviving children would view the surviving spouse as both a primary beneficiary—someone who can better manage the property if the surviving children are minors, and is more in need of the property to ensure a secure retirement if the surviving children are adults—and as a conduit—someone who will, in time, pass the property on to the surviving children when the surviving spouse dies.⁷⁹

The conduit theory further posits that, because of the surviving spouse's divided loyalties, the surviving spouse is a less certain conduit when there are non-mutual children who survive the decedent.⁸⁰ The surviving spouse who has children who are not also the decedent's children is likely to treat all of her

statutes cannot provide details for many variations in their application. Instead, one common plan is applied to all intestates and also to cases of partial intestacy.").

72. See UNIF. PROBATE CODE § 2-102(1)(i) (amended 1997).

73. See *id.* § 2-102(1)(ii).

74. See *id.* § 2-102(2).

75. See *id.* § 2-102(3).

76. See *id.* § 2-102(4).

77. See *id.* § 2-102A(b).

78. See generally Waggoner, *supra* note 33, at 231–34.

79. See *id.* at 232.

80. See *id.* at 233.

children equally when she dies.⁸¹ The result is that the decedent's property that the intestacy statute distributes to the surviving spouse is likely to be divided at the surviving spouse's death among the decedent's children and the non-mutual children of the surviving spouse. For this reason, the 1990 Code distributes more of the decedent's property to the decedent's children at the decedent's death as compared to the scenario in which the decedent and the surviving spouse had only mutual children.⁸²

The drafters of the 1990 Code believed that the surviving spouse is an even less reliable conduit when the intestate decedent leaves surviving children who are not also the children of the surviving spouse because the surviving spouse has no biological connection to these children.⁸³ Because of the fear that the surviving spouse may disinherit the intestate decedent's children who are not also the surviving spouse's children, the 1990 Code distributes even less of the decedent's intestate estate to the surviving spouse and distributes more of the intestate estate to the decedent's children who are not the children of the surviving spouse.⁸⁴

Section 2-103 provides for the intestate share of heirs other than the surviving spouse. The drafters intended for its provisions to carry out the attributed donative intent of seven more prototypical intestate decedents. Of the share of intestate property that is not distributed to the surviving spouse (perhaps because the decedent left no surviving spouse, or perhaps because section 2-102 provides that, in light of the decedent's family situation, the surviving spouse does not take all of the property), the intestate property passes as follows: to the intestate's (Intestate 7) descendants by representation;⁸⁵ if the intestate (Intestate 8) left no descendant, to her parents or surviving parent;⁸⁶ if the intestate (Intestate 9) left no descendant and no parent, to her siblings by representation;⁸⁷ if the intestate (Intestate 10) left no descendant, no parent, no siblings, and no descendants of siblings, one-half to the intestate's paternal grandparents and descendants, if any, and one-half to the intestate's maternal grandparents and descendants, if any, but if the intestate (Intestate 11) left no paternal grandparent or descendant of a paternal grandparent, the entire intestate estate passes to the intestate's maternal grandparents and descendants, and if the intestate (Intestate 12) left no maternal grandparent or descendant of a maternal grandparent, the entire intestate estate passes to the intestate's paternal grandparents and descendants.⁸⁸ Finally, if the intestate (Intestate 13) left no taker as described above, the intestate property passes to the state.⁸⁹

81. *See id.*

82. *See* UNIF. PROBATE CODE § 2-102(3) (amended 1997); Waggoner, *supra* note 33, at 233-34.

83. *See* Waggoner, *supra* note 33, at 234.

84. *See* UNIF. PROBATE CODE § 2-102(4) (amended 1997); Waggoner, *supra* note 33, at 233-34.

85. *See* UNIF. PROBATE CODE § 2-103(1) (amended 1997).

86. *See id.* § 2-103(2).

87. *See id.* § 2-103(3).

88. *See id.* § 2-103(4).

89. *See id.* § 2-105.

Thus, the argument that the provision of intestate inheritance rights for a same-sex surviving partner would be inconsistent with Article II's desire for simplicity is less than compelling. The tension between simplicity and fairness is almost always a concern in legislative work. However, a decision to resolve this tension in favor of fairness when dealing with step-families but in favor of simplicity when dealing with gay men and lesbians is difficult to justify. In light of the 1990 Code's multiple provisions intended to implement the conduit theory with respect to the attributed desires of married intestate decedents in families with step-children, it is difficult to see why the drafters could not also include provisions which reflect the attributed donative intent of intestate decedents who die while in a committed same-sex relationship.

Moreover, while the inclusion of committed partners within the intestacy scheme would render the statutory language more complicated, it would not necessarily complicate the application of the statute. The relationship between statutory simplicity and certainty is not linear. Indeed, a complicated statute can result in greater administrative certainty if it answers outstanding questions clearly.⁹⁰

2. *Qualification as a Committed Partner*

A second argument against provision of intestate inheritance rights for a surviving same-sex partner that derives from the certainty principle concerns the qualification as a same-sex committed partner. The argument is that it would be difficult for a statute to define with precision who counts as a committed partner. Further, the argument goes, courts charged with implementing such a statute would be forced to conduct an intrusive and potentially embarrassing inquiry into the decedent's and putative committed partner's private lives.⁹¹

a. A Registration Approach

One approach to qualification of a committed partner that would address these concerns is the implementation of a registration system to identify same-sex committed partners. Hawaii has already adopted such an approach with respect to its provision of intestate inheritance and other rights to same-sex couples.⁹²

In 1997, Hawaii became the first state in the Union to extend intestate inheritance rights to same-sex committed partners. The relevant legislation is actually broader than that, for it applies to anyone who qualifies as a "reciprocal beneficiary" and it extends to reciprocal beneficiaries not only intestate inheritance rights but also many other rights, including elective share rights, which previously

90. See, e.g., *id.* § 2-603 & cmt. (comprehensive antilapse statute that is intended to resolve numerous ambiguities arising under traditional antilapse statutes). I am grateful to both Mary Louise Fellows and Tom Gallanis for bringing this point to my attention.

91. See Ralph C. Brashier, *Disinheritance and the Modern Family*, 45 CASE W. RES. L. REV. 83, 155 (1994) (making this argument with respect to extending elective share rights to mixed-sex unmarried cohabitants).

92. See HAW. REV. STAT. ANN. §§ 572C-1 to -7 (Michie Supp. 1997).

were available only to legally married persons.⁹³ Only persons who register with the state as reciprocal beneficiaries may enjoy the inheritance rights and other benefits provided by the statute. A couple may voluntarily register for reciprocal beneficiary status if both parties to the relationship are at least eighteen years of age, unmarried, not parties to other reciprocal beneficiary relationships, and legally prohibited from marrying each other.⁹⁴ Thus, a same-sex couple, who do not enjoy the right under Hawaii law to marry each other, may qualify as reciprocal beneficiaries.⁹⁵

The Hawaii system leaves no room for judicial subjectivity in determining who qualifies as a reciprocal beneficiary for the purposes of intestate inheritance rights. It thus overcomes fully the argument from certainty that provision of intestate inheritance rights for a same-sex surviving partner would entail a subjective and intrusive inquiry into the private lives of the decedent and her partner.⁹⁶

However, a registration system like Hawaii's has its own shortcomings. Principal among these is the fact that a registration system provides no inheritance rights to a surviving same-sex partner if the partners did not register their relationship during the decedent's life, even if there is strong evidence that the decedent and the surviving partner were committed to each other to the degree that one would expect the decedent to have wanted the surviving partner to share in her intestate estate.⁹⁷ This problem is compounded because many gay men and lesbians may be reluctant to publicly acknowledge their relationships with their committed partners in light of the systemic sexual orientation discrimination that exists in our society.⁹⁸

One could envision, however, a registration procedure for committed same-sex partners that would not require public disclosure and, thus, would not

93. *Id.*

94. *See id.* § 572C-4.

95. It is a peculiar feature of the reciprocal beneficiary legislation that others who are prevented from marrying each other, such as an adult brother and adult sister, may also qualify for reciprocal beneficiary status and, thus, enjoy many benefits previously limited to legally married couples. *See Fellows, supra* note 9, at 30 ("The inclusion of couples who are related to each other biologically or through adoption undermines the recognition of same-sex committed relationships as uniquely intimate, emotional attachments and therefore supports rather than disrupts subordination based on sexual orientation.").

96. *See id.* at 64.

97. *See id.* at 29. *See also id.* at 55 (reporting the results of an empirical study showing that only 36.3% of respondents in a same-sex committed relationship who lived in a city that provided for registration of a partnership had registered their partnership); Gallanis, *supra* note 11 (suggesting that low registration rates by committed partners might be an indication that the benefits of such registration do not outweigh the burdens and hypothesizing that extension of additional benefits to registrants might induce more couples to register).

98. *See Fellows, supra* note 9, at 56 ("By making a public symbol a prerequisite to obtaining statutory recognition of a committed relationship, only those persons who are willing or able to declare their relationships publicly would be eligible to have their partners share in their estates.").

limit inheritance rights to only those same-sex couples who were willing to risk discrimination based upon their public declaration of their committed partnership status. Under such a system, the partners could convey committed partner status upon each other for the purposes of intestacy law simply by executing a written statement that they consider themselves to be in a committed partnership.

One should anticipate the objection that such an informal registration system, which allows alteration of the intestacy scheme with a simple unattested writing, would be unreasonably prone to abuse. Article II as it presently exists, however, already allows alteration of the intestacy scheme by means of a simple unattested writing if the writing is made in conjunction with a lifetime gift. Section 2-109 of the Uniform Probate Code sets forth the circumstances under which a lifetime gift will be treated as an advancement against the donee's stake in the donor's intestate estate.

If an individual dies intestate as to all or a portion of his [or her] estate, property the decedent gave during the decedent's lifetime to an individual who, at the decedent's death, is an heir is treated as an advancement against the heir's intestate share only if (i) the decedent declared in a contemporaneous writing or the heir acknowledged in a writing that the gift is an advancement or (ii) the decedent's contemporaneous writing or the heir's written acknowledgment otherwise indicates that the gift is to be taken into account in computing the division and distribution of the decedent's intestate estate.⁹⁹

Thus, the 1990 Code allows a property owner to alter the distribution of her intestate estate with a simple, unattested writing in conjunction with an *inter vivos* gift.¹⁰⁰ A similar provision, which would allow gay men and lesbians in a committed relationship to opt into an intestacy scheme that recognizes the significance of their relationship and is not based on the attributed intent of the non-gay majority, would be equally workable and no more prone to abuse.

