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## Committed Partners and Inheritance: An Empirical Study

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## Introduction

There is widespread recognition that U.S. households have changed dramatically in the latter half of the twentieth century.<sup>1</sup> The changes include an increased number of blended families,<sup>2</sup> single-parent households,<sup>3</sup> and unmarried same-sex and opposite-sex committed couples, including some with children.<sup>4</sup> The transformation taking place in U.S. households implicates property law

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1. See Craig W. Christensen, *Legal Ordering of Family Values: The Case of Gay and Lesbian Families*, 18 CARDOZO L. REV. 1299, 1311-16 (1997).

2. See ARTHUR J. NORTON ET AL., CURRENT POPULATION REPORTS, SERIES P23-180, MARRIAGE, DIVORCE, AND REMARRIAGE IN THE 1990S, at 1-6 (1992); Jan Larson, *Understanding Stepfamilies*, 14 AM. DEMOGRAPHICS INC., 1992, at 36, 36, 38.

3. See STACY FURUKAWA, U.S. DEPT OF COMMERCE, CURRENT POPULATION REPORTS, SERIES P70-38, THE DIVERSE LIVING ARRANGEMENTS OF CHILDREN: SUMMER 1991, at 2 (1994).

4. The definition of a committed couple is contested and raises a number of theoretical, political and practical questions. Does it mean partners who cohabit? Does it mean partners who are sexually intimate? Does it mean partners who are financially interdependent? These questions and many others are explored, *infra*, in the text accompanying notes 234-265.

and vice versa. In recognition of the changing U.S. household and the symbiotic relationship between wealth transmission and family, we undertook an empirical study designed to assess public attitudes about the inclusion of surviving committed partners as heirs. This Article reports our findings.

In 1994, approximately 7% of the nation's couples were in unmarried committed relationships.<sup>5</sup> Data from surveys of "unmarried partner households" indicate about 30%, or approximately 1.7 million, of unmarried households are likely to be headed by same-sex couples.<sup>6</sup> The number of opposite-sex committed relationships is growing at a more rapid pace than the number of same-sex relationships. Opposite-sex households increased at a 28% rate between 1990 and 1994 as compared to just 4% for same-sex households.<sup>7</sup> A significant minority of same-sex couples (between 8 and 9%) and an even greater percentage of opposite-sex couples (35%) have children under the age of fifteen living with them.<sup>8</sup>

Coincidental with the changes occurring in U.S. households is an increase of public and political attention to issues relating to sexual orientation. The increased attention has led to greater support, or at least greater societal tolerance, for lesbians, gays, bisexuals and transgender persons (LGBT). It has also led, how-

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

Sociologists Larry Bumpass and James Sweet have conducted numerous studies on cohabitation that primarily focus on opposite-sex couples. See LARRY L. BUMPASS & JAMES A. SWEET, COHABITATION, MARRIAGE AND UNION STABILITY: PRELIMINARY FINDINGS FROM NSFH2, 6 (Center for Demography and Ecology, Univ. of Madison-Wis., Nat'l Survey of Families and Households Working Paper No. 65, May 1995). According to their data, "about half of the population under age 40 have [sic] lived with an unmarried partner—in ten years that will be true for the population under age 50." *Id.* at 8. What is striking about the data is that it shows increases in the percentage of unmarried persons currently cohabiting across ages between the late 1980s and the early 1990s. For persons interviewed between the ages of 35 and 39, the percent of unmarried couples cohabiting increased from about 17% in 1987-88 to about 22% in 1992-94. See *id.* at tbl.2, fig.4. For persons between the ages of 45 and 49 the increase was less dramatic (about 13% as compared to about 16%). See *id.* For persons between the ages of 50 and 54, however, the increase went from about 4% to about 16%. See *id.*

6. American Demographics Inc., *One-third of Unmarried Partners Are Gay*, THE NUMBER NEWS, May 1996, at 1, 1 (basing these numbers on surveys in which the householder reported "being one of two partners of the same sex").

7. See *id.*; see also Monica A. Seff, *Cohabitation and the Law*, 21 MARRIAGE & FAMILY REV. 141, 143-46 (1995) (reviewing the literature estimating the extent of cohabitation by opposite-sex couples in the United States, considering the difficulties involved in measurement and explaining the possible reasons for the increase in cohabitation by opposite-sex couples).

8. See CPS, *supra* note 5, at tbl.8.

ever, to increased hostility. Today, the news media commonly profiles lesbians and gay men and their issues,<sup>9</sup> the census bureau tracks households based on the gender of the parties,<sup>10</sup> and a number of municipalities and corporations extend benefits to their employees' domestic partners, which can include partners of the same-sex.<sup>11</sup> At the same time, however, we also are not surprised to find Congress enacting the Defense of Marriage Act,<sup>12</sup> which denies federal recognition of same-sex marriages and allows states not to recognize same-sex marriages authorized in other states.<sup>13</sup>

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9. See Gerald Lubenow et al., *Gays and Lesbians on Campus*, NEWSWEEK, Apr. 5, 1982, at 75, 75; Ramon G. McLeod, *Group Urges Gays, Lesbians to Be Counted in Census*, SAN FRANCISCO CHRON., Mar. 15, 1990, at A15; Eloise Salholz et al., *The Power and the Pride*, NEWSWEEK, June 21, 1993, at 54, 54; Joseph P. Shapiro & Stephen Gregory, *Kids with Gay Parents*, U.S. NEWS & WORLD REP., Sept. 16, 1996, at 75, 75; Alex Witchel, *At Lunch with Chastity Bono; Growing Up in Public: From Babe in Arms to Gay Advocate*, N.Y. TIMES, July 9, 1997, at C1.

10. See, e.g., BUREAU OF THE CENSUS, U.S. DEPT. OF COMMERCE, STATISTICAL ABSTRACT OF THE UNITED STATES 1996, at 57, tbls.64, 65 (116<sup>th</sup> ed. 1996).

11. See Mary Patricia Treuthart, *Adopting a More Realistic Definition of "Family,"* 26 GONZ. L. REV. 91, 101-05 (1990-1991). Santa Cruz and West Hollywood, California and Seattle, Washington have extended health benefits along with sick and bereavement leave to city employees' domestic partners. See *id.* at 101-02 n.32. Other cities, including Madison, Wisconsin and Los Angeles, California, have extended sick and bereavement leave only. See *id.* Berkeley and San Francisco, California are among several municipalities that have a formal domestic partnership registration scheme that provides unmarried committed couples with a "relationship" approximating marriage. See *id.* Many corporations, law firms and universities, including Apple Computer, HBO, IBM, Levi Strauss Corp., Microsoft Corp., Viacom International, Walt Disney, Shearman & Sterling, Skadden, Arps, Slate, Meagher & Flom, the University of Iowa and the University of Pittsburgh also provide domestic partnership benefits to their employees. See Jeff Barge, *More Firms Offer Benefits for Gay Couples: Managers Say Fairness Concerns Prompted Change: Low Cost Was a Surprise*, A.B.A. J., June 1995, at 34; Los Angeles County Bar Ass'n, *The Los Angeles County Bar Association Report on Sexual Orientation Bias*, 4 S. CAL. REV. L. & WOMEN'S STUD. 297, 336 n.170 (1995); Mary Deibel, *Boycotted Disney Late on Same-Sex Benefits*, PITTSBURGH POST-GAZETTE, July 7, 1996, at B2; David W. Dunlap, *Gay Partners of I.B.M. Workers to Get Benefits*, N.Y. TIMES, Sept. 20, 1996, at A18; Marilynne Pitz, *Pitt To Provide Benefits for Same-Sex Partners*, PITTSBURGH POST-GAZETTE, June 10, 1993, at A1.

12. 1 U.S.C.A. § 7 (West Supp. 1997); 28 U.S.C.A. § 1738C (West Supp. 1997).

13. See 1 U.S.C.A. § 7; 28 U.S.C.A. § 1738C. The issue of same-sex marriage has gained particular public prominence as a result of the Hawaii Supreme Court's decision in *Baehr v. Lewin*, 852 P.2d 44 (Haw. 1993). The court found that the state was denying same-sex couples the right to marry based on the sex of the applicants. See *id.* at 59-60. In accordance with the Equal Protection Clause of the Hawaii Constitution, HAW. CONST. art I, § 5, the court held that the state was required to demonstrate a compelling state interest why same-sex couples should be denied the right to marry. See *id.* at 67. It remanded the case for trial to hear evidence on that issue. See *id.* at 68. The trial court ruled in late 1996 that the state had failed to meet its burden of showing that prohibiting same-sex couples from marrying was necessary to achieve a compelling state interest. See *Baehr v. Miiike*, No. 91-1394, 1996 WL 694235, at \*18 (Haw. Cir. Ct. Dec. 3, 1996). The court granted the state's motion to stay the ruling pending an appeal to the Hawaii

In addition, the federal government and all but a small minority of states permit discrimination in employment, housing, lending, education and public accommodation based on a person's sexual orientation.<sup>14</sup> The broad range of social and legal responses to various issues concerning sexual orientation indicates that some issues are more controversial than others and that any legal change acknowledging same-sex committed relationships is likely to engender substantial debate.

Until recently, one area in which there has been little or no legislative or political attention regarding committed couples has been that of intestacy laws. The increasing prevalence of committed relationships is reason enough to ask whether state intestate

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Supreme Court. See 65 U.S.L.W. 2399. In the meantime, the Hawaii legislature has passed a bill calling for a constitutional amendment to authorize the legislature to restrict marriage to opposite-sex couples. See H.R. 117, 19th Leg., Reg. Sess. (Haw. 1997). The state has also enacted a broad domestic partnership law. See *infra* notes 22-28, 140-158 and accompanying text.

In a preemptive effort to prevent having to recognize Hawaii same-sex marriages, a substantial number of states have enacted anti-same-sex marriage bills. See *Hawaii Seeks Law to Block Gay Marriages*, N.Y. TIMES, Apr. 18, 1997, at A15 [hereinafter *Hawaii Gay Marriages*] (reporting that as of April 1997, 18 states had enacted laws not to recognize same-sex marriage). In 1996, the federal government also took preemptive action by enacting the Defense of Marriage Act, 1 U.S.C.A. § 7; 28 U.S.C.A. § 1738C. The Act allows states to refuse to recognize same-sex marriages of another state. See 28 U.S.C.A. § 738C. It also provides that the term "marriage" as used in all federal statutes or agency rulings, regulations or interpretations means "only a legal union between one man and one woman as husband and wife" and the term "spouse" means "only . . . a person of the opposite sex who is a husband or a wife." 1 U.S.C.A. § 7. Same-sex married couples, therefore, would not be treated as married for purposes of federal taxation, immigration or other federal programs.

A related development is the continuing possibility that Hawaii will hold a constitutional convention, depending on the outcome of a case currently on appeal in the Ninth Circuit Court of Appeals. See Bruce Dunford, Assoc. Press, Sept. 10, 1997, available in 1997 WL 2548469 (describing the Hawaii Supreme Court's holding invalidating a vote favoring holding a constitutional convention and a federal district court's order of a December 6, 1997 special election on whether there should be a constitutional convention, which the Ninth Circuit ordered not take place pending the appeal).

14. As of August 1997, only eight states—California, Connecticut, Hawaii, Massachusetts, Minnesota, New Jersey, Vermont, Wisconsin—and the District of Columbia, prohibit by statute discrimination based on sexual orientation. See CAL. CIV. CODE § 51.7 (West Supp. 1997); CONN. GEN. STAT. ANN. § 46a-81a-r (West Supp. 1991); D.C. CODE ANN. §§ 1-2501, -2502, -2512 (1992 & Supp. 1997); HAW. REV. STAT. § 378-2 (Supp. 1992); MASS. ANN. LAWS ch. 151B, § 4 (Law Co-op. Supp. 1997); *id.* ch. 272, § 92A (Law. Co-op. 1992); MINN. STAT. § 363.03(1)-(5), (7)-(8), (8a) (1996); N.J. STAT. ANN. § 10:5-12 (West 1993); VT. STAT. ANN. tit. 3, § 963 (1996); *id.* tit. 8, §§ 1211, 1302, 4724 (1993 & Supp. 1997); *id.* tit. 9, §§ 2362, 2488, 4502, 4503 (1993); *id.* tit. 21, §§ 495, 1726 (Supp. 1993); WIS. STAT. ANN. §§ 16.765, 21.35 (West 1996 & Supp. 1997); *id.* §§ 66.395, 432 (West 1990); *id.* §§ 101.22, 111.31 (West 1988); *id.* § 230.18 (West 1997).