A registration system that allows qualification of a committed partner for purposes of intestate distribution by means of an informal writing would be consistent with Article II's de-emphasis of formalism which itself, in part, grows

99. UNIF. PROBATE CODE § 2-109(a) (amended 1997).

100. Section 2-609 of the 1990 Code, which provides for ademption of testamentary devises by satisfaction, parallels section 2-109. Section 2-609 provides that lifetime gifts by the testator to a legatee under the testator's will may be treated as a complete or partial satisfaction of a devise to that legatee provided that the donor/testator declared in a writing contemporaneous with the lifetime gift that the gift is in satisfaction of the devise. *See id.* § 2-109(a). Thus, Article II allows for alteration of the distributive scheme of a will by means of a simple unattested writing if the writing is made in conjunction with a lifetime gift. Additionally, section 2-513 allows testate succession to be altered by means of an unattested writing, providing that the writing is referred to in the testator's will. This section provides that "a will may refer to a written statement or list to dispose of items of tangible personal property not otherwise specifically disposed of by the will...." *Id.* § 2-513. This writing is effective to dispose of the testator's personal property and may be prepared before or after the testator executes her will and may be altered by the testator after she executes her will. *See id.*

out of a desire for unification of the subsidiary laws of probate and non-probate transfers. It has long been the general rule that a will, to be valid, must strictly comply with the jurisdiction's execution requirements. These requirements commonly dictate that the will be in writing, be signed by the testator, and be attested by at least two witnesses.¹⁰¹ Under the traditional approach, a will that fails to comply with these formalities is of no effect, no matter how slight the defect.¹⁰²

This is not so for will substitutes. Although will substitutes have the testamentary characteristic of passing property at the death of the owner, they are considered inter vivos gifts and, therefore, need not comply with the formalities for execution of wills.¹⁰³ Moreover, substantial compliance rather than literal compliance with formalities for execution has long been all that is required for will substitutes.¹⁰⁴

In the last few decades, will substitutes, especially the revocable inter vivos trust, have experienced a remarkable increase in popularity as means for passing property at death.¹⁰⁵ With this growth in popularity of will substitutes has risen the debate as to whether and to what extent the subsidiary laws of wills and will substitutes ought to be unified.¹⁰⁶ Subsidiary rules are those rules that are not mandatory, such as the formal requirements for the execution of a will, but rather yield to the contrary intention of the parties. Examples include revocation-upon-divorce provisions, which set out the effect of divorce on a beneficiary designation in favor of one's spouse,¹⁰⁷ and antilapse provisions, which provide for redirection of a gift from a beneficiary who predeceases the donor to a substitute taker.¹⁰⁸ Professor John Langbein set forth the compelling justification for unification of the law of wills and of will substitutes:

Transferors use will substitutes to avoid probate, not to avoid the subsidiary law of wills. The subsidiary rules are the product of centuries of legal experience in attempting to discern transferors' wishes and suppress litigation. These rules should be treated as presumptively correct for will substitutes as well as for wills.¹⁰⁹

Article II moves significantly toward unification of the subsidiary laws of wills and will substitutes.¹¹⁰ An example is Article II's revision of the 1969

101. See, e.g., MCGOVERN, *supra* note 6, at 156.

102. See *id.* at 158-60. See also John H. Langbein, *The Nonprobate Revolution and the Future of the Law of Succession*, 97 HARV. L. REV. 1108, 1125 (1984).

103. See Langbein, *supra* note 102, at 1109, 1115, 1125-26.

104. UNIF. PROBATE CODE § 2-503 cmt. (amended 1997).

105. See *id.* art. II, prefatory note ("recogni[zing] that will substitutes and other inter-vivos transfers have so proliferated that they now constitute a major, if not the major, form of wealth transmission").

106. See Langbein, *supra* note 102, at 1134-40.

107. See UNIF. PROBATE CODE § 2-804 (amended 1997).

108. See *id.* § 2-603.

109. Langbein, *supra* note 102, at 1136-37.

110. See UNIF. PROBATE CODE art. II, prefatory note (amended 1997) ("The proliferation of will substitutes and other inter-vivos transfers is recognized, mainly, in measures tending to bring the law of probate and nonprobate transfers into greater unison."); *id.* art. II, pt. 7 general cmt. (pointing out that Article 7 contains several rules of

Uniform Probate Code's revocation-upon-divorce provision. The 1969 Uniform Probate Code provided that the testator's divorce from her spouse automatically revoked any designation in the testator's pre-divorce will in favor of the now-former spouse. The 1969 Uniform Code's revocation-upon-divorce provision did not apply, however, to will substitutes.¹¹¹ The rationale for the revocation-upon-divorce-provision applies whether the gift to the now-former spouse was made by will or by non-probate transfer; the property owner is unlikely to wish to benefit her former spouse and, had she thought about it, probably would have revoked the pre-divorce beneficiary designation. Thus, section 2-804 of the 1990 Code revised the revocation-upon-divorce provision so that it now applies not only to devises but also to nonprobate beneficiary designations in favor of the former spouse.¹¹²

The 1990 Code's movement toward unified treatment of probate and nonprobate transfers is reflected also in the revised Article II's de-emphasis of formalism. Generally, the revised Article II has de-emphasized the formalities associated with testamentary transfers to bring such transfers more in line with the nonprobate means of transferring property at death.¹¹³ The most significant

construction which apply to both wills and will substitutes and which applied, in the drafters' view inappropriately, only to wills in the pre-1990 Code). *See also id.* § 2-707 & cmt. ("The objective of this section is to project the antilapse idea into the area of future interests."); *id.* § 2-702 & cmt. (providing a "simultaneous death" provision for wills and will substitutes that parallels Section 2-104's simultaneous death provision for intestacy); *id.* § 2-706 (providing an antilapse provision for will substitutes that parallels section 2-603's antilapse provision applicable to wills); *id.* art. II, pt. 8 general cmt. ("Part 8 contains four general provisions that cut across probate and nonprobate transfers"); *id.* § 2-801 & cmt. (broadening the pre-1990 Code's disclaimer provision in light of the fact that "the scope of Article II has now been expanded to cover dispositive provisions not contained in wills"); *id.* § 2-802 (governing the effect of divorce on one's qualification as a "surviving spouse" under both probate and non-probate instruments); *id.* § 2-803 (providing that one who intentionally and feloniously kills the decedent forfeits any right to accede to the decedent's property through intestacy, a will or nonprobate instruments); *id.* § 2-804 (revocation-upon-divorce provision that revokes a gift to an ex-spouse in both probate and non-probate instruments).

111. *Id.* § 2-804 cmt.

112. *See id.* § 2-804 & cmt.

The revisions of this section...intend to unify the law of probate and nonprobate transfers.... [They] expand the section to cover "will substitutes" such as revocable inter vivos trusts, life insurance and retirement-plan beneficiary designations, transfer-on-death accounts, and other revocable dispositions to the former spouse that the divorced individual established before the divorce (or annulment).

Id. *See id.* art. II, prefatory note ("[T]he revocation-upon-divorce provision (section 2-804) is substantially revised so that divorce not only revokes devises, but also nonprobate beneficiary designations, in favor of the former spouse."). Section 2-804 provides that divorce "revokes any revocable (i) disposition or appointment of property made by a divorced individual to his [or her] former spouse in a governing instrument and any disposition or appointment created by law or in a governing instrument to a relative of the divorced individual's former spouse...." *Id.* § 2-804(b).

113. *See, e.g., id.* § 2-513 (allowing incorporation by reference of a document that is not in existence at the execution of the will or a document that is altered after execution of the will, which document may direct how to dispose of the testator's tangible personal

provision reflecting this movement revolutionizes the Uniform Probate Code's approach to formalities for execution of a will.¹¹⁴

Statutes generally require that a will, to be valid, must have been executed in compliance with certain formalities—most commonly that the will be in writing, be signed by the testator, and be attested by at least two witnesses. Traditionally, courts have demanded strict compliance with the execution formalities. Even the slightest deviation from the prescribed formalities voids the will.¹¹⁵

The 1990 Code specifies formalities for the execution of a will. Section 2-502 provides that a will is validly executed if it is in writing, is signed by the testator or signed in her name by another at her direction, and is witnessed by two persons each of whom signed the will within a reasonable time after she saw the testator sign or acknowledge the will.¹¹⁶ In reality, however, Article II makes these formalities for execution a mere safe harbor; those who seek absolute certainty may comply with such formalities and are assured that the law will recognize their wills as validly executed. Article II makes these formalities a mere safe harbor, however, by abandoning the strict compliance approach to execution formalities and adopting in its stead a harmless error principle, also known as the dispensing power. Section 2-503 provides that

[a]lthough a document or writing added upon a document was not executed in compliance with Section 2-502 [setting forth the formalities for executing a will], the document or writing is treated as if it had been executed in compliance with that section if the proponent of the document or writing establishes by clear and convincing evidence that the decedent intended the document or writing to constitute (i) the decedent's will, (ii) a partial or complete revocation of the will, (iii) an addition to or an alteration of the will, or (iv) a partial or complete revival of his [or her] formerly revoked will or of a formerly revoked provision of the will.¹¹⁷

Thus, Article II allows a court to treat as a will a document that fails to comply with the formalities for execution of a will if the court is convinced by

property); *id.* § 2-513 cmt. (“As part of the broader policy of effectuating a testator’s intent and of relaxing formalities of execution, this section permits a testator to refer in his or her will to a separate document disposing of tangible personalty other than money.”).

114. *See id.* § 2-503 (adopting a “harmless error” principle with respect to compliance with the formalities for execution of a will). *See also id.* § 2-503 cmt. (“Consistent with the general trend of the revisions of the UPC, section 2-503 unifies the law of probate and nonprobate transfers, extending to will formalities the harmless error principle that has long been applied to defective compliance with the formal requirements for nonprobate transfers.”).

115. *See supra* notes 101–102 and accompanying text.

116. *See UNIF. PROBATE CODE* § 2-502(a) (amended 1997). Article II also accepts holographic wills “if the signature and material portions of the document are in the testator’s handwriting.” *Id.* § 2-502(b).

117. *Id.* § 2-503.

clear and convincing evidence that the decedent intended for the document to control the disposition of her property at death.¹¹⁸

Returning now to the issue of whether a gay or lesbian property owner should be allowed to opt into an alternate intestacy scheme favoring her or his committed partner by means of an informal writing, it is apparent that Article II's values de-emphasizing formalism and seeking to unify the subsidiary laws of probate and non-probate transfers support such an informal registration scheme. Given that the 1990 Code provides, pursuant to the harmless error principle, for giving effect as a will to an informal writing, it would be wholly consistent for Article II to give effect also to an informal writing that seeks to alter the default majoritarian intestacy scheme.

Indeed, the 1990 Code, through its harmless error principle in combination with its provision allowing for a "negative will," already allows this type of redrafting of the intestacy scheme.¹¹⁹ Section 2-101(b) abrogates the common law rule that one may disinherit an heir only by passing all of one's property at death by means other than intestacy.¹²⁰ This section provides that "[a] decedent by will may expressly exclude or limit the right of an individual or class to succeed to property of the decedent passing by intestate succession."¹²¹ Thus, Article II allows for a negative will by which one may entirely disinherit a particular heir even if one dies partially or wholly intestate. Moreover, Article II, pursuant to section 2-503's harmless error principle, excuses any harmless error with respect to the execution of such a negative will so long as the proponent of the improperly executed negative will demonstrates by clear and convincing evidence that the decedent intended the document to be her negative will.¹²² Thus, Article II allows one who intends to die wholly or partly intestate, or who fears doing so, to redraft the intestate scheme of distribution by means of an informal writing.

b. A Multi-Factor Approach

A registration system that allows gay men and lesbians to opt into an intestacy scheme by means of a simple unattested writing is still subject to the criticism that those in a committed same-sex relationship who, for whatever reason, fail to opt into the alternate intestacy scheme are left unprotected. Professor Fellows, among others, suggests that states consider overcoming this arguable

118. Similarly, Article II's choice of law provisions also de-emphasize formalism in a manner that tends to validate a variety of means for will execution. *See id.* § 2-506 (validating a will that was executed in compliance with Article II's formalities or that was executed in compliance with the formalities of the jurisdiction where executed or where the testator was then domiciled or that is in compliance at the time of death with the formalities of the jurisdiction where the testator dies).

119. *Id.* § 2-101(b).

120. *See id.* § 2-101 cmt. ("By specifically authorizing so-called negative wills, subsection (b) reverses the usually accepted common-law rule, which defeats a testator's intent for no sufficient reason.")

121. *Id.* § 2-101(b).

122. *See id.* § 2-503.

shortcoming by creating a dual registration/multi-factor system.¹²³ A registration/multi-factor system would allow those who seek to make certain that their committed partners will be recognized for purposes of intestate distribution to register their partnerships, while also providing an opportunity for a putative surviving committed-but-unregistered partner to demonstrate that she and the decedent enjoyed a committed partnership at the decedent's death.¹²⁴ This dual system is subject, however, to the criticisms, to which this Article now turns, that have been leveled at the multi-factor approach generally.

A multi-factor approach to qualifying an individual as a surviving committed partner would require the court to evaluate the nature and strength of the relationship between the decedent and the putative committed partner by considering a variety of factors that a statute or the court considers relevant. The principal proponent of such an approach is Professor Lawrence Waggoner.¹²⁵

In 1994, Professor Waggoner tentatively proposed amending the 1990 Code to provide intestate inheritance rights for the surviving committed non-marital partners of both same-sex and mixed-sex relationships.¹²⁶ Professor Waggoner revised his proposal in a "Working Draft" dated January 20, 1995.¹²⁷ The Working Draft proposed that a surviving committed partner receive from the decedent's intestate estate a fixed sum, such as \$50,000, plus one-half the balance of the intestate estate if the decedent left no parent or descendant or if all of the decedent's descendants were also descendants of the surviving committed partner and the surviving partner had no other descendants who survived the decedent.

123. Fellows, *supra* note 9, at 64. Professor Lawrence Waggoner also is a proponent of this approach. *See infra* note 125 and accompanying text.

124. Fellows, *supra* note 9, at 62-64.

125. Professor Waggoner actually advocates an approach that combines the multi-factor approach with registration or other means of self-identification. When Professor Waggoner first proposed the multi-factor approach, *see generally* Waggoner, *supra* note 7, he made clear that registration was not mutually exclusive with his proposed multi-factor approach. *See id.* at 86-87. Since then, he has strongly advocated the combined approach in letters to various law-reform organizations. *See* Letter from Professor Lawrence W. Waggoner, Lewis M. Simes Professor of Law, University of Michigan Law School, to Janice Henderson-Lypkie, Counsel, Alberta Law Reform Institute (December 11, 1998) (advocating that "the ideal approach is to combine some form of province-wide registration system with a statute along the lines of the" multi-factor approach); Letter from Professor Lawrence W. Waggoner, Lewis M. Simes Professor of Law, University of Michigan Law School, to Beth Bryant, Bryant & Van Nest, LLC (March 11, 1998) (advising the Colorado Governor's Commission on the Rights and Responsibilities of Same-Sex Relationships to consider enactment of a registration system along with some version of the multi-factor approach).

126. *See generally* Waggoner, *supra* note 7 *passim*. Professor Waggoner made his draft proposal tentative pending empirical research concerning whether extension of inheritance rights to committed non-marital partners enjoyed popular support. *See* Fellows, *supra* note 9, at 6.

127. *See* LAWRENCE W. WAGGONER ET AL., FAMILY PROPERTY LAW 107-08 (2d ed. 1997). The text of the Working Draft is also set forth in Fellows, *supra* note 9, at app., and in RESTATEMENT (THIRD) OF PROPERTY (Wills and Other Donative Transfers § 2.2 reporter's note 5 (1999)).

Otherwise, the surviving committed partner simply would receive one-half of the intestate estate.¹²⁸

Any multi-factor approach to qualifying a surviving same-sex committed partner must be evaluated against the criticism that, because of the discretion such an approach affords to the court to determine who is and who is not a surviving committed partner, it would introduce an unacceptable amount of uncertainty into succession law. Although the multi-factor approach necessarily relies on the court's judgment concerning the nature of the decedent's relationship with the survivor, such discretion can be cabined so that a high degree of predictability is achieved. Professor Mary Ann Glendon has considered how fixed rules and discretion operate in family law and succession law.¹²⁹ Her conclusions are instructive:

[G]ranting the necessity for a great deal of judicial discretion in dealing with the economic and child-related effects of divorce, it is important to recognize that this discretion need not be uncontrolled and that significant predictability can be introduced into a discretionary system.... [T]he fact that no two family situations are identical does not mean that there are not regularly recurring fact patterns that can and should be treated in the same way.¹³⁰

A critical issue in evaluating a multi-factor approach to qualification of a surviving committed partner is what recurring fact patterns should be used to demonstrate sufficient commitment in a relationship such that the law should attribute to the decedent the intent to provide at death for her partner.¹³¹ Those considering this issue might look for guidance to the growing segment of corporate America that offers various benefits to the "domestic partners" of employees.

As a prerequisite to extension of domestic partner benefits, many of these companies have set standards for evidence of sufficient commitment in a qualifying relationship. Among the more common requirements that corporations have set are cohabitation, financial interdependence (such as shared assets or debts), exclusivity of the relationship, similarity to a marriage relationship and/or a declaration that the partners would be married if they were legally able to marry, a minimum duration of the relationship, and naming the partner as beneficiary under a non-probate instrument such as a life insurance policy.¹³²

128. See WAGGONER, *supra* note 127, at 107.

129. See generally Mary Ann Glendon, *Fixed Rules and Discretion in Contemporary Family Law and Succession Law*, 60 TUL. L. REV. 1165 (1986).

130. *Id.* at 1170-71.

131. See Fellows, *supra* note 9, at 26 ("The challenge under the approach adopted in the Waggoner Working Draft is to identify easily applied criteria that will accurately identify committed partners.").

132. See Raymond C. O'Brien, *Domestic Partnership: Recognition and Responsibility*, 32 SAN DIEGO L. REV. 163, 178-81 (1995). Another approach that corporations might utilize is to simply require cohabitation and registration by the domestic partners. See *id.* at 183.

Professor Waggoner sought, in drafting his proposal, to strike a balance between over- and under-inclusiveness.¹³³ To guard against over-inclusiveness, the Working Draft sets forth three objective requirements that serve to eliminate many potential claims to committed partner status even before the court's discretion comes into play. The putative committed partners: (1) must not have been married to anyone at the decedent's death, (2) must not have been precluded under state law from marrying each other because of their blood relationship, and (3) must have been cohabiting with each other at the decedent's death.¹³⁴ These requirements are intended to decrease litigation by ensuring that no married decedent's estate is subject to the claim of a putative committed partner and that blood relatives will not be able to assert claims as committed partners.¹³⁵ Only if these requirements are met does the court then examine multiple factors in a partly discretionary inquiry into the quality of the commitment in the relationship.

Professor Waggoner's Working Draft further defines a committed partner as one who *inter alia* was "sharing a common household with the decedent in a marriage-like relationship."¹³⁶ The Working Draft defines a "marriage-like" relationship as "a relationship that corresponds to the relationship between marital partners, in which two individuals have chosen to share one another's lives in a long-term, intimate, and committed relationship of mutual caring."¹³⁷ The Working Draft further lists several factors that a court should consider in determining whether such a "marriage-like" relationship existed between the decedent and the putative surviving partner.¹³⁸

In order to reduce litigation further, Professor Waggoner sought to rely chiefly on criteria that could be easily verified by objective or documentary evidence.¹³⁹ The Working Draft factors include the duration and exclusivity of the relationship; the financial interdependence of the parties; whether the partners formally accepted legal and financial responsibility for each other, for example, through such means as execution of durable powers of attorney or by naming each other beneficiaries of non-probate property transfers; whether the couple raised children together; whether the couple went through a commitment or marriage

133. See Waggoner, *supra* note 7, at 81-83.

134. See WAGGONER, *supra* note 127, at 107; Waggoner, *supra* note 7, at 81. For the purposes of the Working Draft, a couple shared a common household if they "shared the same place to live" even if the individuals were residing apart at the decedent's death. See WAGGONER, *supra* note 127, at 107. Thus, Professor Waggoner's proposal allows intestate inheritance by a surviving partner who was not physically living with the decedent at the time of her death if their separation was job-related or involuntary, such as in cases of hospitalization or imprisonment. See Waggoner, *supra* note 7, at 81 n.145.