In 1996, a bill proposing to prohibit discrimination based on sexual orientation, see S. 2056, 104th Cong. (1996), failed in the U.S. Senate.

statutes need reform. Two recent developments make exploration of intestacy laws even more timely. The first is a 1995 tentative statutory proposal made by Lawrence Waggoner, a preeminent scholar of wills and trusts who is a national leader in probate reform.<sup>15</sup> The proposal (hereinafter referred to as the Waggoner Working Draft) would amend the Uniform Probate Code (UPC) by providing an intestacy share for a surviving committed partner.<sup>16</sup> It establishes qualifications for a committed partner, including a listing of factors that, if one or more are present, raise a presumption in favor of finding the claimant to be a committed partner.<sup>17</sup> It applies to both same-sex and opposite-sex couples. Under the proposal a committed partner is given the right to share a decedent's intestate estate in an amount that varies depending on whether the decedent is also survived by children or parents.<sup>18</sup> The approach to determining the statutory share of the committed partner is modeled after the 1990 UPC's spousal share, but the amounts recommended are less than the amounts that a legal spouse would have a right to receive under the UPC.<sup>19</sup> Professor Waggoner made the draft tentative pending the results of this empirical study, appreciating that legislatures and bar associations might be more receptive to a proposal to reform intestate statutes to include a committed partner if it is supported by an empirical study.

The second development occurred in 1997 in Hawaii. In response to *Baehr v. Lewin*<sup>20</sup> and *Baehr v. Miike*,<sup>21</sup> which found that the state's prohibition of same-sex marriage violated the Constitution of the State of Hawaii,<sup>22</sup> the Hawaii legislature reached a po-

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15. Lawrence Waggoner is the Reporter for the Restatement (Third) of Property (Wills and Other Donative Transfers). He is also the Director of Research of the Joint Editorial Board for the Uniform Probate Code (UPC), which is a supervisory body that monitors the UPC. He was the Chief Reporter of the revisions to Article II of the UPC, which were promulgated by the National Conference of Commissioners on Uniform State Laws (NCCUSL) in 1990.

16. See Appendix, Waggoner Working Draft, *infra* pp. 192-94 [hereinafter Appendix]. An earlier version of the statutory proposal is found in Lawrence W. Waggoner, *Marital Property Rights in Transition*, 59 MO. L. REV. 21 (1994).

17. See Appendix, §§ (b)-(f), *infra* pp. 92-94 (listing requirements for qualification as a committed partner and defining the strength of the presumption).

18. See Appendix, § (a), *infra* p. 92. The amount that the committed partner receives also depends on whether the decedent's children are the children of the committed partner and on whether the committed partner has children that are not the children of the decedent. See Appendix, § (a), *infra* p. 92.

19. See Table 1 *infra* p. 26; *infra* notes 119-126 and accompanying text.

20. 852 P.2d 44 (Haw. 1993).

21. No. 91-1394, 1996 WL 694235 (Haw. Cir. Ct. Dec. 3, 1996).

22. See *supra* note 13 (discussing *Baehr v. Lewin*, 852 P.2d 44 (Haw. 1993), and *Baehr v. Miike*, No. 91-1394, 1996 WL 694235 (Haw. Cir. Ct. Dec. 3, 1996)).



litical compromise that included calling for a constitutional amendment authorizing the legislature to restrict marriage to opposite-sex couples.<sup>23</sup> Along with this proposed constitutional amendment, the legislature enacted a domestic partnership act that the governor allowed to become law without his signature.<sup>24</sup> The act permits same-sex couples to register as "reciprocal beneficiaries."<sup>25</sup> It extends to "reciprocal beneficiaries" many of the benefits of marriage, including the right to inherit under the state's intestacy statute the same share that a surviving legal spouse receives and the right to elect an elective share that is the same as that available to a surviving legal spouse.<sup>26</sup> To take under the intestacy statute, the same-sex partners must have signed a "declaration of reciprocal beneficiary relationship;" to take under the elective share statute, the partners must have registered the declaration with the state director of health.<sup>27</sup> Hawaii has enacted the UPC and therefore the amount the reciprocal beneficiary receives under the intestacy statute varies depending on whether the decedent also is survived by children or parents.<sup>28</sup> In this regard, the Hawaii Reciprocal Beneficiaries Act and the Waggoner Working Draft are similar.

Within the context of *Baehr v. Lewin* and *Baehr v. Miike*, the reciprocal beneficiaries legislation is a major setback for same-sex couples seeking the right to marry.<sup>29</sup> Judged within the context of the prevailing law in the United States, however, the Hawaii legislation is ground breaking. The Waggoner Working Draft and the Hawaii legislation present two different approaches for defining a committed partner and reforming a state's inheritance statutes to allow a committed partner to share in a decedent's estate. In this

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23. A Bill for an Act Proposing a Constitutional Amendment Relating to Marriage, H.R. 117, 19th Leg., Reg. Sess. (Haw. 1997). The proposed constitutional amendment was filed with the Office of Elections on July 22, 1997, and will be placed on the general election ballot in November 1998. See *Who Will Be First with Same-Sex Marriage: Hawaii or the Netherlands?*, LESBIAN / GAY L. NOTES, Nov. 1997, at 163.

24. Act Relating to Unmarried Couples (Reciprocal Beneficiaries), ch. 383, 1997 Haw. Sess. Laws § 1 (codified at HAW. REV. STAT. ANN. §§ 572C-1 to -7 (Michie Supp. 1997)).

25. See HAW. REV. STAT. ANN. §§ 572C-4 to -5 (Michie Supp. 1997).

26. See *id.* §§ 560:2-102, 2-201 to -214.

27. See *id.* §§ 560:2-102, 2-201.

28. See *id.* § 560:2-102; UNIF. PROBATE CODE § 2-102 (amended 1993), 8 U.L.A. 105-06 (Supp. 1997). The amount that the reciprocal beneficiary receives also depends on whether the decedent's children are also the children of the reciprocal beneficiary and on whether the reciprocal beneficiary has children that are not also the children of the decedent. HAW. REV. STAT. ANN. § 560:2-102 (3)-(4) (Michie Supp. 1997).

29. See *Hawaii Gay Marriages*, *supra* note 13, at A15.

Article we will evaluate the two approaches to intestacy law reform based on our empirical findings.

Intestacy statutes serve multiple functions.<sup>30</sup> They reflect society's commitment to: (1) donative freedom; (2) equity, meaning concerns about fairness and protection of reliance interests; and (3) family. At the same time that intestacy statutes reflect social norms and values, they also shape the norms and values by recognizing and legitimating relationships.<sup>31</sup> Over the last few hundred years, they have continually changed to reflect and support societal changes.<sup>32</sup> In making the transition from feudalism to liberal democracies, Britain and Europe began in the eighteenth century to develop new ideologies. The Enlightenment idea of the rational man unconnected to a bloodline or community was a cornerstone of liberalism.<sup>33</sup> Primogeniture,<sup>34</sup> dower,<sup>35</sup> and curtesy<sup>36</sup> eventually gave way to the inclusion of a spouse and nonmarital and adopted children as heirs of a decedent's property.<sup>37</sup> The history of gradual

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30. See G.D.H. Cole, *Inheritance*, in 8 *ENCYCLOPÆDIA OF THE SOCIAL SCIENCES* 35-43 (Edwin R.A. Seligman & Alvin Johnson eds., 1932); 1 RICHARD T. ELY, *PROPERTY AND CONTRACT IN THEIR RELATION TO THE DISTRIBUTION OF WEALTH* 425-32 (1914); Lawrence M. Friedman, *The Law of Succession in Social Perspective*, in *DEATH, TAXES AND FAMILY PROPERTY: ESSAYS AND AMERICAN ASSEMBLY REPORT 9*, 14-15 (Edward Halbach, Jr., ed., 1977); LEWIS M. SIMES, *PUBLIC POLICY AND THE DEAD HAND* 6-21 (1955).

31. See MARY ANN GLENDON, *THE TRANSFORMATION OF FAMILY LAW: STATE, LAW, AND FAMILY IN THE UNITED STATES AND WESTERN EUROPE* 4-34 (1989); ALISON REPPY & LESLIE J. TOMPKINS, *HISTORICAL AND STATUTORY BACKGROUND OF THE LAW OF WILLS: DESCENT AND DISTRIBUTION, PROBATE AND ADMINISTRATION* 67-90 (1928).

32. See *infra* notes 56-62 and accompanying text.

33. Cf. DAVID THEO GOLDBERG, *RACIST CULTURE: PHILOSOPHY AND THE POLITICS OF MEANING* 2-6 (1993).

34. "The superior or exclusive right possessed by the eldest son, and particularly, his right to succeed to the estate of his ancestor, in right of his seniority by birth, to the exclusion of younger sons." *BLACK'S LAW DICTIONARY* 1191 (6th ed. 1990).

35. "A species of life-estate, which a woman is, by law, entitled to claim on the death of her husband, in the lands and tenements of which he was seised in fee during the marriage. . . ." *Id.* at 492.

36. "The estate to which by common law a man is entitled, on the death of his wife, in the lands or tenements of which she was seised in possession in fee-simple or in tail during her coverture, provided they have had lawful issue born alive which might have been capable of inheriting the estate. It is a freehold estate for the term of his natural life." *Id.* at 383.

37. See, e.g., UNIF. PROBATE CODE §§ 2-102, 2-114 (amended 1993), 8 U.L.A. 105-06, 114-15 (Supp. 1997). In the United States, rejection of the preference of males over females and of primogeniture among male descendants began during the colonial period. See Stanley N. Katz, *Republicanism and the Law of Inheritance in the American Revolutionary Era*, 76 *MICH. L. REV.* 1, 10-11 (1977). Reform of intestacy laws, including the elimination of primogeniture in virtually all of the states in favor of a rule that treated the children equally, reflected the influ-

change reveals not only the fact of change but also the values and criteria that have supported change. Reforms to inheritance laws can be attributed consistently to legislative efforts to honor donative intent whenever possible, strive for equality and fairness and strengthen the family.<sup>38</sup>

With these three criteria in mind, we designed a telephone survey that the Minnesota Center for Survey Research administered to four sampling groups of Minnesota residents: the general public, persons in opposite-sex committed relationships, women in same-sex committed relationships and men in same-sex committed relationships. The primary purpose of the survey was to gather data to assist in answering the following two questions: Should a decedent's surviving committed partner be an heir? How should a statute define a committed partner for purposes of determining whether that partner should inherit from the decedent? To be able to provide more comprehensive answers to these questions, we included questions about the family units headed by committed partners. Specifically, we explored public attitudes about treating a partner's child as an heir and the implications of those findings on the question of the committed partner as an heir.

The implications of allowing a decedent's committed partner to take under an intestacy statute are different for opposite-sex and same-sex couples. For opposite-sex couples, their sexual orientation is part of the dominant culture. Therefore, the recognition of committed partners in an intestacy statute has the benefit of validating those relationships but carries with it less symbolic implications than it does for same-sex couples. What is most likely predominantly at stake for most opposite-sex couples is whether the intestacy statute reflects their likely intent, treats the partners fairly and strengthens their family ties. For some opposite-sex couples, however, heirship rights risk assimilation into a marriage model that the partners might have chosen to reject because of its patriarchal roots. For them, change in the intestacy laws potentially presents a double bind.

For same-sex couples, values—in addition to donative intent, fairness and familial ties—are even more likely to be at stake. On

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ence of the political tradition of republicanism. *See id.* at 12-13. The preambles to the Revolutionary and post-Revolutionary acts governing inheritance expressed the republican abhorrence of aristocracy, family dynasties and large estates. *See id.* at 14-15. For further discussions of the relationship between early American inheritance law and republican political ideology, see Gregory S. Alexander, *Time and Property in the American Republican Legal Culture*, 66 N.Y.U. L. REV. 273 (1991), and Katz, *supra*.

38. *See infra* notes 56-62 and accompanying text.

one hand, inclusion leads to treating same-sex relationships the same as married couples and, therefore, has the potential of disrupting systemic subordination based on sexuality. Statutory reform may not only validate the couple's relationship but also may validate individual identity. On the other hand, inclusion risks reinforcing the heterosexual model of marriage by extending recognition only to those who come close to duplicating it. Intestacy reform raises the principled, as well as the pragmatic, question of whether recognition of a committed partner will assist only those who are already close to the center of power and conformity.<sup>39</sup>

Part I describes current law.<sup>40</sup> Section A explains the implications of extending heirship rights to committed partners by examining the purpose and design of intestacy statutes.<sup>41</sup> Section B summarizes court-recognized rights of committed partners to each other's property using traditional legal and equitable theories in this nontraditional setting.<sup>42</sup> It then considers the benefits of including committed partners as heirs under intestacy statutes. Section C outlines the Waggoner Working Draft and the Hawaii legislation, describing various aspects of each and indicating the similarities and differences between the two approaches.<sup>43</sup>

Part II presents the findings of the survey.<sup>44</sup> Section A describes the method and design of the survey.<sup>45</sup> Section B first details the findings when respondents were presented with a set of scenarios involving committed partners and were asked to determine who should share in the decedent's estate and to what extent.<sup>46</sup> It then considers the findings when respondents were asked a series of questions that were designed to develop a definition of a "committed relationship" and a "committed partner."<sup>47</sup> Based on the data, we are able to draw some limited conclusions and suggest directions for further research.<sup>48</sup>

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39. See Mary C. Dunlap, *The Lesbian & Gay Marriage Debate: A Microcosm of Our Hopes and Troubles in the Nineties*, 1 LAW & SEXUALITY 63, 78 (1991) ("juxtaposing widespread legalistic and feminist criticisms of marriage as an institution with the fact of lesbian and gay momentum toward inclusion in the institution").