135. Letter from Professor Lawrence W. Waggoner, Lewis M. Simes Professor of Law, University of Michigan Law School, to Stanley C. Kent, Esq. (February 2, 1998).

136. WAGGONER, *supra* note 127, at 107.

137. *Id.*

138. The Working Draft presumes a relationship to be "marriage-like" if the couple lived together for five of the six years preceding the decedent's death, registered as domestic partners, joined in a commitment ceremony that was conducted and certified in writing by an organization, or shared one of several specified parenting roles. See *id.* at 108.

139. Waggoner, *supra* note 135.

ceremony; and “the degree to which the couple held themselves out to others as emotionally and financially committed to one another on a permanent basis.”¹⁴⁰

There is room for good faith disagreement over the factors that Professor Waggoner sets forth for qualification of a committed partner. For example, some in the gay and lesbian communities, but I suspect particularly in the gay male community, will take strong exception to the Working Draft’s equation of commitment with monogamy. Professor Waggoner has explained his position: “[T]he behavior of the parties forms the basis of the relationship, and such behavior [sex outside of the relationship] shows a weakened commitment to the relationship.”¹⁴¹ Many in the gay male community would disagree. For example, Professor David Chambers has expressed another view: “Most gay men and lesbians within couples prize loyalty and fidelity, but many would resist the notion that the test of fidelity—indeed the sole test in the law—turns on whom one has sex with. Many gay men and lesbians, particularly gay men, explicitly disavow sexual exclusivity within their long-term relationships.”¹⁴² This issue highlights the importance of empirical data in determining attributed intent and the importance of a willingness to differentiate between gay people and non-gay people and between gay men and lesbians in prescribing attributed intent.

In their empirical survey, Professor Fellows and her colleagues gathered information from persons in self-identified committed partnerships, both same-sex and mixed-sex, to determine whether the partnerships shared common traits that could be used in drafting a multi-factor approach intestacy statute to qualify a surviving committed partner.¹⁴³ Professor Fellows and her colleagues concluded that several “[o]bservable factors closely correspond to self-definitions of a committed relationship and can be associated with a preference for having a committed partner inherit.”¹⁴⁴ The Fellows survey found that such factors include the sharing of a common household for several years, financial interdependence, the naming of the putative committed partner as beneficiary of a non-probate means of passing property at death, the partners’ assumption of legal responsibility and/or decision-making authority for each other as through the execution of powers of attorney for healthcare decisions, and the exchange of observable symbols of the committed relationship.¹⁴⁵ Professor Waggoner’s Working Draft utilizes several of these factors.¹⁴⁶

140. WAGGONER, *supra* note 127, at 107–08.

141. Waggoner, *supra* note 7, at 83 n.149.

142. Chambers, *supra* note 40, at 460. Professor Chambers supports his assertion with empirical data that suggest that gay men do not place the same value on monogamy as do lesbians or non-gay people. *See id.* at 460 n.51 (citing to *inter alia* an empirical study in which only seven of 172 male couples had a monogamous relationship; citing also to an empirical study in which 75% of husbands, 84% of wives, and 71% of lesbians in couples but only 36% of gay men in couples said that they thought monogamy important).

143. *See* Fellows, *supra* note 9, at 52–53.

144. *Id.* at 63.

145. *See id.*

146. *See* WAGGONER, *supra* note 127, at 107–08 (utilizing multiple factors, including cohabitation, financial interdependence, the partners’ naming of each other as primary beneficiary of a life insurance or retirement benefit, and the partners’ designation

Thus, thoughtful drafters can design a multi-factor approach to qualification of a surviving committed partner that both accurately attributes the general donative intent of those in committed same-sex relationships and also constrains judicial discretion and subjectivity. The remaining level of uncertainty inherent in such a multi-factor approach is consistent with existing Article II provisions that tolerate a fair amount of uncertainty in service of higher goals—principally vindication of donative freedom.¹⁴⁷

Indeed, Professor Mark Ascher has criticized the 1990 Code for its subordination of simplicity and certainty in favor of what Professor Ascher views as a sometimes excessive devotion to the goal of promoting donative freedom.¹⁴⁸ Upon review of the revisions adopted in the 1990 Code, Professor Ascher concludes that “[e]ffectuation of a decedent’s intent seems to have served as the revisers’ primary compass.”¹⁴⁹ Professor Ascher further concludes that, in furtherance of Article II’s “need better to effectuate a decedent’s intent[,]” the 1990 Code “frequently specifies outcomes that depend explicitly upon the decedent’s intention (as opposed to what the controlling document says), which, in turn, is ascertainable (if at all) only upon analysis of all the facts and circumstances.”¹⁵⁰

In sum, the argument against provision of intestate inheritance rights for a surviving committed same-sex partner that derives from the principle in favor of simplicity and certainty is not persuasive. Article II’s intestacy scheme presently takes account of multiple “typical” intestate decedents and might easily accommodate others. Moreover, the drafters might adopt a multi-factor approach to qualification of a same-sex surviving committed partner that utilizes principally objective criteria and is consistent with Article II’s tolerance of some uncertainty in order to serve Article II’s principal value in favor of donative freedom. In addition, the drafters might adopt a registration system for qualification of a same-sex surviving committed partner that entails little or no judicial discretion and, thus, little or no uncertainty.

of each other as agent for healthcare decisions, to qualify an individual as a surviving committed partner).

147. See Ascher, *supra* note 55, at 641 (“In seeking to implement the often unexpressed intent of decedents, the 1990 version invites litigation concerning many more issues than the pre-1990 version did.”); Fellows, *supra* note 55, at 661 (responding to criticism that the 1990 Code’s spousal intestate succession provision is more complicated than was its predecessor, as demonstrated inter alia by counting additional lines of text: “It seems irresponsible, however, to suggest that, in the 1990s, the UPC should not have added statutory text in order to recognize the emergence of blended families.”). See also UNIF. PROBATE CODE §§ 2-404 to -405 & cmts. (amended 1997) (granting to the personal representative or the court the discretion to determine the amount of a “reasonable” family allowance “on the basis of the facts of each individual case”).

148. See generally Ascher, *supra* note 55.

149. *Id.* at 640.

150. *Id.* Professor Ascher focuses his criticisms on revisions adopted in the 1990 Code that he feels complicate matters in an attempt to carry out unexpressed donative intent but with little gain in return, in particular the revised rules for ademption by extinction and for prevention of lapse of gifts to a predeceased beneficiary. See *id.* at 642–57.

C. Arguments Deriving from Support of the Traditional Family or Opposition to Same-Sex Relationships

Much opposition to extension of intestate inheritance rights for surviving same-sex committed partners arises from the political and moral opposition to same-sex relationships.¹⁵¹ This opposition implicates the three remaining expressed values that ground the 1990 Code: the endorsement of marital-sharing theory, the recognition of the changing nature of "family," and a desire for multi-state uniformity in succession law.

1. The Endorsement of the "Marital-Sharing" Theory

The 1990 Code strongly endorses the view that marriage is an economic partnership whose fruits should be enjoyed by both partners to the marriage.¹⁵² The drafters explain:

The partnership theory of marriage, sometimes also called the marital-sharing theory, is stated in various ways. Sometimes it is thought of "as an expression of the presumed intent of husbands and wives to pool their fortunes on an equal basis, share and share alike." Under this approach, the economic rights of each spouse are seen as deriving from an unspoken marital bargain under which the partners agree that each is to enjoy a half interest in the fruits of the marriage, i.e., in the property nominally acquired by and titled in the sole name of either partner during the marriage (other than in property acquired by gift or inheritance). A decedent who disinherits his or her surviving spouse is seen as having reneged on the bargain. Sometimes the theory is expressed in restitutionary terms, a return-of-contribution notion. Under this approach, the law grants each spouse an entitlement to compensation for non-monetary contributions to the marital enterprise, as "a recognition of the activity of one spouse in the home and to compensate not only for this activity but for opportunities lost."¹⁵³

As noted earlier, Article II implements the marital-sharing theory in its elective share provisions.¹⁵⁴ The drafters expressly rejected the pre-1990 Code approach to the elective share, in which the surviving spouse was entitled to a fixed one-third share of the decedent's estate, as failing to implement sufficiently the marital-sharing theory.¹⁵⁵ Instead, to better implement marital-sharing theory,

151. See *infra* notes 189–207 and accompanying text.

152. See UNIF. PROBATE CODE art. II, pt. 2 general cmt. (amended 1997) ("The main purpose of the revisions [to the elective share provisions] is to bring elective-share law into line with the contemporary view of marriage as an economic partnership.")

153. *Id.* (quoting MARY ANN GLENDON, *THE TRANSFORMATION OF FAMILY LAW: STATE, LAW, AND FAMILY IN THE UNITED STATES AND WESTERN EUROPE* 131 (1989)). See also Waggoner, *supra* note 33, at 236–37.

154. See *supra* notes 63–69 and accompanying text. See also UNIF. PROBATE CODE §§ 2-202 to -208 (amended 1997).

155. UNIF. PROBATE CODE art. II, pt. 2 general cmt. (amended 1997) (explaining how traditional elective share statutes, including the pre-1990 Uniform Probate Code, fail to adequately implement the marital-sharing theory).

the revised 1990 Code provides that the size of the elective share in any given estate shall be determined by a sliding scale percentage that generally increases with the length of the marriage until the percentage reaches a maximum of fifty percent.¹⁵⁶ The assumption that grounds this accrual method of calculating the elective share percentage is that, as the duration of the marriage increases, the amount of the property owned by the spouses that is marital property—in which both partners should have a claim—also increases.¹⁵⁷ The 1990 Code further implements the marital-sharing theory by calculating the final elective share award using an “augmented estate” which includes the probate and non-probate property of both spouses.¹⁵⁸

Thus, the 1990 Code’s elective share provisions and the accompanying comments make plain that the drafters favor a theory of marriage that views the spouses as economic partners, each of whom possesses a stake in the marital property regardless of how such property is titled. There is no express support, however, for the view that the drafters implemented the marital-sharing theory because of a preference for marital relationships as compared to non-marital relationships. The principle in favor of implementing the marital-sharing theory is essentially neutral with respect to extension of intestate inheritance rights for a surviving same-sex partner.

One might argue that implementation by the 1990 Code of the marital-sharing theory implicitly seeks to privilege and favor marital relationships over non-marital relationships. As Professor Fellows has noted in a different context, “[l]egal regulation of marriage and divorce discourages nonmarital relationships directly by denying unmarried couples the benefits of marriage provided by the state. It also discourages nonmarital relationships indirectly by creating a privileged category of legitimate relationships.”¹⁵⁹ In the context of the elective share, however, this argument is undermined by the fact that, to the extent that the marital-sharing theory privileges surviving married spouses in relation to surviving unmarried spouses it necessarily disadvantages married decedents in relation to unmarried decedents. For each surviving spouse who enjoys the right to assert an elective share against her decedent spouse’s estate, there is a decedent spouse whose donative freedom is limited by such a right. Moreover, in light of the absence of any express indication by the drafters that they intentionally sought to privilege marital relationships and disadvantage non-marital relationships, it is equally plausible that any such privileging is an unintentional byproduct rather than intended policy.

Nor does Article II’s implementation of marital-sharing theory directly support extension of intestate inheritance rights to surviving committed same-sex

156. See *id.* § 2-202. See also *id.* § 2-202 cmt. (“The revision of this section is the first step in the overall plan of implementing a partnership or marital-sharing theory of marriage, with a support theory back-up.”).

157. *Id.* art. II, pt. 2 general cmt.

158. See *id.* § 2-207 & cmt. (“The purpose of combining the estates and nonprobate transfers of both spouses [in calculating the augmented estate] is to implement a partnership or marital-sharing theory.”).

159. Fellows, *supra* note 9, at 13.

partners. One might argue that marital-sharing theory's recognition of marital partners as an economic partnership should be extended to recognize that many non-marital partners also function as an economic unit in which the partners utilize their talents for their joint economic benefit.¹⁶⁰ One might further argue that the surviving partner's contributions to such an economic unit entitle her to share in the decedent partner's intestate estate.¹⁶¹ Whether or not such an argument might have force with respect to extension of elective share provisions to surviving non-marital partners, the argument is off the mark with respect to intestate inheritance rights. Intestacy law is grounded principally on the intent of the intestate decedent and seeks to carry out her attributed intent irrespective of whether, or to what extent, her heirs contributed to the acquisition of her property.¹⁶²

2. *A Responsiveness to the Changing Nature of "Family"*

Succession law developed on the basis of the traditional family. It is not surprising, therefore, that traditional succession law does not take notice of same-sex couples.¹⁶³ Traditional families, however, have become increasingly less typical in recent years.¹⁶⁴ Succession law, in turn, must adapt to recognize the changing nature of the American family lest the law become less effective at implementing the policies that ground it. Professor Ralph Brashier has focused attention on this problem and has called for the development of succession laws that reflect the realities of nontraditional families.¹⁶⁵

For example, Professor Brashier notes that increasing numbers of children are born into and/or raised in families in which the mother and father are not married to each other.¹⁶⁶ He argues that the increased rate of out-of-wedlock births and increased rate of divorce have heightened the need for direct protection of

160. See O'Brien, *supra* note 132, at 216-17 ("The issue is whether states, the traditional purveyor of wealth at death through statutes guarantying intestate or testate distribution, will make the connection between the joint efforts of married couples and the joint efforts of non-marital cohabitants.").

161. See *id.* at 218.

It is not that marriage is unimportant, it is simply that, since domestic partnership presumes the absence of a spouse but nonetheless the presence of wealth that accumulates in a partnership fashion, the person who contributed to that function should participate in the economic distribution without contest from a formal family.

Id.

162. See *supra* notes 32-35 and accompanying text.

163. See UNIF. PROBATE CODE art. II (amended 1997) (failing to mention gay and lesbian families in any of its provisions or comments).

164. See IRA MARK ELLMAN ET AL., FAMILY LAW: CASES, TEXT, PROBLEMS 929-32 (3d ed. 1998).

165. See generally Brashier, *supra* note 37; *id.* at 225 ("It is clear that the efficient probate schemes that have served the traditional family for decades are ill equipped to address many of the problems that face its nontraditional counterpart."); Ralph C. Brashier, *Protecting the Child From Disinheritance: Must Louisiana Stand Alone?*, 57 LA. L. REV. 1 (1996) [hereinafter Brashier, *Protecting the Child*].

166. See Brashier, *Protecting the Child*, *supra* note 165, at 14.

children from disinheritance.¹⁶⁷ Professor Brashier explains how traditional succession law protects the marital child from disinheritance. He asks us to imagine a father who dies, disinheriting both his wife and child. Traditional succession law provides the surviving spouse with an elective share in the decedent's estate despite the will that disinherited her. The surviving spouse is likely to share this property during life with her child and/or devise this property to her child at the surviving spouse's death.¹⁶⁸ Thus, pursuant to this conduit effect, traditional succession law protects the marital child from disinheritance.¹⁶⁹

Professor Brashier further points out how traditional succession law allows the conduit effect to break down in the nontraditional family in which the mother and father are unmarried at the father's death.¹⁷⁰ Under traditional succession law, the surviving mother receives no elective share in the father's estate.¹⁷¹ Thus, she is disinherited and cannot pass any portion of the father's estate on to their mutual child whom the non-marital father may also disinherit.¹⁷²

The drafters of the 1990 Code were well aware of the changing nature of the American family and the challenges and opportunities that these changes present to American succession law. Professor Waggoner, who served as Reporter for the Drafting Committee to Revise Article II of the Uniform Probate Code, noted near the time of the revisions:

The traditional "Leave It To Beaver" family no longer prevails in American society. To be sure, families consisting of a wage-earning husband, a home-making and child-rearing wife, and their two joint children still exist. But because divorce rates are high and remarriage abounds, many married couples have or will end life having children from prior marriages on one or both sides. Families are routinely headed by two adults working outside the home, or by a single parent. Unmarried heterosexual and homosexual couples, sometimes with children, are also unmistakable parts of the American family scene.¹⁷³

Professor Waggoner has further noted that one of the principal goals of the 1990 Uniform Probate Code revisions "was to develop sensible probate rules for the altered and ever-changing climate of marital behavior."¹⁷⁴

The 1990 Code reflects the drafters' recognition of the changing nature of the American family. It does so principally in its elective share provisions, which provide a smaller share in the decedent's estate to the survivor of a late-in-life short-term marriage,¹⁷⁵ and in its intestacy provisions, which expressly seek to

167. See *id.* at 13–15.

168. See *id.* at 13–14.

169. See *id.* at 14.

170. See *id.* at 14–15.

171. See *id.*

172. See *id.*

173. Waggoner, *supra* note 33, at 223–24.

174. *Id.* at 225.

175. See UNIF. PROBATE CODE § 2-202 (amended 1997); *id.* art. II, prefatory note ("The multiple-marriage society and the partnership/marital-sharing theory are reflected in

effectuate the attributed intent of intestate decedents who die leaving both a surviving spouse and non-mutual children.¹⁷⁶ Article II would better implement the principle of responding to the changing nature of the American family if it extended intestate inheritance rights to surviving same-sex committed partners. Such responsiveness, however, is not merely an end in itself. Rather, recognition in Article II's intestacy scheme of the reality that gay and lesbian families exist would allow for promotion of Article II's higher value of respect for donative freedom.¹⁷⁷

3. *A Desire for Multi-State Uniformity in Succession Law*

The drafters of the 1990 Code placed a high value on multi-jurisdiction uniformity in succession law which they hoped to achieve through widespread adoption of the 1990 Code.¹⁷⁸ Their hope was that widespread adoption of the 1990

the revised elective-share provisions of Part 2 [which] adjust[] the elective share to the length of the marriage.”); *id.* art. II, pt. 2 general cmt.

The general effect of implementing the partnership theory in elective-share law is to increase the entitlement of a surviving spouse in a long-term marriage in cases in which the marital assets were disproportionately titled in the decedent's name.... A further general effect is to decrease or even eliminate the entitlement of a surviving spouse in a short-term, later-in-life marriage in which neither spouse contributed much, if anything, to the acquisition of the other's wealth....

....

Because each spouse in this type of marriage [short-term, later-in-life marriage] typically comes into the marriage owning assets derived from a former marriage, the one-third fraction of the decedent's estate [typical of less modern elective share statutes including the pre-1990 Uniform Probate Code] far exceeds a 50/50 division of assets acquired during the marriage.

Id.

176. See *id.* § 2-102 & cmt. (amended 1997); *id.* art. II, prefatory note (“The children-of-previous-marriages and stepchildren phenomena are reflected most prominently in the revised rules on the spouse's share in intestacy.”); *id.* § 2-213 & cmt.

The provisions of this section, permitting a spouse or prospective spouse to waive all statutory rights in the other spouse's property, seem desirable in view of the common desire of parties to second and later marriages to insure that property derived from the prior spouse passes at death to the joint children (or descendants) of the prior marriage instead of to the later spouse.

Id. See *id.* § 2-901 & cmt. (stating that the Statutory Rule Against Perpetuities was drafted with an awareness of the perpetuity problem arising from reproductive technologies such as sperm banks and frozen embryos that allow one to have children long after death).

177. For a proposal on expanding the definition of “parent” and “child” for intestate distribution purposes to encompass those persons in a “functional” parent-child relationship, see Susan Gary, *Adapting Intestacy Laws to Changing Families*, 18 LAW & INEQ. J. (forthcoming 2000).

178. See, e.g., UNIF. PROBATE CODE § 2-803 & cmt. (amended 1997).

The pre-1990 version of this section [governing the effect on succession of homicide of the donor by the donee] was bracketed to indicate that it may be omitted by an enacting state without difficulty.