40. See *infra* notes 54-160 and accompanying text.

41. See *infra* notes 54-91 and accompanying text.

42. See *infra* notes 92-116 and accompanying text.

43. See *infra* notes 117-160 and accompanying text.

44. See *infra* notes 161-265 and accompanying text.

45. See *infra* notes 161-174 and accompanying text.

46. See *infra* notes 175-233 and accompanying text.

47. See *infra* notes 234-265 and accompanying text.

48. See *infra* text accompanying notes 263-265.

Part III further investigates the committed partner as heir by considering the family unit headed by committed partners and, most especially, in the context of inheritance, the parental nature of the relationship between committed partners and their partners' children.<sup>49</sup> Section A describes the laws that determine parent-child relationships and how they affect committed couples with children.<sup>50</sup> Section B first details the findings when respondents were presented with a set of scenarios involving a partner's child.<sup>51</sup> It then considers, through analysis of the findings, the effect a parent-child relationship between a decedent and the partner's child might have on the definition of a committed partner relationship, as well as the effect a committed partner relationship might have on the definition of a parent-child relationship.<sup>52</sup> The Article concludes by summarizing the major findings of the study and considering the legal and social implications of including committed partners as heirs.<sup>53</sup>

## I. Legal Treatment of Committed Partners

### A. Intestacy Law

#### 1. Objectives

Article II of the UPC by the National Conference of Commissioners on Uniform State Laws (NCCUSL) in 1969,<sup>54</sup> and its subsequent revision in 1990,<sup>55</sup> have served as catalysts for reexamination of existing intestate succession laws. The UPC pattern of distribution inevitably is a product of the tradition and history that has influenced other intestacy statutes. The drafters of the UPC, however, were careful not to perpetuate historical rules that they found to be inconsistent with modern attitudes. Their goal was to design a statute that reflects the donative intent of persons who die without wills.<sup>56</sup> By reflecting probable donative intent of

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49. See *infra* notes 266-341 and accompanying text.

50. See *infra* notes 267-295 and accompanying text.

51. See *infra* notes 296-325 and accompanying text.

52. See *infra* notes 326-341 and accompanying text.

53. See *infra* notes 342-350 and accompanying text.

54. UNIF. PROBATE CODE, 8 U.L.A. 1 (1983).

55. See *id.* 8 U.L.A. 101 (Supp. 1997).

56. See UNIF. PROBATE CODE art. II, pt. I (amended 1993), 8 U.L.A. 104 cmt. (Supp. 1997); *id.* at 56 cmt. (1983).

The drafters' objectives correspond to the rationale that is commonly ascribed to intestacy laws today. This rationale is expressed in the following passage:

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.<sup>57</sup>

Effectuating probable intentions of decedents, however, is not the only objective of intestacy statutes. A second objective of intestacy statutes is to produce a pattern of distribution that the recipients believe is fair and thus does not produce disharmony among expectant takers or disdain for the legal system.<sup>58</sup> Rooted in a patriarchal tradition, historically inheritance laws were not concerned with principles of equality. Today, however, it is no longer acceptable to treat an eldest son as more deserving of the family's wealth than his siblings, nor is it acceptable to treat adopted children differently than biological children, or nonmarital children differently than marital children.<sup>59</sup>

The question of fairness goes beyond issues of equality. Fairness also includes equity considerations of financial dependence, reliance, unjust enrichment and trust.<sup>60</sup> Based on these considerations, there is widespread acceptance of the right of a surviving legal spouse to receive a substantial share of a decedent's estate, even when the decedent is survived by children.<sup>61</sup>

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Our laws concerning intestate succession are designed to effect the orderly distribution of property for decedents who lack either the foresight or the diligence to make wills. The purpose of these statutes . . . is to provide a distribution of real and personal property that approximates what decedents would have done if they had made a will.

*King v. Riffe*, 309 S.E.2d 85, 87-88 (W. Va. 1983)

57. See Lawrence H. Averill, Jr., *Wyoming's Law of Decedents' Estates, Guardianship and Trusts: A Comparison with the Uniform Probate Code—Part I*, 7 LAND & WATER L. REV. 169, 176 (1972); Earl M. Curry, Jr., *Intestate Succession and Wills: A Comparative Analysis of Article II of the Uniform Probate Code and the Law of Ohio*, 34 OHIO ST. L.J. 114, 116 (1973); William J. Fratcher, *Toward Uniform Succession Legislation*, 41 N.Y.U. L. REV. 1037, 1047 (1966); Thomas J. Mulder, *Intestate Succession under the Uniform Probate Code*, 3 PROSPECTUS 301, 301, 306 (1970); Daniel H. O'Connell & Richard W. Effland, *Intestate Succession and Wills: A Comparative Analysis of the Law of Arizona and the Uniform Probate Code*, 14 ARIZ. L. REV. 205, 209 (1972).

58. See LAWRENCE W. WAGGONER ET AL., FAMILY PROPERTY LAW: CASES AND MATERIALS ON WILLS, TRUSTS, AND FUTURE INTERESTS 34 (2d ed. 1997).

59. Inheritance statutes consistently provide for equality among children and permit adopted and nonmarital children to inherit. See, e.g., UNIF. PROBATE CODE §§ 2-103 (1), -106, -114 (amended 1993), 8 U.L.A. 107, 109, 114-15 (Supp. 1997).

60. See 1 ELY, *supra* note 30, at 431-43.

61. See, e.g., UNIF. PROBATE CODE § 2-102(1)(ii), (3)-(4) (amended 1993), 8 U.L.A. 105-06 (Supp. 1997).

A final objective of intestacy laws is to promote and encourage the nuclear family.<sup>62</sup> Historically, the family has been a highly valued institution viewed as of great benefit to a stable and productive society.<sup>63</sup> Indeed, the safeguarding of families and family life is a value that continues to shape policy and political debate today.<sup>64</sup>

The difficulty, of course, arises in defining *family*. One of the central ways that families have been valued and privileged is through the institution of marriage and its accompanying legal, social and religious significance. As Lawrence Friedman notes, "family," for the purposes of intestacy, has meant a married couple and children of the marriage.

Rules of inheritance and succession are, in a way, the genetic code of a society. They guarantee that the next generation will, more or less, have the same structure as the one that preceded it . . . . Rules favoring wives and children reinforce the nuclear family. Any radical change in the rules, if carried out, will radically change the society.<sup>65</sup>

Marriage and marital families are deeply rooted in Western tradition. Legal 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. This leads to nonmarital relationships being characterized as abnormal at best and as deviant at worst.<sup>66</sup>

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62. Two other objectives also have been identified. The first is to avoid complicating property titles and excessive subdivision of property. See 1 ELY, *supra* note 30, at 431; Cole, *supra* note 30, at 36. The second is to encourage the accumulation of property by individuals. See 1 ELY, *supra* note 30, at 431-32; Cole, *supra* note 30, at 37-43. These objectives raise no peculiar issues with regard to inheritance rights for surviving committed partners and therefore will not be discussed.

63. See Martha Albertson Fineman, *Our Sacred Institution: The Ideal of the Family in American Law and Society*, 2 UTAH L. REV. 387, 390-91 (1993).

64. See *id.*; David L. Chambers, *The "Legalization" of the Family: Toward a Policy of Supportive Neutrality*, 18 U. MICH. J.L. REFORM. 805 (1985); *Looking for a Family Resemblance: The Limits of the Functional Approach to the Legal Definition of Family*, 104 HARV. L. REV. 1640 (1991).

65. Friedman, *supra* note 30, at 14. For further support for this point, see 1 ELY, *supra* note 30, at 431.

66. See Fineman, *supra* note 63, at 392 n.12 (citing *Speeches from the Federalist Society Fifth Annual Lawyers Convention: Individual Responsibility and the Law*, 77 CORNELL L. REV. 1012, 1016 (1992)).

As demonstrated in the U.S. Supreme Court case of *Michael H. v. Gerald D.*,<sup>67</sup> the primary justification for support of marriage is tradition.<sup>68</sup> The case involved a California statute treating any child born to a married woman as the child of her husband.<sup>69</sup> A majority of the Court upheld the constitutionality of the statute.<sup>70</sup> In reaching its decision, the plurality opinion, written by Justice Scalia, relied upon historical traditions,<sup>71</sup> meaning "the historic respect—indeed, sanctity would not be too strong a term—traditionally accorded to the relationships that develop within the unitary family."<sup>72</sup> Rejecting more generalized traditions such as "family relationships" or "emotional attachments," Justice Scalia wrote:

We refer to the most specific level at which a relevant tradition protecting, or denying protection to, the asserted right can be identified. If . . . there were no societal tradition, either way, regarding the rights of the natural father of a child adulterously conceived, we would have to consult, and (if possible) reason from, the traditions regarding natural fathers in general. But there is such a more specific tradition, and it unqualifiedly denies protection to such a parent.<sup>73</sup>

The inheritance law objective of supporting the nuclear family becomes highly contestable given the historical context of marriage. One view would be that the intestacy statute is one component of a state's statutory scheme to support the tradition of marriage. Within this view, recognition of inheritance rights for surviving committed partners is inconsistent with the objectives of an intestacy statute because it would devalue marriage. Another view would be that the intestacy statute is part of a state's statutory scheme to support family functions, such as child rearing and mutual financial responsibility. Within this understanding of intestacy, a recognition of inheritance rights for surviving committed partners would further the state's objectives. Persons holding this view presumably would acknowledge the possibility that recognizing committed partners as heirs could undermine marriage.<sup>74</sup>

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67. 491 U.S. 110 (1989) (holding that an unwed biological father has no parental rights with respect to his child if the mother of the child is married to another man at the time of the child's birth).

68. *See id.*

69. *See id.* at 113.

70. *See id.* at 131-32.

71. *See id.* at 123.

72. *Id.* at 123.

73. *Id.* at 127 n.5.

74. *Cf. Nan D. Hunter, Marriage, Law, and Gender: A Feminist Inquiry*, 1 LAW & SEXUALITY 9, 17 (1991) (arguing that the institution of marriage is challenged



Perhaps some would even welcome that possibility.<sup>75</sup> 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. Although persons holding this view might appreciate the potential for challenging the tradition of marriage through amendment of intestacy statutes, they nevertheless would conclude that the more likely consequence is that the change will reinforce the dominance of the marriage tradition.<sup>76</sup>

We do not suggest, of course, that this highly contested question is resolvable through the present study. We do suggest, however, that assessing public attitudes regarding the status of marriage can assist in evaluating the potential benefits and costs of changing the intestacy law to include a committed partner as an heir.<sup>77</sup>

## 2. Treatment of Committed Partners

Under prevailing statutory law, the surviving committed partner does not share in the decedent's intestate estate. The property of the decedent passes to the decedent's lineal descendants (children, grandchildren, etc.).<sup>78</sup> If the decedent is not survived by any lineal descendants, the property passes to the decedent's parents, if any, or to the descendants of the parents.<sup>79</sup>

New Hampshire<sup>80</sup> and Oregon<sup>81</sup> have enacted a limited exception to this prevailing statutory law. Both states have codified

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and changed by allowing same-sex marriage because it undermines the linkage of certain roles to a certain gender).

75. *See id.*

76. Cf. Nitya Duclos, *Some Complicating Thoughts on Same-Sex Marriage*, 1 LAW & SEXUALITY 31, 34 (1991) (advancing similar argument regarding same-sex marriage); Dunlap, *supra* note 39, at 78 (raising concerns about reinforcing discrimination in the context of considering the consequences of same-sex marriage); Ruthann Robson, *Resisting the Family: Repositioning Lesbians in Legal Theory*, 19 SIGNS 975, 983 (1994) (explaining the limits of subversiveness in a context where traditional heterosexual marriage remains the standard for determining eligibility).

77. *See infra* notes 177-233 and accompanying text (describing the preferences of respondents when presented with scenarios in which the decedent was survived by a committed partner and members of the family in which the decedent was born and scenarios in which the decedent was survived by a committed partner and children).

78. *See, e.g.*, UNIF. PROBATE CODE § 2-103(1) (amended 1993), 8 U.L.A. 107 (Supp. 1997).

79. *See, e.g., id.* § 2-103(2), (3), 8 U.L.A. 107.

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

a statutory version of common-law marriage applicable only at death.<sup>82</sup> The statutes provide that under certain circumstances a

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81. The relevant Oregon provision reads as follows:

For purposes of [intestate succession], a person shall be considered the surviving spouse of a decedent under either of the following circumstances:

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

OR. REV. STAT. § 112.017 (Supp. II 1996); *see id.* § 106.010 (1990) (defining marriage as a "civil contract entered into in person by males at least 17 years of age and females at least 17 years of age," thereby excluding a lesbian or gay surviving partner from qualifying as a spouse under the statute).

As originally enacted in 1993, OR. REV. STAT. § 112.017 reads as follows:

For purposes of [intestate succession], a person shall be considered the surviving spouse of a decedent if:

- (1) The person was legally married to the decedent at the time of the decedent's death; or
- (2) (a) The person and the decedent lived together for at least 10 years;
- (b) The person and the decedent represented themselves, and conducted their affairs, as husband and wife; and
- (c) The decedent was not legally married to another person at the time of the decedent's death.

Act of Aug. 4, 1993, ch. 598, 1993 Or. Laws 1508.

82. Common-law marriage is currently available only to opposite-sex couples. Most states have abolished common-law marriage by statute. *See, e.g.*, GA. CODE ANN. § 19-3-1.1 (Supp. 1997) (providing that common-law marriages entered into after January 1, 1997, are not recognized); IDAHO CODE § 32-201 (1996) (providing that common-law marriages entered into after January 1, 1996, are not recognized). Only eleven states (Alabama, Colorado, Iowa, Kansas, Montana, Oklahoma, Pennsylvania, Rhode Island, South Carolina, Texas, and Utah) and the District of Columbia still recognize common-law marriages. *But see* IOWA CODE ANN. § 595.11 (West Supp. 1997) (validating marriage but requiring the parties to the marriage and "persons aiding or abetting them" to pay \$50 cash to state); UTAH CODE ANN. § 30-1-4.5 (1995) (recognizing marriage if it meets certain statutory requirements, which are modeled generally on traditional common-law marriage requirements). For a general discussion of the requirements necessary to establish a common-law marriage, see Sol Lovas, *When Is a Family Not a Family? Inheritance and the Taxation of Inheritance within the Non-Traditional Family*, 24 IDAHO L. REV. 353, 361 (1987-1988).

surviving partner of an opposite-sex committed relationship should be treated as a legal spouse for inheritance law purposes. Both states require the decedent and the surviving partner to have been cohabiting, but New Hampshire only requires cohabitation for three years,<sup>83</sup> whereas Oregon requires cohabitation for ten years.<sup>84</sup>

The exclusion of surviving committed partners as heirs has been challenged unsuccessfully in court. The surviving gay partner of the decedent in *In re Petri* challenged the constitutionality of New York's inheritance statute because it precluded him from inheriting the estate of his deceased partner.<sup>85</sup> The court held that the inheritance statute was not violative of the surviving partner's rights under either the state or federal constitutions, but it suggested that denying a marriage license to same-sex couples may be unconstitutional.<sup>86</sup>

A similar challenge to New York's elective share statute also failed.<sup>87</sup> A surviving committed partner was successful, however, in obtaining the same rent and eviction protections accorded the "surviving spouse of the deceased tenant or some other member of the deceased tenant's family who has been living with the tenant [of record]."<sup>88</sup> In *Braschi v. Stahl Associates Co.*, the New York Court of Appeals held that the surviving gay partner of a deceased tenant was entitled to statutory rent and eviction protections.<sup>89</sup>

Both the successful and unsuccessful litigation just described had to do with legislative recognition of the rights of a committed partner.<sup>90</sup> The next Section discusses a growing body of law that allocates rights and obligations between partners using contract law and equitable principles.<sup>91</sup> To a large extent, these cases may also be read as protecting individual claimants rather than ongoing family units headed by committed partners.

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83. See N.H. REV. STAT. ANN. § 457:39.

84. See OR. REV. STAT. § 112.017.

85. See N.Y.L.J., Apr. 4, 1994, at 29.

86. See *id.* But see *Storrs v. Holcomb*, 645 N.Y.S.2d 286, 286 (Sup. Ct. 1996) (holding that marriage in New York is limited to opposite-sex couples and that the gender classification serves a valid public purpose).

87. See *In re Estate of Cooper* 592 N.Y.S.2d 797 (App. Term. 1993), *appeal dismissed*, 624 N.E.2d 696 (N.Y. 1993).

88. *Braschi v. Stahl Assoc. Co.*, 543 N.E.2d 49, 50 (N.Y. 1989) (quoting the regulations in effect in New York City pertaining to rents and evictions).

89. See *id.*

90. See *supra* notes 85-89 and accompanying text.

91. See *infra* notes 92-116 and accompanying text.

### B. Property Rights of Committed Partners outside of Inheritance Law

The law in most jurisdictions gives effect to express contracts entered into by committed partners.<sup>92</sup> Through agreement, the partners can define the ongoing committed relationship in terms of living arrangements, income pooling, support and maintenance and parenting responsibilities.<sup>93</sup> Contracts also can provide for the distribution of property in the event the relationship ends other than by death of one of the partners.<sup>94</sup> Although persons in committed relationships can protect their respective interests under current law through private agreements, the protections fall short of the predictability and enforceability provided to persons who are married.<sup>95</sup>

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92. For recent discussions of the effectiveness of contracts between committed partners, see Mike McCurley, *Same-Sex Cohabitation Agreements*, in *PREMARITAL AND MARITAL CONTRACTS* 195 (Edward L. Winter & Lewis Becker eds., 1993); Margaret F. Brinig, *Status, Contract and Covenant*, 79 *CORNELL L. REV.* 1573 (1994) (reviewing MILTON C. REGAN, JR., *FAMILY LAW AND THE PURSUIT OF INTIMACY* (1993)); Kristin Bullock, *Applying Marvin v. Marvin to Same-Sex Couples: A Proposal for a Sex-Preference Neutral Cohabitation Contract Statute*, 25 *U.C. DAVIS L. REV.* 1029 (1992); Christensen, *supra* note 1, at 1341-48; Raymond C. O'Brien, *Domestic Partnership: Recognition and Responsibility*, 32 *SAN DIEGO L. REV.* 163 (1995).

93. See, e.g., *Posik v. Layton*, 695 So. 2d 759, 767 (Fla. Dist. Ct. App. 1997) ("The State is not thusly condoning the lifestyles of homosexuals or unmarried live-ins; it is merely recognizing their constitutional private property and contract rights."). The agreements may require the execution of other legal documents, such as durable powers of attorney, health care directives, wills and the like. See, e.g., *Posik v. Layton*, 695 So. 2d 759 (discussing an agreement requiring a will be executed).

94. See, e.g., *Marvin v. Marvin*, 557 P.2d 106 (Cal. 1976). Couples cannot contract to simulate other marital rights, such as personal injury damages, joint custody of one partner's child or U.S. citizenship for a foreign partner. See 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, 458-59, 463-65, 484-85 (1996).

95. As one lawyer who specializes in gay and lesbian issues observes, "I used to say, 'Why do we want to get married? It doesn't work for straight people,' . . . [b]ut now I say we should care: They have the privilege of divorce and we don't. We're left out there to twirl around in pain." Kirk Johnson, *Gay Divorce: Few Markers in This Realm*, *N.Y. TIMES*, Aug. 12, 1994, at A20. For a list of the tangible benefits of marriage, see Jennifer Gerarda Brown, *Competitive Federalism and the Legislative Incentives to Recognize Same-sex Marriage*, 68 *S. CAL. L. REV.* 745, 786 (1995).

One rarely used and controversial method for obtaining legal recognition of rights between committed partners is for one partner to petition to adopt the other. Compare *Adoption of Swanson*, 623 A.2d 1095 (Del. 1993) (permitting the adoption) with *In re Robert Paul P.*, 471 N.E.2d at 427 (denying the adoption). See also UNIF. ADOPTION ACT § 5-101, 9 U.L.A. 75 cmt. (1997) (favoring the approach adopted in *In re Robert Paul*, 471 N.E.2d 424 (N.Y. 1984), stating that "[i]f a relationship other than that of parent and child is intended, the adoption may be de-

A substantial body of case law has developed regarding the enforcement of express or implied agreements between committed partners and the imposition of equitable remedies in the absence of mutual agreement.<sup>96</sup> For the most part, plaintiffs are most successful when the courts treat the committed couples as having created the equivalent of business, rather than familial-type, arrangements and treat any agreements having to do with sexual relations as severable from the agreement they are enforcing.<sup>97</sup> In

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nied"); cf. *First Nat'l Bank of Dubuque v. Mackey*, 338 N.W.2d 361 (Iowa 1983) (holding that daughter's "friend" whom daughter adopted should not be included as a member of the class named in the mother's trust absent evidence that the adopted adult had an *in loco parentis* relationship with the adopter).

96. The most famous of the so-called "palimony" cases is *Marvin*, 557 P.2d 106., in which the court held that Michele Triola's complaint based on an express or implied contract stated a cause of action and that it could be amended to include the equitable theories of constructive trust, resulting trust or *quantum meruit*. See *id.* at 122. On remand, Triola failed to prove the existence of an express or implied contract, but the trial court awarded her \$104,000 for rehabilitation on the ground of an unspecified equitable theory. See *Marvin v. Marvin*, 176 Cal. Rptr. 555, 556 (Ct. App. 1981). On appeal, the judgment granting this award was reversed for want of a "recognized underlying obligation in law or in equity." *Id.* at 559; accord, e.g., *Connell v. Francisco*, 898 P.2d 831 (Wash. 1995) (en banc) (relying on the state's marital dissolution statutes for determining the appropriate division of property); *Goode v. Goode*, 396 S.E.2d 430 (W. Va. 1990) (allowing equitable property division in cases of heterosexual unmarried cohabitants even though common-law marriage could not arise by operation of law in West Virginia).

Although most of the cases have involved property disputes between living committed partners who have separated, some cases have involved contractual or equitable claims by a surviving partner to a share of a decedent's estate. Complaints founded upon breach of oral promises supported by social, domestic, nursing and business services have been held to state a cause of action. See, e.g., *Poe v. Estate of Levy*, 411 So. 2d 253 (Fla. Dist. Ct. App. 1982) (considering public policy in the enforcement of an express support contract); *Donovan v. Scuderi*, 443 A.2d 121 (Md. Ct. Spec. App. 1982) (discussing expenditures and services provided by companion); *Tyranski v. Piggins*, 205 N.W.2d 595 (Mich. Ct. App. 1973) (examining the validity of an oral agreement to convey a house). Complaints also have been held to state a cause of action when they sought the imposition of a constructive trust on specific property based on a confidential relationship between the domestic partners. See, e.g., *Poe*, 411 So. 2d at 253. In addition, complaints seeking damages in the amount of the value of services on the theory of *quantum meruit* have been upheld. See, e.g., *Green v. Richmond*, 337 N.E.2d 691 (Mass. 1975) (concerning services rendered by plaintiff in reliance of descendant's oral promise); *Williams v. Mason*, 556 So. 2d 1045 (Miss. 1990) (same); *Humiston v. Bushnell*, 394 A.2d 844 (N.H. 1978) (same); *Estate of Steffes*, 290 N.W.2d 697 (Wis. 1980) (same). Moreover, complaints seeking the imposition of an implied partnership with respect to a business arrangement have been upheld. See, e.g., *Bass v. Bass*, 814 S.W.2d 38 (Tenn. 1991) (granting judgment for cohabitant which entitled her to one half of partnership assets); *Estate of Thornton*, 499 P.2d 864 (Wash. 1972) (involving a cohabitant of 16 years with four children).

97. See *Marvin*, 557 P.2d 106; *Whorton v. Dillingham*, 248 Cal. Rptr. 405 (Ct. App. 1988); *Small v. Harper*, 638 S.W.2d 24 (Tex. Ct. App. 1982); *Watts v. Watts*, 405 N.W.2d 303 (Wis. 1987).

other words, the price paid for the limited recognition of committed relationships that emerges out of the case law is that the circumstances of the couples' lives are distorted. Although the right to contract has proven to be an incomplete legal response to the needs of persons in committed relationships,<sup>98</sup> the limited protec-

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Several courts have refused to follow *Marvin* because they disagreed that the sexual nature of the relationship was severable. The court in *Rehak v. Mathis*, stated that:

It is well settled that neither a court of law nor a court of equity will lend its aid to either party to a contract founded upon an illegal or *immoral* consideration . . . . The parties being unmarried and the appellant having admitted the fact of cohabitation in both verified pleadings, this would constitute immoral consideration . . . .