Code would “tend to induce persons to rely on a single will as sufficient even though they may own land in two or more states, and to refrain from making new wills when they change domicile from one state to another.”¹⁷⁹

Thus, the drafters avoided provisions that were inherently unlikely to achieve wide spread adoption. The drafters’ discussions concerning the 1990 Code’s revised elective share provisions reflected this concern. The drafters rejected an “equitable distribution” model for the elective share, in which the court would decide, based on its notion of fairness, how much of the decedent’s estate should be awarded to the surviving spouse. The drafters rejected this approach in part because the various states have several different schemes for equitable distribution upon divorce. Thus, assuming that each state would want to model its equitable distribution scheme at death upon the equitable distribution scheme it presently uses upon divorce, uniformity of law could not be achieved.¹⁸⁰

A second way in which the drafters’ desire for uniformity in succession law influenced the content of Article II is reflected in the 1990 Code’s avoidance of politically unpopular provisions that might endanger adoption of the Code as a whole.¹⁸¹ The drafters were aware that the more the 1990 Code contained radical deviations from incumbent succession law the less likely the 1990 Code would be to achieve widespread adoption as a whole.¹⁸² This concern was part of the motivation for the drafters’ decision not to include a substantive mistake reformation doctrine in the 1990 Code.¹⁸³

As the drafters are not known to have lived in caves shut away from contemporary society or to otherwise have isolated themselves from the realities of heterosexism and homophobia, it is safe to assume that the drafters were aware that

The revised version omits the brackets because the Joint Editorial Board/Article II Drafting Committee believes that uniformity is desirable on the question.

Id. See id. § 2-804 cmt. (“Because the Uniform Probate Code contemplates multistate applicability, it is well suited to be the model for federal common law absorption.”).

179. *Id.* art. II, pt. 10 prefatory note. *See also* Langbein & Waggoner, *supra* note 24, at 878 (arguing that uniformity in succession law is valuable in light of the reality that the “decedent can own property in many jurisdictions, and because it is ever more common for people to change domicile later in life, an estate plan that is crafted in one state may come into effect in another”); Averill, *supra* note 18, at 895 (arguing that lack of uniformity in succession law “may cause not only unjust results but also an inherent confusion and distrust among a very mobile lay populace”).

180. *See* Waggoner, *supra* note 33, at 242–43.

181. *See* Averill, *supra* note 18, at 892 (relating that “[m]uch time was spent in committee meetings with Bar Association groups advocating the [1969 Uniform Probate] Code and attempting to mold it in a politically acceptable fashion”).

182. *See* Adam J. Hirsch, *Inheritance and Inconsistency*, 57 OHIO ST. L. J. 1057, 1157 (1996) (concluding that the drafters of the 1990 Code were “sensitive to th[e] reality” that “radical deviation from past practices is rarely palatable politically”).

183. *See id.* at 1103 n.129 (1996). Professor Lawrence Waggoner, Reporter for the revised Article II, stated in a letter to Professor Hirsch that the decision not to include a substantive mistake reformation doctrine in the UPC was motivated in part by a desire to avoid political controversy that “might have endangered state adoptions of the revised Code as a whole.” *Id.*

inclusion in the 1990 Code of intestate inheritance rights for surviving committed same-sex partners would endanger adoption of the 1990 Code as a whole in many states.¹⁸⁴ Even assuming an inverse relationship between inclusion in Article II of protections for same-sex partners and widespread adoption of Article II as a whole, however, the uniformity argument against inclusion of intestate inheritance rights for surviving same-sex committed partners is vulnerable to serious criticism.

Not all provisions of Article II are equal with respect to the utility of uniform enactment. The drafters themselves recognized this and expressly allowed for diversity of thought on some succession matters.¹⁸⁵ Compelling reasons for desiring uniformity exist with respect to some substantive areas of succession law but may have no force in other areas of succession law.

For example, as noted above, the debate concerning the revised elective share provisions in the 1990 Code was informed by a desire for wide-spread adoption of such provisions.¹⁸⁶ Uniformity with respect to elective share law would serve the compelling policy of preventing avoidance behavior by husbands or wives intent on disinherit their spouses.¹⁸⁷ Intestacy law, however, which is grounded on the principle of carrying out the decedent's unexpressed intent, need not be concerned at all with preventing avoidance behavior, which is itself an expression of the property owner's intent.

The well-grounded fear remains, however, that inclusion of intestate inheritance rights for surviving same-sex committed partners might cause

184. See Brashier, *supra* note 91, at 162 (noting that the "[e]xtension of the forced share to gay or lesbian cohabitants would be anathema to some segments of American society, which might prefer to abolish the elective share altogether rather than extend its protection to homosexual couples").

185. See UNIF. PROBATE CODE art. II, pt. 4 general cmt. (amended 1997).

States adopting the Code may see fit to alter the dollar amounts suggested in these sections, or to vary the terms and conditions in other ways so as to accommodate existing traditions. Although creditors of estates would be aided somewhat if all family exemption provisions relating to probate estates were the same throughout the country, there is probably less need for uniformity of law regarding these provisions than for any of the other parts of this article.

Id. See *id.* § 2-102A(b) & cmt. (stating alternate intestacy provision for community property states is intended to allow states the "free[dom] to adopt a different scheme for distribution of the decedent's half of the community property, as some community property states have done"); *id.* § 2-212(c)(2) & cmt. ("giv[ing] enacting states a choice as to whether governmental benefits for which the spouse must qualify on the basis of need, such as Medicaid" should be considered by a custodial trustee of an elective share custodial trust in determining how much of the trust property should be expended for the incapacitated beneficiary); *id.* § 2-907 & cmt. (providing an optional provision that validates "honorary" trusts for pets, which provision itself has a bracketed limit on the duration of such an honorary trust to indicate that "an enacting state may select a different figure").

186. See *supra* note 180 and accompanying text.

187. See Waggoner, *supra* note 33, at 243 ("The logic of a uniform laws project dealing with probate law is that each state will adopt the same elective-share system, particularly in order to prevent a spouse bent on disinheritance from domicile shopping by relocating property to a state with fewer safeguards against this sort of behavior.").

legislatures to reject adoption of Article II as a whole and, instead, to pick and choose on a provision-by-provision basis the portions of Article II that the legislature will enact. The concern is that once a legislature rejects the idea of adopting Article II as a whole, and chooses instead to examine the 1990 Code on a provision-by-provision basis, the legislature may reject numerous provisions in addition to the intestacy provisions. The likelihood of such an occurrence might be reduced by including in Article II alternate (and mutually inconsistent) intestacy schemes between which a legislature must choose.¹⁸⁸ This might lessen the chance that legislatures would reject Article II as a whole, since they may easily avoid adoption of intestate inheritance rights for surviving same-sex committed partners but still have available to them adoption of an otherwise complete model probate code.

In sum, same-sex exclusion from Article II's intestacy provisions is fundamentally inconsistent with the values that ground the 1990 Code. The drafters would promote the principal value of donative freedom and at the same time implement the goal of reforming succession law to reflect the changing nature of the American family by altering Article II's present intestacy scheme to provide intestate inheritance rights for the survivor of a same-sex committed relationship. Moreover, the drafters could craft such an intestacy scheme without unreasonably undermining Article II's subsidiary goals of simplicity and certainty or unreasonably jeopardizing multi-state adoption of Article II as a whole.

III. THE EXPRESSIVE FUNCTION OF LAW AND THE STRUGGLE FOR SAME-SEX EQUALITY

The potential of succession law to affect change in cultural norms is at the heart of the debate over same-sex equality and succession law reform. Exclusionists oppose same-sex recognition because, in their view, it would inappropriately reward and legitimate an immoral and anti-societal relationship.¹⁸⁹ Under this view, unequal treatment under succession law of same-sex relationships as compared to marital relationships is appropriate. The argument is that the law should treat same-sex relationships as inferior to marital relationships because they are inferior.¹⁹⁰ To treat such relationships as on a par with marriage would be to

188. See, e.g., UNIF. MARRIAGE AND DIVORCE ACT § 211, 9A U.L.A. 177-79 (1987 & Supp. 1997) (containing provisions that alternately validate and invalidate common law marriage).

189. See, e.g., Chambers, *supra* note 40, at 486 ("Heterosexual conservatives object to same-sex marriage either on the ground that sex between persons of the same sex is immoral or pathological or on the ground that permitting same-sex couples to marry will somehow contribute to the crumbling of the 'traditional' family."); Arthur A. Murphy & John P. Ellington, *Homosexuality and the Law: Tolerance and Containment II*, 97 DICK. L. REV. 693, 706 (1994) (arguing against same-sex marriage and any other change in the law that "is likely to increase the incidence of homosexuality and same-sex carnal behavior or which seems to endorse homosexuality as a desirable lifestyle").

190. See Lynn D. Wardle, *Loving v. Virginia and the Constitutional Right to Marry, 1790-1990*, 41 HOW. L. REV. 289, 345-46 (1998) (arguing that "relationships that do not contribute to society as much as traditional life-long committed marriages of a man and woman may not be said to be protected by the fundamental 'right to marry'").

extend "special rights" to same-sex couples.¹⁹¹ The exclusionist view further holds that provision of inheritance rights to same-sex committed partners would be detrimental to society because it would be an implicit, and misguided, acknowledgment of the merit of same-sex relationships and thus, a state endorsement of such relationships.¹⁹²

If exclusionists and inclusionists agree on nothing else, they share a similar view of the expressive function of same-sex equality under the law. Inclusionists seek extension of intestate inheritance rights to same-sex couples, in part for the same reason that exclusionists oppose it; inclusion would indicate that gay and lesbian relationships merit positive attention and would be a powerful symbol that society accepts such relationships.¹⁹³

It is a truism that the law teaches as it governs.¹⁹⁴ The law has great potential to teach and reinforce the values that ground it or appear to ground it.¹⁹⁵ Those who experience the law operating upon them personally and those who observe the law operating on others are likely to learn whom the law respects, ignores, privileges, and disadvantages.

In this way, intestacy law not only reflects society's familial norms but also helps to shape and maintain them.¹⁹⁶ Thus, succession law reform has great

191. See Peter J. Rubin, *Equal Rights, Special Rights, and the Nature of Antidiscrimination Law*, 97 MICH. L. REV. 564, 591-93 (1998).

[A] law prohibiting discrimination against homosexuals might be perceived by such a person [who views gay people as objectionable] to provide them (unlike members of similar groups, prostitutes and gamblers) with a kind of special right, indeed, with something that would seem very much like affirmative action. For until a person shares the conclusion that gay people are the same in all relevant respects as everyone else entitled to full membership in society, the command of antidiscrimination contained in the law may actually force him or her to depart from what he or she perceives as a rule of neutrality with respect to homosexuals.