238 S.E.2d 81, 82 (Ga. 1977). An Illinois court expressed a similar policy:

Illinois' public policy regarding agreements such as the one alleged here was implemented long ago . . . , where this court said: 'An agreement in consideration of future illicit cohabitation between the plaintiffs is void.' . . . The issue, realistically, is whether it is appropriate for this court to grant a legal status to a private arrangement substituting for the institution of marriage sanctioned by the State. The question whether change is needed in the law . . . [is best left to] the legislative branch . . . .

*Hewitt v. Hewitt*, 394 N.E.2d 1204, 1208-09 (Ill. 1979). In *Thomas v. LaRosa*, 400 S.E.2d 809 (W. Va. 1990), the court denied recovery because the appellant had known that the appellee was married:

The type of 'business consulting services' appellant alleges that she performed . . . are typical of the services performed by most wives who are in the good graces of their husbands. Finally, traveling with and entertaining for a man are not such services that a court can determine to be so distinctly business-related as to be entirely separable from illegal meretricious consideration.

*Id.* at 814; see also *Bergen v. Wood*, 18 Cal. Rptr. 2d 75, 78 (Ct. App. 1993) ("The agreement is unenforceable because the parties did not cohabit and therefore no consideration by [the plaintiff] existed severable from the sexual relationship.").

Several other courts have refused to follow *Marvin* because they refused to recognize an implied contract. See *Levar v. Elkins*, 604 P.2d 602 (Alaska 1980); *Carnes v. Sheldon*, 311 N.W.2d 747 (Mich. Ct. App. 1981); *Estate of Alexander*, 445 So. 2d 836 (Miss. 1984); *Dominguez v. Cruz*, 617 P.2d 1322 (N.M. Ct. App. 1980); *Morone v. Morone*, 413 N.E.2d 1154 (N.Y. 1980); see also *Posik v. Layton*, 695 So. 2d 759, 762 (Fla. Dist. Ct. App. 1997) (relying on Florida's Statute of Frauds, which requires that contracts made upon consideration of marriage be in writing, indicating that a writing requirement should also apply to "non-marital, nuptial-like agreements"). In Minnesota, an express written contract "between a man and a woman who are living together . . . out of wedlock" is valid, even if "sexual relations between the parties are contemplated." MINN. STAT. §§ 513.075, .076 (1996). It also provides, however, that in the absence of an express written contract, any claim to another's earnings or property must be dismissed as contrary to public policy if it is "based on the fact that the individuals lived together in contemplation of sexual relations and out of wedlock within or without this state." *Id.*

98. We recognize that private law making through contract is sometimes useful. See LENORE WEITZMAN, *THE MARRIAGE CONTRACT: SPOUSES, LOVERS AND THE LAW* 246-331, 360-417 (1981); Elizabeth Kingdom, *Cohabitation Contracts and Equality*, 18 INT'L J. SOC. L. 287, 295-97 (1990).

tions and benefits available through private law making have themselves become the basis for arguing for greater public rights.<sup>99</sup>

One underlying problem with relying on contract law is that the cost of obtaining legal advice to accomplish the contract may be prohibitive for some couples and lead to postponement for others. A second problem is that the benefits of an agreement are realized only when conflicts arise. Up to that time, especially in the early period of a committed relationship, partners are likely to discount its value and have very little interest in defining their respective rights. A third problem is that, even if the partners have entered into an express contract, at the end of the relationship, either during life or at death, the agreement may not reflect changes and oral arrangements. Later developments, therefore, can lead to the agreement becoming irrelevant, inappropriate or inadequate.

A final problem is that one partner may have greater bargaining power than the other because of age, financial situation, gender or emotional commitment.<sup>100</sup> If the partners do enter into a contract, it is likely to be one that favors the partner in a dominant position and may be no more than the nondominant partner waiving all rights to the dominant partner's property.<sup>101</sup> As Mary Becker has discussed in a recent article, power differentials in bargaining operate differently for opposite-sex and same-sex committed couples.<sup>102</sup> For opposite-sex couples, gender-based power differentials are likely to operate to the disadvantage of women in committed relationships who must bargain for rights.<sup>103</sup> In contrast, for same-sex couples, social and economic disparities are less likely to favor one partner consistently over the other.<sup>104</sup> Another major difference in contract making by opposite-sex as opposed to same-sex couples is that an agreement between partners of the

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99. See Martha M. Ertman, *Contractual Purgatory for Sexual Minorities: Not Heaven, But Not Hell Either*, 73 DENV. U. L. REV. 1107 (1996).

100. See Frances E. Olsen, *The Family and the Market: A Study of Ideology and Legal Reform*, 96 HARV. L. REV. 1497, 1537-38 (1983) (criticizing the use of interpersonal contracts by married couples and cohabiting couples because they promote individualism rather than altruism and because they are likely to reflect and perpetuate inequalities within the relationships); see also Ruthann Robson & S.E. Valentine, *Lov(h)ers: Lesbians as Intimate Partners and Lesbian Legal Theory*, 63 TEMP. L. REV. 511, 520-28 (1990) (analyzing the role of contracts within lesbian relationships and in the development of lesbian legal theory, showing how contract theory "imports the considerable power of the patriarchal state into lesbian existence").

101. See Waggoner, *supra* note 16, at 67-68.

102. See Mary Becker, *Problems with the Privatization of Heterosexuality*, 73 DENV. U. L. REV. 1169, 1170-71, 1173-74 (1996).

103. See *id.* at 1170.

104. See *id.* at 1171.

opposite sex is undertaken within the context that the couple has recourse to legal marriage.<sup>105</sup> The decision not to marry operates to the advantage of the more socially and economically powerful partner.<sup>106</sup> Any agreement entered into by the couple regarding property rights is likely to result in less, and not more, protection than the other partner would obtain through the marriage and dissolution laws.<sup>107</sup> In contrast, the absence of the alternative to marry for same-sex couples becomes the impetus for entering into contracts that provide protection to a partner who is relatively economically vulnerable.<sup>108</sup> Private contract making by same-sex committed couples, therefore, has a greater potential for serving the mutual interests of both partners.<sup>109</sup>

Concern about unequal bargaining power, other practical limits of a private ordering scheme, unjust enrichment and inefficiencies of a case-by-case resolution led Waggoner to consider reform of the intestacy law.<sup>110</sup> 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.<sup>111</sup> Recognition of the partner as an heir, therefore, has the potential to prevent or reduce unjust enrichment and sharp bargaining by setting a standard of fair treatment. 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

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105. *See id.* at 1174.

106. *See id.* at 1173.

107. *See id.* at 1170-71, 1173-74.

108. *See id.* at 1173-74.

109. Whether enforcement of contracts made between same-sex partners should be viewed as a positive development is a contested issue. Mary Becker argues that it can be seen as a positive development only if it is disassociated from the fact that recognition of contracts made between same-sex partners is a byproduct of the courts having recognized contracts made between opposite-sex partners, which has had the regressive effect of disadvantaging heterosexual women. *See id.* at 1175. She concludes that the potential of contract law to serve same-sex couples is severely limited because the enforcement of private ordering that reinforces gender hierarchies inevitably reinforces heterosexism. *See id.* at 1174-75. Martha Ertman, in contrast, argues for both theoretical and practical reasons that enforcement of contracts made between same-sex couples has the potential to do more good than harm and has the potential to be a "way station" on the way to recognition of public rights. *See Ertman, supra* note 99, at 1154-67.

110. *See Waggoner, supra* note 16, at 71-78.

111. *See id.* at 78.



substitutes or other contractual arrangements based on assertions of undue influence.<sup>112</sup>

Waggoner recognized, however, that the counterpart in the area of wills to the contract cases would be some form of an elective-share statute.<sup>113</sup> Such a provision would give a surviving committed partner the right to claim a portion of the decedent's probate and nonprobate estates in contravention of the decedent's intent. It would recognize the partner's right to support as well as the partner's contribution to the decedent's acquired wealth. Without an elective-share type statute, the potential for unjust enrichment remains.

Notwithstanding the benefits of protecting a surviving committed partner through an elective-share type statute, Waggoner began by working on the intestate share.<sup>114</sup> Without ruling out the possibility of extending elective-share rights to committed partners, Waggoner believed that the intestacy statute was "the easiest place to start," because it can be based on the imputed intent of the decedent.<sup>115</sup> A proposal for including a committed partner as an heir can be defended politically as facilitating individual donative freedom and as being remedial in nature. In that sense, including

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112. See *Lamborn v. Kirkpatrick*, 50 P.2d 542 (Colo. 1935); *In re Will of Kaufmann*, 205 N.E.2d 864 (N.Y. 1965); ARTHUR S. LEONARD, SEXUALITY AND THE LAW: AN ENCYCLOPEDIA OF MAJOR LEGAL CASES 664-71 (1993); Joseph W. deFuria, Jr., *Testamentary Gifts Resulting from Meretricious Relationships: Undue Influence or Natural Beneficence?*, 64 NOTRE DAME L. REV. 200 (1989); Jeffrey G. Sherman, *Undue Influence and the Homosexual Testator*, 42 U. PITT. L. REV. 225 (1981); Jane Birnbaum, *Gay Partners' Problem: Passing on Their Assets*, N.Y. TIMES, Jan. 15, 1994, at 31. But see *Estate of Sarabia*, 270 Cal. Rptr. 560 (Ct. App. 1990) (reasoning that the will, which had named the decedent's partner as a devisee, was not an "unnatural will" in a will contest by the decedent's brother); *Evans v. May*, 923 S.W.2d 712, 715 (Tex. Ct. App. 1996) (declining to hold that the devisee's "30-year relationship as the decedent's 'lifemate' constitutes undue influence as a matter of law" and finding that the testator's sister, who was contesting the will, provided no other evidence to establish the elements of undue influence at trial).

The current law of undue influence raises particularly serious problems for the gay community when a gay partner, who dies of AIDS, leaves a will devising a substantial portion of his estate to his surviving partner who cared for him during his illness. Legal advocates report that challenges to the wills of their AIDS patients have been on the rise. See Trent J. Thornley, *The Caring Influence: Beyond Autonomy as the Foundation of Undue Influence*, 71 IND. L.J. 513, 514 (1996); Carol Angel, *Legal Challenges to AIDS Patients' Wills Seem on Rise*, L.A. DAILY J., Aug. 16, 1988, at 1. As Trent Thornley put it, "acts of care become evidence of undue influence" under current law. Thornley, *supra*, at 515. Thornley also discusses how the law of undue influence is based on a theory of autonomy, meaning a view "of society as merely a collection of free-thinking, rational beings," and how that theory produces inappropriate results. *Id.* at 529-31.

113. See Waggoner, *supra* note 16, at 78.

114. See *id.* at 78, 87.

115. *Id.* at 78.

a surviving committed partner as an heir under an intestacy statute can be seen as an intermediate step between private and public rights.<sup>116</sup> The next Section describes the Waggoner Working Draft in greater detail, as well as the Hawaii reciprocal beneficiary legislation, which does provide same-sex committed partners the protection of an elective share.

### *C. Recent Legislative Developments*

#### 1. The Waggoner Working Draft

Waggoner's proposal, last revised in 1995, is put forward as an amendment to the UPC's intestacy statute.<sup>117</sup> It has two parts: (1) determining the intestacy share passing to the surviving committed partner and (2) defining who is a surviving committed partner.<sup>118</sup> The share passing to the committed partner varies depending on who else survives the decedent.<sup>119</sup> If the decedent is survived by a parent or a child who is not also the child of the surviving committed partner, then the committed partner receives one-half of the decedent's probate estate.<sup>120</sup> If all the decedent's children are also children of the surviving committed partner, the partner also receives only one-half of the probate estate if the partner has a child who is not also a child of the decedent. If, however, the decedent is not survived by a parent or children or if all the children of the decedent are also the children of the surviving partner and that partner had no other children, then the partner receives the first \$50,000 plus one-half of the balance, if any, of the probate estate.<sup>121</sup> This means that, for intestate de-

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116. See Christensen, *supra* note 1, at 1318-25 (analyzing gay and lesbian family law in terms of the "alternative approaches to the legal ordering of gay and lesbian family identity").

117. See Appendix, *infra* p. 92-94.

118. See Appendix, *infra* p. 92-94.

119. See Appendix, § (a), *infra* p. 92.

120. See Appendix, § (a), *infra* p. 92. The Waggoner Working Draft refers to lineal descendants rather than children. By doing so, the proposal addresses the problem of a child predeceasing the decedent leaving grandchildren, great-grandchildren, etc. For ease of discussion, we are describing the proposal exclusively in terms of surviving children.

121. See Appendix, § (a), *infra* p. 92. For example, if a decedent died leaving a probate estate of \$125,000 survived by children from a prior relationship and a partner who also had children from a prior relationship, then the surviving partner would receive one-half of the decedent's estate or \$62,500. If all the decedent's children had been children of the surviving partner and if the partner had no children from a prior relationship, then the surviving partner would receive the first \$50,000 plus one-half of any balance of the probate estate or \$87,500.

cedents with relatively modest estates, their committed partners receive all or nearly all of their estates.

The approach for determining the intestacy share for the committed partner is modeled after the UPC's approach for determining the intestacy share for legal spouses. The UPC provides less to a spouse when a decedent is survived by a parent but no children than when the decedent is not survived by a parent.<sup>122</sup> It also provides less to a spouse when the spouse has children from a prior relationship than when the spouse's children are also the decedent's children.<sup>123</sup> As Table 1 shows, the amount passing to the surviving spouse in each of these situations, however, is more than the amount passing to the surviving committed partner. For example, the surviving spouse receives the entire probate estate if the decedent is not survived by a parent or if the decedent is survived by children who are also the children of the spouse and the spouse has no children from a prior relationship. If the decedent is survived by a parent but no children, the surviving spouse receives the first \$200,000 plus three-fourths of the remaining balance of the probate estate.

Waggoner explained he was recommending that a relatively smaller share pass to committed partners "in recognition of the competing claims of the decedent's blood or adoptive relatives, and to some extent to maintain the incentive to enter into a formal marriage."<sup>124</sup> The smaller share also avoids the appearance that the statutory proposal is reintroducing common-law marriage.<sup>125</sup> He readily recognized that arguments can be made for increasing the share passing to the committed partner and welcomed debate on this issue. In this regard, he suggested that "consideration should be given to granting a larger intestate share, perhaps the same share a spouse would take, to a surviving de facto partner who, because of gender, was prohibited by law from marrying the decedent."<sup>126</sup>

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122. See UNIF. PROBATE CODE § 2-102 (amended 1993), 8 U.L.A. 106 (Supp. 1997).

123. See *id.*

124. Waggoner, *supra* note 16, at 80.

125. See *id.* at 80-81.

126. *Id.* at 80 n.143.

**Table 1. Comparison of Intestate Estate to Spouse under UPC and Intestate Estate to Partner under Waggoner Working Draft**

Family Circumstances	UPC §2-102	Waggoner Working Draft
No children or parent	100% of estate	\$50,000 plus one-half of any balance of the estate
All of decedent's children are also children of the spouse/partner and the spouse/partner has no other children	100% of estate	\$50,000 plus one-half of any balance of the estate
No children but parent	\$200,000 plus three-fourths of any balance of the estate	one-half of the estate
All decedent's children are also children of the spouse/partner and the spouse/partner also has other children	\$150,000 plus one-half of any balance of the estate	one-half of the estate
One or more of the decedent's children are not children of the spouse/partner	\$100,000 plus one-half of any balance of the estate	one-half of the estate

The second part of the proposal defines who is a surviving committed partner.<sup>127</sup> The challenge under the approach adopted in the Waggoner Working Draft is to identify easily applied criteria that will accurately identify committed partners. The proposal denies committed-partner status to anyone who at the time of the decedent's death is married, a minor, prohibited from marrying under the law of the state by reason of a blood relationship to the decedent and who was not sharing a common household with the decedent.<sup>128</sup> The first three of these criteria raise few, if any, factual disputes.<sup>129</sup>

127. See Appendix, § (b), *infra* p. 92.

128. See Appendix, § (b), *infra* p. 92.

129. One could imagine, however, an allegation that a person claiming to be a committed partner was a common-law spouse of another person or that a divorce was invalid.

The proposal imposes one further requirement in determining whether a person qualifies as a surviving committed partner—that person must have been in a “marriage-like relationship” with the decedent.<sup>130</sup> There is a substantial benefit of using marital relationships as the standard for evaluating the degree of commitment and the likelihood that the decedent would have intended the person to share in the estate; it is a standard familiar to the courts and one they likely will feel comfortable applying.<sup>131</sup> It has, however, unpredictable political implications. Conferring marriage-like status may generate political resistance to the proposal by some who hold traditional attitudes toward marriage. For quite different reasons, a statutory requirement that insists on committed couples “mimicking” marriage may be politically unappealing to LGBT communities. They might reason that it increases the potential of reinforcing heterosexual norms. It also may be problematic for some opposite-sex couples who have rejected marriage because of its patriarchal underpinnings.<sup>132</sup> Alternatively, the standard may make the proposal more politically acceptable because it embraces familiar constructs. It is difficult to predict which reaction is likely to prevail.

Within this construction of the “marriage-like relationship,” the proposal adopts three related definitional techniques.<sup>133</sup> First, it establishes a general definition of a “marriage-like relationship”

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The criteria of “sharing a common household” could be problematic. The partners could have separate households because, for example, they are not employed in the same city or because one of the partners requires nursing home care. The draft addresses this question effectively by providing that “sharing a common household” means that the partners “shared the same place to live,” regardless of whether “one or both had other places to live” and regardless of whether “one or both were physically residing somewhere else at the decedent’s death.” *Id.* § (c). This language, along with accompanying commentary to the statute, should give the courts sufficient guidance to apply this requirement functionally, not literally. See Waggoner, *supra* note 16, at 81 n.145. The explanatory language recognizes the complex living arrangements that couples may have at different times during their lives. It is broad enough to include a person who did not cohabit with the decedent. For example, access to a decedent’s home along with the storing of some pieces of clothing and toiletries may be sufficient for a finding that the couple shared a place to live. The most salient point to be made about the proposal’s approach is that it leaves flexibility to the courts, allowing them to apply on a case-by-case basis the requirement “share the same place to live” narrowly or broadly, depending likely on whether the claimant can provide an explanation for why the couple did not cohabit.

130. Appendix, § (d), *infra* pp. 92-93.

131. *Cf. Butch v. Forte*, 188 Cal. Rptr. 503 (Ct. App. 1983) (using marriage as the standard by which to evaluate a relationship for purposes of a claim for loss of consortium) (discussed *infra* note 234).

132. See *supra* pp. 9-10 (speculating that intestacy laws may reinforce the traditional marriage model that some opposite-sex couples reject).

133. See Appendix, § (d), *infra* pp. 92-93.

that refers to two individuals "who share one another's lives in a long-term, intimate and committed relationship of mutual caring."<sup>134</sup> Second, it sets out a number of objective factors to be considered in determining whether the general definition has been met with a warning that no single factor or set of factors should be viewed as determinative.<sup>135</sup> The factors include duration, intermingling of finances, participation in a commitment ceremony and one or both individuals naming the other as a primary beneficiary of life insurance.<sup>136</sup> Third, the proposal creates a presumption in favor of finding a marriage-like relationship if any one of the following factors is met: (1) that the couple shared a household for at least five years during the six-year period preceding the decedent's death; (2) that the decedent or the individual registered the other as a domestic partner; (3) that "the decedent and the individual joined in a marriage or commitment ceremony;" or (4) that "the individual is the parent of a child of the decedent, or is or was a party to a written co-parenting agreement with the decedent . . . and if, in either case, the child lived," while under the age of 18, with the decedent and the individual in a common household.<sup>137</sup> The presumption in favor of finding a marriage-like relationship can be rebutted only by clear and convincing evidence if more than one of the four listed factors is met.<sup>138</sup> The presumption can be rebutted by a preponderance of the evidence if only one of the four listed factors is met.<sup>139</sup>

By using a combination of three techniques to determine whether an individual qualifies as a surviving committed partner, the proposal minimizes the risk of over- and underinclusion. At the same time that it gives the courts objective factors and procedural rules with which to reduce evidentiary controversies, it also allows courts to look at the totality of circumstances to determine whether a decedent and an individual claimant had been in a committed relationship. Some may argue with the factors listed and want to include more, fewer, or different ones, and some may argue that certain factors should be made prerequisites to finding that an individual qualifies as a committed partner. What is difficult to argue is that the combination of definitional techniques proposed will likely lead to injustice. The approach presents the

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134. See Appendix, § (d), *infra* pp. 92-93.

135. See Appendix, § (d), *infra* pp. 92-93.

136. See Appendix, § (d) (1)-(6), *infra* p. 93.

137. See Appendix, § (e), *infra* p. 93.

138. See Appendix, § (f), *infra* p. 94.

139. See Appendix, § (f), *infra* p. 94.

best chance that a deserving individual will obtain heir status and that an undeserving individual will not.

## 2. The Hawaii Legislation: The Reciprocal Beneficiaries Act

Effective July 1, 1997, Hawaii enacted legislation recognizing reciprocal beneficiaries.<sup>140</sup> The stated purpose of the Reciprocal Beneficiaries Act "is to extend certain rights and benefits which are presently available only to married couples to couples composed of two individuals who are legally prohibited from marrying under state law."<sup>141</sup> The legislation establishes the requirements of a reciprocal beneficiary relationship<sup>142</sup> and then amends, among many other statutes, the inheritance laws to extend to reciprocal beneficiaries the same rights accorded legal spouses.<sup>143</sup> The primary qualifications of a reciprocal beneficiary relationship are that each of the parties be adults; that they be unmarried, not a party to another reciprocal beneficiary relationship, legally prohibited from marrying under Hawaii law and that they sign a declaration of reciprocal beneficiary relationship that they then may file with the director of health.<sup>144</sup>

Hawaii's approach of relying exclusively on self-identification avoids the definitional issues addressed in the Waggoner Working Draft.<sup>145</sup> Its limitation, however, is that it provides no inheritance rights for couples who fail to sign a declaration, even when there is substantial and convincing evidence that a committed relationship existed between the decedent and another person.<sup>146</sup> This under-inclusiveness is particularly troubling because it may tend to oper-

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140. HAW. REV. STAT. ANN. §§ 572C-1 to -7 (Michie Supp. 1997); *see supra* notes 24-28 and accompanying text (discussing Hawaii's intestacy law that is extended to same-sex couples).

141. HAW. REV. STAT. ANN. § 572C-1.

142. *See id.* §§ 572C-4 to -5.

143. *See* Act Relating to Unmarried Couples (Reciprocal Beneficiaries), ch. 383, 1997 Haw. Sess. Laws §§ 2-41.

144. *See* HAW. REV. STAT. ANN. §§ 572C-4 to -5. A "declaration of reciprocal beneficiary relationship" is defined as "a statement in a form issued by the director [of health] that declares the intent of two people to enter into a relationship. By signing it, two people swear under penalty of perjury that they meet the requirements for a valid reciprocal beneficiary relationship." *Id.* § 572C-3.

145. The benefit of the Hawaii approach is that it will not force committed partners into "potentially damaging attempts to calibrate their lives to conform to heterosexual models." Robson & Valentine, *supra* note 100, at 539. For further discussion of the two approaches, *see infra* notes 260-265 and accompanying text.

146. If the couple has not signed a written declaration, Hawaii's Reciprocal Beneficiaries Act raises the question whether courts will be less willing to recognize the contractual and equitable claims of one same-sex committed partner against the other. *See supra* Part I.B (discussing property rights of committed partners outside of inheritance law).

ate to the advantage of the more socially and economically powerful partner.<sup>147</sup>

Opposite-sex committed partners are not prohibited from marrying under state law and therefore are ineligible to be reciprocal beneficiaries.<sup>148</sup> The qualifications, however, are broad enough to allow persons who are related to each other to qualify, such as a parent and child.<sup>149</sup> 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.<sup>150</sup>

Through this law, the state is asserting its regulatory powers over committed relationships by establishing eligibility requirements and a filing procedure.<sup>151</sup> It is also asserting its regulatory powers by treating the reciprocal beneficiary relationship as terminated if one of the parties to the relationship marries or if either files a declaration of termination.<sup>152</sup> Within this regulatory scheme, the rights and obligations of reciprocal beneficiaries under Hawaii's inheritance law mirror those available for persons who are legally married.

The reciprocal beneficiary receives the same share of a decedent's estate as a surviving spouse would receive under the intestacy statute.<sup>153</sup> The beneficiary is also entitled to a homestead allowance, exempt property and a family allowance.<sup>154</sup> Consistent with its approach of treating a surviving reciprocal beneficiary the same as a legal spouse for inheritance purposes, the legislation provides reciprocal beneficiaries an elective share<sup>155</sup> and an intes-

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147. Cf. *supra* notes 100-107 and accompanying text (discussing the greater bargaining power one partner may have over the other).

148. See HAW. REV. STAT. ANN. § 572C-4 (3). Given the fact that opposite-sex partners are not eligible to file as reciprocal beneficiaries, it would seem that the courts would continue to allow them to pursue contractual and equitable claims against each other or each other's estates. See *supra* Part I.B.