Id. See Lynn D. Wardle, *A Critical Analysis of Constitutional Claims for Same-Sex Marriage*, 1996 B.Y.U. L. REV. 1, 58-61 (concluding that the demand for same-sex marriage "is a demand for special preferred status, not merely tolerance").

192. See Murphy, *supra* note 189, at 706 (arguing against same-sex inclusion lest "over the long-term, this kind of endorsement could lead to an increase in homosexual behavior"); Wardle, *supra* note 191, at 192 (arguing that to legalize same-sex marriage would be to endorse such relationships as "essential to the success of our society").

193. See Chambers, *supra* note 40, at 450-51 (arguing that the acceptance of gay men and lesbians through recognition of same-sex marriage is a principal motivation of advocates on both sides of the same-sex marriage debate); Harlon Dalton, *Reflections on the Lesbian and Gay Marriage Debate*, 1 LAW & SEXUALITY 1, 7 (1991).

194. See generally MARY ANN GLENDON, *ABORTION AND DIVORCE IN WESTERN LAW* (1987); Carol Weisbrod, *On the Expressive Functions of Family Law*, 22 U.C. DAVIS L. REV. 991, 994 (1989).

195. See generally Sunstein, *supra* note 13, at 2043-44 (exploring how law changes social norms).

196. Fellows, *supra* note 9, at 8 ("At the same time that intestacy statutes reflect social norms and values, they also shape the norms and values by recognizing and legitimating relationships." (footnote omitted)).

potential to change the way our society views gay men and lesbians and, indeed, how gay men and lesbians view themselves.¹⁹⁷ Having reviewed the evolution over the past several hundred years of succession law, Professor Fellows concludes: “[C]hanging the intestacy statutes to allow a committed partner to share in the decedent’s estate could potentially have substantial legal, social and political effects. Recognition within intestacy statutes has consistently had the effect of shaping, as well as reflecting, societal norms and values and the definition of family itself.”¹⁹⁸

Yet, provision of same-sex inheritance rights need not be an endorsement of the merits of same-sex relationships vis-à-vis marriage. The drafters of a reformed Article II might make clear that inclusion of same-sex relationships within the intestacy scheme is merely an acknowledgment that such same-sex relationships do exist and do give rise to a desire among their partners to provide for one another. The drafters’ effort within Article II to bring the laws of probate and nonprobate transfers into greater unison¹⁹⁹ is instructive:

It would not quite capture the intent of the 1990 UPC to say that the statute strives to promote nonprobate transfers. Many of us who shared responsibility for the 1990 UPC, indeed perhaps most of us, view the spread of the will substitutes with misgivings.... In responding to the spread of the will substitutes, the drafters of the 1990 UPC felt themselves to be following rather than leading. The forces that led to the proliferation of the will substitutes...are deep seated. The 1990 UPC accepts the inevitability of the will substitutes and attempts to deal with the consequences.²⁰⁰

Similarly, Article II might merely profess acceptance of the inevitability of same-sex partnerships and an intent to deal with the consequences of such relationships—that is, to promote the principle of donative freedom by taking into account the donative wishes of those persons who choose to enjoy such relationships—without seeking to promote those relationships.²⁰¹ In this way, the drafters would muffle the expressive function of same-sex inclusion. Of course, to the extent that a reformed Article II limits intestate inheritance rights to non-marital relationships with a requisite level of “marriage-like” commitment and responsibility, extension of intestate inheritance rights to same-sex partnerships

197. See *id.* at 91 (“Just as legal invisibility currently shapes the internal dynamics of the family unit, recognition inevitably will shape the relations of the partners to each other and to their children.”); *id.* at 22 (“By including a surviving committed partner as an heir, the intestacy scheme would reflect decedents’ intent to have their partners share in their probate estates and it would also establish a social norm that a partner should have a share in a decedent’s estate.”).

198. *Id.* at 8–9, 90–91 (footnotes omitted).

199. See *supra* notes 106–112 and accompanying text.

200. Langbein & Waggoner, *supra* note 24, at 875.

201. Cf. Ronald J. Krotoszynski, Jr., *Cohen v. California: “Inconsequential” Cases and Larger Principles*, 74 TEX. L. REV. 1251, 1254 (1996) (noting how the Supreme Court’s First Amendment jurisprudence has vindicated the principle in favor of full and free public debate of controversial issues without at the same time embracing or endorsing specific views or behavior).

would necessarily be an acknowledgment that such commitment and responsibility do exist within some gay and lesbian relationships. To the extent that familial commitment and responsibility are seen as a good to be promoted, therefore, such inclusion would be an acknowledgment of the merit of some same-sex relationships.

Relatedly, exclusionists also fear that same-sex inclusion within succession law would undermine the institution of heterosexual marriage.²⁰² Traditional intestacy law privileges the marital family and elevates it above all competing family structures.²⁰³ From this, one could argue that two consequences would follow from reformed intestacy laws that privilege families other than the traditional marital family. First, such reforms would debase traditional marriage by equating it with less worthy family structures. Second, such reforms would elevate family structures that compete with traditional marriage.

The drafters could partially mute the debasement argument by making clear that same-sex inclusion is meant to honor marriage as an institution whose values should be emulated in non-marital relationships. So understood, extension of intestate inheritance rights to non-marital couples would seek to reward and support those who assume responsibility for family members outside of a marital family and thus, conform to the traditional values that marriage seeks to promote.²⁰⁴

Professor Waggoner's Working Draft is responsive to the criticism that provision of intestate inheritance rights for non-marital partners might undermine traditional marriage. "[T]o maintain the incentive to enter into a formal marriage," the Working Draft grants a surviving committed non-marital partner less of an intestate share of her decedent partner's estate than a similarly situated surviving spouse would take under the 1990 Code's existing intestacy scheme.²⁰⁵ Professor Waggoner acknowledges that such an incentive structure is of questionable efficacy with respect to gay and lesbian partners, who may not enter into state-recognized marriages. He urges, therefore, that consideration be given to decoupling the intestate shares of heterosexual versus homosexual non-marital partners. He suggests it may be appropriate to award a larger intestate share to a

202. See Fellows, *supra* note 9, at 14 (reporting the view that recognition of intestate inheritance rights for committed non-marital partners is inconsistent with the view of intestacy law as functioning to support traditional marriage).

203. See Chambers, *supra* note 40, at 485-86; Lawrence M. Friedman, *The Law of Succession in Social Perspective*, in DEATH, TAXES AND FAMILY PROPERTY: ESSAYS AND AMERICAN ASSEMBLY REPORT 9, 14 (Edward Halbach, Jr., ed., 1977) (arguing that intestacy law reinforces the nuclear family and "[a]ny radical change in the rules, if carried out, will radically change the society").

204. Fellows, *supra* note 9, at 14-15 ("Yet another view is to consider any retrofitting of inheritance laws to include a committed partner as more likely to result in persons in committed relationships conforming to traditional family norms.").

205. See Waggoner, *supra* note 7, at 80 (expressing this point concerning an earlier version of the Working Draft). Compare UNIF. PROBATE CODE § 2-102 (amended 1997), with WAGGONER, *supra* note 127, at 107-08 (demonstrating that Article II provides a larger share of the decedent's intestate estate to a surviving spouse than the Working Draft does with respect to a similarly situated surviving committed non-marital partner).

survivor of a same-sex non-marital partnership than to a similarly situated survivor of a mixed-sex, non-marital partnership.²⁰⁶

In sum, the drafters could take several steps to muffle the expressive function of same-sex inclusion, but would be hard pressed to alleviate all of the concerns that exclusionists have raised. In light of these concerns, and in light of the great schism that divides society over the issue of same-sex inclusion and the passion with which advocates on both sides of the issue hold their views,²⁰⁷ the drafters might conclude that it would be prudent at this time for Article II to take no position on same-sex intestate inheritance rights. But those who would shape succession law should recognize that they cannot truly sit out this fight. To remain inactive, no less than to act, is to choose sides. The choice for the drafters, therefore, is not whether to speak, but what to say.

Exclusion of intestate inheritance rights for same-sex couples, in the context of Article II and in conjunction with recent empirical evidence demonstrating that the 1990 Code does not reflect the donative preferences of those persons who live in same-sex partnerships, serves a powerful expressive function. Such silence, in context, is deafening in its devaluation of gay relationships. This message emanates from the present inconsistency between the values that ground the 1990 Code, on the one hand, and same-sex exclusion, on the other.

The 1990 Code is appropriately classified as a family property law code. In many instances, Article II bases property rights at the death of the property owner on the familial relationship between the donor and the putative donee.²⁰⁸ It is

206. See Waggoner, *supra* note 7, at 80 n.143. Of course, the premise for such disparate treatment is that such survivors can never be truly similarly situated in that the survivor of a mixed-sex committed partnership had the option of entering into a state-sanctioned marriage, while the survivor of a same-sex committed partnership did not. See *id.*

207. See Murphy, *supra* note 189, at 693-94; Wardle, *supra* note 191, at 53-58.

208. See UNIF. PROBATE CODE § 2-102 (amended 1997) (providing a share of the intestate estate to a surviving spouse); *id.* § 2-103 (providing for shares of the intestate estate to heirs other than the surviving spouse); *id.* § 2-106 (passing of intestate property by representation); *id.* § 2-109 (governing advancements to intestate heirs); *id.* §§ 2-202 to -208 (providing an elective share in the decedent's estate to a surviving spouse); *id.* § 2-301 (providing property equal to an intestate share for a surviving spouse omitted from the decedent's premarital will); *id.* § 2-302 (providing for a share in the decedent's estate to a child born after execution of the decedent's will); *id.* § 2-402 (providing homestead allowance to a surviving spouse or, if there is no surviving spouse, to minor and dependent children); *id.* § 2-403 (providing for "exempt property" — up to \$10,000 of household furniture, automobiles, furnishings, appliances and personal effects — to a surviving spouse or, if there is no surviving spouse, to the decedent's children); *id.* § 2-404 (providing that the surviving spouse and minor children whom the decedent was obligated to support and was supporting at death are entitled to a reasonable allowance for their maintenance during the administration of the estate); *id.* § 2-603 (antilapse provision for wills applies only to devises to the testator's grandparents, to the descendants of the testator's grandparents, or to the testator's stepchild; moreover, substitute gift is created in the devisee's surviving descendants); *id.* § 2-706 (antilapse statute for will substitutes such as life insurance, retirement accounts, and POD accounts, which applies only to transfers to the donor's

striking, therefore, that Article II not only fails to provide intestate inheritance rights for same-sex committed partners, but also contains no indication in its two hundred-plus pages of provisions and commentary that gay men, lesbians, or the families of either exist.