149. See HAW. REV. STAT. ANN. § 572C-2 (using the example of "a widowed mother and her unmarried son").

150. The inclusion of familial relationships also makes implementation of the act complex and creates a number of ambiguities. It is beyond the scope of this Article to critique in detail this aspect of the Hawaii legislation, but we urge its further consideration.

151. See *id.* §§ 572C-4 to -5.

152. See *id.* § 572C-7.

153. See *id.* § 560:2-102.

154. See *id.* §§ 560:2-402 to -404.

155. See *id.* §§ 560:2-201 to -214. For purposes of claiming an elective share, the reciprocal beneficiary must be a party to a *registered* reciprocal beneficiary relationship. See *id.* § 560:2-201.



tacy share if the decedent entered into the reciprocal beneficiary relationship after executing a will.<sup>156</sup> The rights accorded surviving reciprocal beneficiaries are all subject to the relationship not being terminated before the decedent's death.<sup>157</sup> The Act also provides that individuals' dispositions contained in donative instruments, including wills, to their reciprocal beneficiaries or to relatives of their beneficiaries are revoked upon termination of the reciprocal beneficiary relationships.<sup>158</sup>

The Waggoner Working Draft and the Hawaii legislation present two different approaches to defining committed relationships for the purpose of determining who is eligible to be an heir of a decedent. They also provide for different shares of the decedent's intestate estate passing to the committed partner.<sup>159</sup> The details of both approaches are evaluated below on the basis of the findings of an empirical study assessing public attitudes about including committed partners as heirs.<sup>160</sup>

## II. Assessing Public Attitudes about Treating Committed Partners as Heirs

### A. Method and Design

In the fall of 1996, survey data were collected by the Minnesota Center for Survey Research (MCSR) at the University of Minnesota. Telephone surveys were completed by 256 Minnesota residents, including a sample of the general public, and three samples of persons in unmarried committed relationships: 1) persons with opposite-sex committed partners, 2) women with same-sex committed partners, and 3) men with same-sex committed partners. Interviewers indicated that they were calling from the University of Minnesota and told respondents they were conducting a study to assess attitudes about the inheritance rights of couples who are living together without being married. For the general public sample, MCSR used random digit dialing to generate a random

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156. See *id.* § 560:2-301.

157. See *id.* § 560:2-802 (stating the effect of divorce, annulment, decree of separation and termination of reciprocal beneficiary relationship on the intestacy, elective share, omitted spouse, homestead, exempt property and family allowance protections).

158. See *id.* § 560:2-804. This provision affects donative transfers to a partner's child who is not also a child of the donor. See *infra* notes 267-295 and accompanying text (discussing how the current law of intestacy defines parent-child relationships).

159. See Table 1 *supra* p. 26.

160. See *infra* Parts II.B, III.B.

sample of persons over age 25 residing in the state. Respondents were selected randomly from household members 25 years and older. In several cases, respondents were in unmarried committed relationships and were incorporated into the committed partner samples. Thus, the general public sample does not include persons in unmarried committed relationships. The final size of the general public sample was 87, with a response rate of 57%.<sup>161</sup>

The sample of persons with opposite-sex committed partners was generated by asking respondents in the general public sample to provide the name and phone number of someone they knew in an opposite-sex committed relationship. The final sample size was 33, with a response rate of 74%. Due to the difficulties in generating random samples of same-sex committed couples,<sup>162</sup> we solicited volunteers for these samples. We placed flyers in bookstores, cafes, bars and other businesses in Minneapolis and St. Paul, Minnesota that the LGBT communities support. We also contacted LGBT advocacy groups throughout the state, including groups at the University of Minnesota, and asked for their help in generating names. A few radio stations and newspapers ran community service ads about the study. Finally, names were generated by word-of-mouth as our acquaintances became aware of our project. The final sample size for men with same-sex partners was 51 yielding a response rate of 88%, and for women with same-sex committed partners the sample size was 85 yielding an 81% response rate.

Table 2 compares the demographic characteristics of the general public sample and the samples of respondents with committed partners with state population data.<sup>163</sup> Just over 37% of the respondents in the general public sample had bachelor's degrees. The comparable figure for the state of Minnesota for persons 25

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161. While this response rate is lower than that obtained in some public surveys, it is to be expected given the nature of the topic. Inheritance rights for committed relationships deal with issues of sexuality, mortality and property; three topics persons may be reluctant to discuss with a stranger.

162. To draw a random sample of same-sex committed couples, we would need a sampling frame or a list of all eligible people from which to draw. Because very few persons are in same-sex relationships relative to the population of the United States and because very few persons are willing to identify themselves as lesbian, gay, bisexual or transgender to a poller over the phone due to fear of discrimination, random digit dialing is not a feasible means of identifying potential respondents. In one national phone survey, for example, 1650 calls were made to Kansas, a total of 55 hours of dialing, before pollers spoke with a person willing to identify as being a gay man or a lesbian. See Chambers, *supra* note 94, at 449 n.3 (citing Larry Hatfield, *Methods of Polling*, SAN FRANCISCO EXAMINER, June 5, 1989, at A20).

163. See Table 2 *infra* p. 34.

and older was 21.8% in the 1990 census.<sup>164</sup> The average personal income in our sample of the general public falls between \$25,000 and \$30,000 for 1995. This average is slightly over the personal income per capita in Minnesota, which was \$21,495 for 1995.<sup>165</sup> The proportion of white respondents in our sample is comparable to the proportion of whites in the state's population.<sup>166</sup> In the general public sample, 92% of respondents were white while the figure for Minnesota as a whole is 94.5%.<sup>167</sup>

In comparison to the general public sample, the respondents with opposite-sex partners were younger, more of them had earned a bachelor's degree, and they had slightly higher personal incomes.<sup>168</sup> In our samples of respondents with same-sex partners, we see striking differences in comparison to the general public sample.<sup>169</sup> Much of this is likely due to the way in which we obtained our sample, which focused for practical reasons in the Twin Cities and at the University, generating a sample of more liberal and more educated persons.<sup>170</sup> Nearly 93% of the women and 84% of the men in these samples had bachelor's degrees.<sup>171</sup> They were slightly younger than the general public sample,<sup>172</sup> and earned higher personal incomes.<sup>173</sup> Although not shown, this sample is also more likely to be from large cities in Minnesota and more likely to be comprised of individuals who identify themselves as Democrats.

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164. See BUREAU OF THE CENSUS, U.S. DEP'T OF COMMERCE, 1990 CENSUS OF POPULATION & HOUSING: SUMMARY SOCIAL, ECONOMIC, AND HOUSING CHARACTERISTICS: MINNESOTA 88 tbl.3 (1992).

165. See U.S. BUREAU OF THE CENSUS, U.S. DEP'T OF COMMERCE, STATISTICAL ABSTRACT OF THE UNITED STATES: 1996, at 453 tbl.699 (116<sup>th</sup> ed. 1996).

166. U.S. DEP'T OF COMMERCE, CENSUS OF POPULATION: SOCIAL AND ECONOMIC CHARACTERISTICS, MINNESOTA 1990, at 16 tbl.4 (1993).

167. See *id.*

168. See Table 2 *infra* p. 34.

169. See Table 2 *infra* p. 34.

170. See Thomas C. Wilson, *Urbanism, Migration, and Tolerance: A Reassessment*, 56 AM. SOC. REV. 117, 122 (1991).

171. See Table 2 *infra* p. 34.

172. See *infra* note 191 (examining the effect of age on distributive preferences).

173. See Table 2 *infra* p. 34.

**Table 2. Comparison of Survey Respondents with State Population by Demographic Characteristics**

	Minnesota Population	General Public Sample	Respondents with Opposite-Sex Partners	Female Respondents with Same- Sex Partners	Male Respondents with Same- Sex Partners
Age	n/a	49.3	36.5	41.5	40.3
Graduated from college (%)	21.8	37.3	60.6	92.9	84.0
Mean income <sup>1</sup>	\$23,118	5.9	6.2	7.4	7.9
White (%)	94.5	92.0	90.9	96.5	90.0
Sample Size (N)	n/a	87	33	85	51
Response Rate (%)	n/a	57	74	81	88

<sup>1</sup> Income was measured in the study by the following scale: 1=\$5,000; 2=\$5,000-10,000; 3=\$10,000-15,000; 4=\$15,000-20,000; 5=\$20,000-25,000; 6=\$25,000-30,000; 7=\$30,000-35,000; 8=\$35,000-40,000; 9=\$40,000-50,000; 10=\$50,000-60,000; 11=\$60,000-70,000; 12=\$70,000 and over.

We used a self-definition of committed relationship for eligibility. Not all of our respondents in committed relationships were cohabiting with their partner. Eleven (33.3%) respondents with opposite-sex partners, five (5.9%) female respondents with same-sex partners and 3 (6.0%) male respondents with same-sex partners were not living with their partners.

All of the respondents were presented a series of scenarios in which they were asked to divide the property of the decedent among survivors identified by their familial-type relationship with the decedent.<sup>174</sup> Respondents were told that they could leave the entire estate, any portion of the estate, or none of the estate to any of the survivors identified in the scenario. All the scenarios in-

174. See Scenario A *infra* p. 37; Scenario B *infra* p. 41; Scenario C *infra* p. 47; Scenario D *infra* p. 49; Scenario E *infra* p. 73; Scenario F *infra* p. 74; Scenario G *infra* p. 76; Scenario H *infra* 79.

volved a committed partnership that terminated as a result of the death of a partner. The scenarios described the decedent and surviving partner or decedent and predeceased partner as being of the opposite sex. The first scenario, however, was repeated describing the decedent and decedent's partner as being of the same sex. For all the remaining scenarios, respondents were asked if the way in which they distributed the decedent's estate would differ if the partner had been of the same sex as the decedent. In addition, respondents were asked whether unmarried couples who live together in a committed relationship should be treated the same as married couples under inheritance laws.

For respondents in a same or opposite-sex committed relationship, additional information was gathered regarding their personal relationships, wealth accumulation and children. If respondents had entered into written property agreements with their partners, we gathered information on the nature of their agreements. Demographic information was gathered on all respondents. Sixteen pre-test interviews were conducted by MCSR to assess the length and comprehension level of the questionnaire. The average length of the interview was sixteen minutes for the general public sample and twenty-four minutes for the samples of respondents with committed partners.

Distributive preferences for the scenarios followed easily identifiable patterns. Accordingly, we present our results in tables 3-6 and 10-13 utilizing these patterns. We also combined the responses of women and men in same-sex relationships because we found minimal differences in the two groups' distributive preferences. For the general public sample, which was drawn randomly, we provide a margin of error (indicated by a +/-) for the summary statistics. The margin of error reflects the fact that due to sampling error, an estimate based on a sample of the population can be higher or lower than the actual number for the population. The respondents with committed partners were not drawn randomly and, therefore, a margin of error would not be statistically appropriate.

## *B. Findings*

### *1. Scenarios*

This subsection first describes the respondents' distributive preferences when interviewers presented them with scenarios in which the decedent was survived by members of the family of orientation (the family in which the decedent was born) and a com-

mitted partner.<sup>175</sup> The subsection then describes the respondents' distributive preferences when interviewers presented them with scenarios in which the decedent was survived by children and a committed partner.<sup>176</sup> The focus of the discussion for both types of scenarios was on how large a share of the estate, if any, a surviving committed partner should receive.

### *a. Partner and Family of Orientation*

*Partner and Parents.* Under all state intestacy statutes, the decedent's parents inherit only if the decedent leaves no surviving descendants.<sup>177</sup> Although in a few states the decedent's parents and siblings share in the estate, under most states only the parents share with a surviving legal spouse.<sup>178</sup> Under the 1990 UPC, the spouse receives the first \$200,000 plus three-fourths of any balance of the intestate estate and the parents receive one-fourth of that part of the intestate estate that exceeds \$200,000.<sup>179</sup> The trend in the most recent legislation is to give the surviving spouse all or nearly all of the decedent's probate estate.<sup>180</sup> This trend corresponds to the public attitudes found in previous empirical studies.<sup>181</sup> In a telephone survey of the general public published in

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175. See *infra* notes 177-212 and accompanying text.

176. See *infra* notes 213-233 and accompanying text.

177. See, e.g., UNIF. PROBATE CODE § 2-103(2) (amended 1993), 8 U.L.A. 107 (Supp. 1997).

178. See, e.g., *id.* (giving parents of the decedent the remaining portion of the estate if there are no descendants); Waggoner, *supra* note 16, at 35 n.39. But see, e.g., 755 ILL. COMP. STAT. ANN. 5/2-1(d) (West 1992) (stating that if no spouse survives, then parents, brothers and sisters take equal shares; if only one parent survives, that parent takes a double share; if a brother or sister is deceased, then the surviving descendants of that brother or sister take the deceased sibling's share, *per stirpes*).