This omission is more glaring in light of the 1990 Code's expressed desire to be responsive to the changing nature of the American family.²⁰⁹ The drafters deliberately crafted Article II's provisions to reflect the reality of heterosexual step-families and heterosexual later-in-life second marriages.²¹⁰ The 1990 Code, however, overlooks the existence and needs of millions of gay and lesbian families. In this way, the 1990 Code is a model of heteronormativity.²¹¹

The 1990 Code's primary value is the promotion of donative freedom.²¹² Revision of the 1990 Code to include intestate inheritance rights for same-sex committed partners would further this value and would not conflict with Article II's subsidiary values.

The conclusion that Article II's structural inconsistency, in seeking to promote donative freedom yet failing to provide surviving same-sex committed partners with intestate inheritance rights, serves an expressive function necessarily depends on the assumption that people will notice the inconsistency.²¹³ Professor Adam Hirsch has considered this issue of inconsistency.²¹⁴ Professor Hirsch has concluded that succession law is replete with asymmetrical treatment of analogous legal issues, particularly in the subsidiary law of wills as compared to the

grandparents, to the descendants of the donor's grandparents, or to the donor's stepchild; moreover, substitute gift is created in the transferee's surviving descendants); *id.* § 2-707 (providing for an antilapse statute for future interests under the terms of a trust, which antilapse statute applies all such transfers regardless of the relationship between the settlor and the beneficiary; a substitute gift is created in the beneficiary's surviving descendants); *id.* § 2-804 (providing for revocation upon divorce of all probate and non-probate transfers to the divorced individual's former spouse or relative of the divorced individual's former spouse). *See also* WAGGONER, *supra* note 127, at 1 (discussing "the symbiotic relationship between the transmission of wealth and family").

209. *See supra* notes 173-176 and accompanying text.

210. *See supra* notes 175-176 and accompanying text.

211. *See* Nancy J. Knauer, *Heteronormativity and Federal Tax Policy*, 101 W. VA. L. REV. 129, 133 (1998) (defining heteronormativity as "the largely unstated assumption that heterosexuality is the essential and elemental ordering princip[le] of society" (footnote omitted)). *See also* Gregory M. Herek, *The Social Psychology of Homophobia: Toward a Practical Theory*, 14 N.Y.U. REV. L. & SOC. CHANGE 923, 925 (1986) (defining heterosexism as "a world-view, a value-system that prizes heterosexuality, assumes it is the only appropriate manifestation of love and sexuality, and devalues homosexuality and all that is not heterosexual").

212. *See supra* notes 22-31 and accompanying text.

213. *See* Sunstein, *supra* note 13, at 2050 ("For law to perform its expressive function well, it is important that law communicate well." (footnote omitted)).

214. *See* Hirsch, *supra* note 182, at 1139-41. *See also* Weisbrod, *supra* note 194, at 999 ("Assuming there is a law, or rule of law that can be known accurately in principle, we confront the problem of whether it is known in fact. It is suggested that law is known, though somewhat inaccurately, by the public.").

subsidiary law of will substitutes.²¹⁵ Professor Hirsch also has concluded that such structural inconsistencies are likely to have few political repercussions in light of public ignorance of such inconsistencies:

Among ordinary citizens, [structural inconsistency in the law] is too obscure to raise eyebrows or to diminish in any palpable way our sense of belonging to a community. Only those possessed of professional legal training are equipped to discern structural inconsistencies within their subject matter. If as a result, *lawyers* feel alienated from the larger political community, the popular response will probably be, *good riddance!*²¹⁶

Even assuming *arguendo* that Professor Hirsch's conclusion might have force with respect to the unequal application of, for example, revocation-upon-divorce provisions to wills and to will substitutes, the conclusion does not apply to issues of same-sex equality in the 1990 Code—a far more intimate matter and a matter linked with issues of long-standing systemic oppression. Importantly, those gay men and lesbians who suffer unequal treatment under succession law are likely to be acutely aware of their mistreatment.²¹⁷ This mistreatment may well profoundly influence the way that the mistreated persons view the law and their relationship to the larger community.

Moreover, by its nature, the 1990 Code, if left as it is, will tend to fertilize such unequal treatment in other fields of the law. The 1990 Code is a *model* code, studied by scholars and legislators and by law students who will be tomorrow's scholars and legislators. To the extent that the 1990 Code reinforces in these persons who have the power or potential power to shape the law in a variety of fields and ways that gay and lesbian relationships do not merit positive attention, the 1990 Code's political repercussions are likely to be great.

As noted above, the drafters could make inclusion of same-sex equality within Article II more palatable to exclusionists by muffling the expressive function of such inclusion.²¹⁸ Similarly, the drafters could mitigate Article II's present heterosexist message of exclusion by adding an explanation of their

215. See Hirsch, *supra* note 182, at 1070 n.39, 1071–1135.

216. *Id.* at 1140 (rejecting, for the most part, arguments raised by Professor Ronald Dworkin that structural consistency within an area of statutory law promotes the legitimacy of the law). Cf. DWORKIN, *supra* note 1, at 164–224; Ronald Dworkin, *Hard Cases, in TAKING RIGHTS SERIOUSLY* 81–88 (1977). Professor Hirsch does not conclude that structural inconsistency and awareness of it are of no moment. See Hirsch, *supra* note 182, at 1143. Rather, he argues that, while structural inconsistency is neither a vice nor a virtue itself, it might sometimes be a marker of an undetected misapplication of public policy. See *id.*

217. Indeed, Professor Hirsch qualifies his conclusion that structural inconsistency in succession law is unlikely to have significant political repercussions by noting that “[i]n those instances where inconsistencies distinguish the rights of different groups within society, political discontent is likely to well forth.” Hirsch, *supra* note 182, at 1140. Hirsch concludes, however, that “[t]his peculiarly invidious sort of inconsistency” is rare in succession law. *Id.* at 1140–41 & n.253 (citing as a rare example the former treatment of non-marital children under intestacy law but ignoring same-sex inequality).

218. See *supra* note 199–204 and accompanying text.

rationale for such exclusion. If the drafters believe that same-sex exclusion is justified on the merits, perhaps because of still insufficient data, they should explain their conclusion and how such exclusion comports with the values that ground the 1990 Code. Even if exclusion is a product of political expediency, disclosure of this fact would be a step forward from invisibility, which ultimately is the greatest barrier to same-sex equality.²¹⁹

IV. CONCLUSION

Intestacy statutes seek to further donative freedom by effectuating the attributed intent of those who fail to execute a valid estate plan during life. One might reasonably hypothesize that gay men and lesbians, on the whole, differ from the non-gay majority with respect to their donative intent. The fundamental difference in romantic and affectional preferences between gay people and non-gay

219. Shortly before this Article went to press, the Alberta Law Reform Institute issued its final recommendations for reform of Alberta, Canada's intestacy laws. *See generally* ALBERTA LAW REFORM INSTITUTE, REFORM OF THE INTESTATE SUCCESSION ACT, FINAL REPORT NO. 78 (1999). The Institute recommended that Alberta's intestacy provisions be amended to provide intestate succession rights to the surviving opposite-sex "cohabitant" of an intestate decedent where the decedent and her surviving cohabitant had lived "continuously in a marriage-like relationship." *Id.* at 124-26. The proposed revisions would implement a multi-factor approach to identifying a qualifying cohabitant and draw heavily on Professor Waggoner's Working Draft in proposing a list of factors that a court should consider relevant in determining whether a marriage-like relationship existed. *See id.*

The Institute's recommendations present a dilemma to advocates of same-sex equality within succession law. Viewed positively, the Institute's proposed reforms are an important step away from the view that succession rights should be tied to marital or blood relationships. *See id.* at 99 (recognizing that "[m]arriage is no longer the exclusive marker for stable, committed family units"). Moreover, the Institute's Report implicitly recognized many of the merits of same-sex inclusion. For example, the Institute recognized that where family structures have evolved, "the distribution scheme must be reconfigured to serve modern society." *Id.* at 2. The Institute also recognized the central role that donative intent should play in an intestacy scheme. *See id.* at 61 ("Unless some compelling social policy requires deviation from how most intestates in similar family circumstances would want to distribute their estate, intestacy rules should reflect those wishes."). Also, the Institute made "certainty as to the disposition of property and...ease of administration" central goals of its reform efforts, *id.*, but rejected the argument that its recommended multi-factor approach would unduly increase the complexity of estate administration. *See id.* at 100.

Nevertheless, one could view the Institute's proposed reforms as a set back to same-sex equality, at least in the short-term. If adopted, the proposed reforms granting intestate succession rights to opposite-sex cohabitants but denying those rights to same-sex cohabitants would greatly amplify the anti-gay expressive function of the intestacy statute. The Institute softened this blow to same-sex equality somewhat by explaining its reason for failing to address intestate succession rights for same-sex cohabitants:

The rights of same-sex couples raise pressing issues of social policy and are deserving of a more comprehensive consideration than can be accommodated in a report concerning reform of intestate succession. For this reason, we do not propose to deal with the rights of same-sex couples upon intestacy in this report.

people is likely to produce such a disparate donative intent. Much anecdotal evidence and recent empirical evidence strongly support this hypothesis.

Article II of the Uniform Probate Code presently ignores the existence of gay men and lesbians, despite the drafters' expressed effort to recognize the changing nature of the American family. Article II would better implement its principal goal of promoting donative freedom, however, if its intestacy provisions were redrafted to implement the attributed intent of gay men and lesbians. Such inclusion could be implemented consistent with the 1990 Code's desire for simplicity and certainty in succession law by utilizing a registration system for qualification of committed partners, a multi-factor approach that limits judicial discretion through objective requirements and clearly delineated factors for qualification or a combination of these two systems.

Succession reform to include same-sex committed partners also would remove the badge of inferiority that Article II presently places on gay men and lesbians and their relationships. By failing to recognize the fundamental difference between gay people and non-gay people with respect to donative preferences, Article II implies that gay and lesbian relationships are insignificant or unsuitable for recognition. This implicit expression is made all the more pronounced in light of the lack of any justification for same-sex exclusion deriving from the principles of succession law on which the drafters grounded the 1990 Code.