179. See §§ 2-102(2), -103(2), 8 U.L.A. 106, 107 (Supp. 1997).

180. Alaska, Colorado, Hawaii, Montana and North Dakota have followed the UPC recommendation. See ALASKA STAT. §§ 13.12.102, .103 (Michie 1996); COLO. REV. STAT. §§ 15-11-102, -103 (Supp. 1996); HAW. REV. STAT. ANN. § 560:2-102, -103 (Michie 1997); MONT. CODE ANN. §§ 72-2-112, -113 (1995); N.D. CENT. CODE §§ 30.1-04-02, -03 (1996). States that have otherwise enacted the 1990 UPC's general pattern of intestacy—Arizona, Minnesota, New Mexico, South Dakota, and West Virginia—provide that the surviving spouse inherits the entire estate when the decedent dies without surviving children but with a surviving parent or parents. See ARIZ. REV. STAT. § 14-2102 (1995); MINN. STAT. § 524.2-102 (1996); N.M. STAT. ANN. § 2-102 (Michie 1995); S.D. CODIFIED LAWS § 29A-2-102 (Michie 1997); W. VA. CODE § 42-1-3 (1997).

181. See Olin L. Browder, Jr., *Recent Patterns of Testate Succession in the United States and England*, 67 MICH. L. REV. 1303, 1308-09 (1969) (studying the records of decedent estate administration in Washtenaw County, Michigan, and finding that nine of 13 wills in the sample provided that the spouse receive the entire estate); Allison Dunham, *The Method, Process and Frequency of Wealth Transmission at Death*, 30 U. CHI. L. REV. 241, 252-53 (1963) (studying probate

1978 in which married respondents were asked hypothetically to distribute their estates between their spouses and mothers, over 70% gave their entire estates to their spouses (hereinafter 1978 Inheritance Study).<sup>182</sup>

Several arguments can be made in favor of having parents share to some extent in the estate with the legal spouse. One is that childless couples are typically young, suggesting that the spouse may not have yet emerged as the primary family obligation and any accumulated wealth may have been derived not as a result of the joint efforts of the spouses but from the decedent's parents.<sup>183</sup> One source of wealth of a decedent who dies young is a tort recovery for wrongful conduct leading to the decedent's death.<sup>184</sup> Allowing the parents to share in the tort recovery would recognize that the parents bore the cost of rearing the decedent. Even if the couple is older, it could be argued that in the absence of children, the couple is less likely to have become financially interdependent except to the extent necessary to provide living arrangements.<sup>185</sup> To extend these assumptions to decedents who have been in long-term committed relationships may be inappropriate. Also, for committed couples, the absence of children may be less indicative of age and of parents having been the source of a decedent's wealth.<sup>186</sup>

To assess public attitudes about distributive patterns between partners and their parents, the interviewers presented to respondents Scenario A:

In the first situation, neither the person nor their<sup>187</sup> opposite-sex partner has any children. We are interested in how you would divide the estate among the survivors. If, when the person dies only their own parents and their partner are living, what percentage of the estate would you give to their own

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proceedings initiated in Cook County, Illinois, in 1953 and 1957 and finding only six cases where there was a surviving spouse but no children; in all but one of these cases the testator gave the surviving spouse all of the property).

182. See Mary Louise Fellows et al., *Public Attitudes about Property Distribution at Death and Intestate Succession Laws in the United States*, 1978 AM. B. FOUND. RES. J. 319, 351 (1978).

183. See *id.* at 348.

184. See Lawrence W. Waggoner, *Spousal Rights in Our Multiple-Marriage Society: The Revised Uniform Probate Code*, 26 REAL PROP. PROB. & TR. J. 683, 705 n.65 (1992).

185. See Mulder, *supra* note 57, at 312-13; Waggoner, *supra* note 184, at 705 n.65.

186. See *supra* text accompanying note 8 (indicating percentage of opposite-sex and same-sex couples who have children under the age of fifteen living with them).

187. Although unintentionally grammatically incorrect, the form of the question avoided identifying the gender of the decedent. This grammatical error was made in every scenario presented to respondents.

parents? What percentage would you give to the partner of the person who dies?

Under prevailing law, the parents would receive the decedent's entire estate and the partner would receive nothing.<sup>188</sup>

The most important finding is that a substantial majority of the respondents gave some share of the estate to the surviving partner.<sup>189</sup> Nearly three-quarters of the respondents from the general public sample,<sup>190</sup> over four-fifths of the respondents with opposite-sex partners, and all of the respondents with same-sex partners gave some share of the estate to the surviving partner.<sup>191</sup> In the general public sample, a somewhat greater percentage of the respondents gave half or less of the estate to the partner than gave half or more. Of the respondents with opposite-sex partners, over three-quarters gave the surviving partner half or more and nearly all the respondents with same-sex partners gave the surviving partner half or more. The most prevalent distribution of the respondents with same-sex partners was to give the partner the entire estate (64.7%). In contrast, for the other two samples, the most prevalent distribution was to divide the estate equally between the partner and the parents (45.3% of the general public

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188. See *supra* notes 78-79 and accompanying text.

189. See Table 3 *infra* p. 41.

190. The margin of error is  $\pm 9.8\%$  (95% confidence interval). This margin of error reflects the small sample size as well as the tendency of the responses to be polarized.

191. To assess whether younger people, who are more likely to die intestate, have different distributive preferences for the scenarios, we divided the samples into those who were under 40 years old and those who were 40 or older. We compared these groups using both t-tests for mean differences given to a survivor and using bivariate contingency table analysis. We measured the association of these variables with gamma ( $\gamma$ ), and considered  $\gamma > .3$  as indicating a meaningful relationship. Statistical significance is not reported because the two sample groups were not generated randomly and therefore the results should not be used to make statistical inferences about populations. Gamma ranges from -1.0 to +1.0 with 0 indicating no relationship.

For respondents with same-sex partners, there were no meaningful differences by age for the distributive preferences for any scenario. The age distribution in the sample of respondents with opposite-sex partners did not allow a similar analysis; very few respondents were 40 or older. For the general public respondents, several differences between the age groups were evident. In Scenario C, *infra* p. 47 (decedent survived by own child from a prior relationship and partner), older respondents gave a greater share of the estate to the partner than did younger respondents ( $\gamma = .44$ ). In Scenario F, *see infra* p. 74 (decedent survived by own child from a prior relationship and partner's child from a prior relationship), older respondents gave the partner's child from a prior relationship a greater share of the estate than did younger respondents ( $\gamma = .41$ ). In the modified Scenario H, *see infra* p. 79, (decedent survived by couple's child, partner's child from a prior relationship who never lived in the couple's household, and partner), older respondents gave a smaller share to the couple's child than younger respondents, and gave a greater share to the partner than did younger respondents ( $\gamma = -.50$ ).



sample; 42.4% of respondents with opposite-sex partners).<sup>192</sup> When the scenario was repeated describing the decedent and partner as being of the same sex, the overwhelming majority in each sample did not change their distributive choices.<sup>193</sup>

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192. Because we did not randomly draw the sample of respondents with same-sex partners, we are unable to assess whether the substantial differences in distributive preferences they show reflect actual differences between persons with same-sex partners and the other populations or whether the differences presented here are due to biases in this particular sample. As noted in the methodology section, the sample of respondents with same-sex partners differed from the other samples on several demographic dimensions, including their level of income and education, their likelihood of not being religious and their likelihood of living in the St. Paul/Minneapolis metropolitan area. See *supra* note 170 and accompanying text. Although we have no way to determine conclusively whether these factors account for the differences between samples in distributional preferences, some evidence exists to support the claim that the differences in distributional preferences are not due to these demographic factors. In a series of analyses, the distributional preferences of the general public respondents were compared by educational level, income level, residence in the St. Paul/Minneapolis metropolitan area and religiosity. Educational level was categorized by three groups representing those who had not attended college, those who had some college, and those who completed college or a higher degree. Distributional preferences were compared using bivariate contingency table analysis. Educational level was not found to be related to distributional preferences for either Scenario A, see *supra* p. 37, or Scenario B, see *infra* p. 41. More highly educated people, however, were more likely to give a greater share to the partner's child for Scenarios E, see *infra* p. 73, F, see *infra* p. 74, and G, see *infra* p. 76 (E:  $\gamma=.36$ ; F:  $\gamma=.37$ ; G:  $\gamma=.34$ ). Income, measured in three groups (0-\$20,000; \$20,000-\$35,000; and over \$35,000 per year) was also unrelated to the distributional preferences for Scenario A. Only for Scenario E was income positively correlated with a preference for giving the partner's child a greater share ( $\gamma=.34$ ). Similarly, residence in the St. Paul/Minneapolis area was not associated with the distributional preferences for Scenario A. Only for Scenario F was residence in the St. Paul/Minneapolis area positively related with a preference for giving the partner's child a greater share ( $\gamma=.43$ ). Nonreligiousness was associated with giving the partner a smaller share of the estate in Scenarios A, B, and C, see *supra* p. 37 and *infra* pp. 41, 47 (A:  $\gamma=-.36$ ; B:  $\gamma=-.43$ ; C:  $\gamma=-.35$ ) but not in any of the other scenarios.

193. Of the respondents in the general public, 85.5% (+/-7.8%) indicated no change in their distributive choices. The same was true for 97.0% of the respondents with opposite-sex partners and 94.7% of the respondents with same-sex partners. Of those respondents who gave a share of the estate to the surviving partner, 80.0% (+/-10.4%) of the respondents from the general public sample, 100% of the respondents with opposite-sex partners, and 94.7% of the respondents with same-sex partners, did not change their distributive choices when the surviving partner was of the same sex as the decedent.

These findings may be subject to social desirability bias wherein respondents answer questions so as to "appear well-adjusted, unprejudiced, rational, [or otherwise] openminded . . ." HERMAN W. SMITH, STRATEGIES OF SOCIAL RESEARCH 222 (3d ed. 1991). In Scenario A, see *supra* p. 37, we repeated the scenario, altering it only to describe a same-sex couple, and asked the respondents to distribute the decedent's estate. In the subsequent scenarios, we asked a more simplified form of the question. For example, in Scenario B, see *infra* p. 41, in which the decedent was survived by a partner and siblings, we asked: "Would you give more, less or the same amount to the partner if the partner was [sic] the same sex as the person who dies?" Having asked the question about whether sexual orientation of the

The general public was not supportive of treating committed partners the same as legal spouses under intestacy statutes. The share of the estate given to the committed partner by the respondents in the general public sample varied substantially from the share of the estate given to the legal spouse by respondents in the 1978 Inheritance Study.<sup>194</sup> Respondents with opposite-sex partners (30.3%) were more likely than general public respondents (14.0%) to treat a partner the same as the married respondents in the 1978 Inheritance Study treated a legal spouse (70.8%). The proportion that gave the partner all of the estate was nevertheless substantially less than the proportion of the married respondents in the 1978 Inheritance Study that gave the legal spouse the entire estate. In contrast, the proportion of respondents with same-sex partners who gave the partner the entire estate (64.7%) is similar to the proportion of married respondents who gave the legal spouse the entire estate in the 1978 Inheritance Study (70.8%).<sup>195</sup>

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committed partners mattered in assessing distributive preferences using two different approaches and having yielded comparable results, we have some assurance that social desirability bias is minimal.

194. See *supra* note 182 and accompanying text. It is possible that public attitudes toward inheritance rights of surviving legal spouses has changed since the time of the 1978 Inheritance Study. Legislative trends suggest considerable political support for increasing the share passing to the surviving legal spouse. See *supra* note 180 and accompanying text. Beyond that observation, we have no current evidence either to support or refute the hypothesis of shifting attitudes about the amount that a surviving spouse should take under an intestacy statute.

195. See *supra* note 182 and accompanying text.

**Table 3. Distribution Patterns for Scenario A: Decedent Survived by Partner and Parents**

		General Public Sample	Respondents with Opposite-Sex Partners	Respondents with Same- Sex Partners
Percent Distribution to:				
Partner	Parents	(%)	(%)	(%)
100	0	14.0	30.3	64.7
51-99	1-49	8.1	6.1	24.1
50	50	45.3	42.4	10.5
1-49	51-99	4.7	3.0	0.8
0	100	27.9	18.2	0.0
Total N		86	33	133

*Partner and Siblings.* Under most intestacy statutes, the decedent's siblings do not share in the estate if the decedent is survived by a legal spouse.<sup>196</sup> A decedent is unlikely to have received financial support from or given financial support to siblings. A sibling's claim to a decedent's estate would be based exclusively on familial ties whether biological or adoptive. To assess public attitudes about the distributive patterns between the surviving partner and the siblings, the interviewers presented respondents with Scenario B:

Now suppose that when the person dies, only their own brothers and sisters and their opposite-sex partner are living. What percentage of the estate would you give to the brothers and sisters of the person who dies? What percentage of the estate would you give to the partner of the person who dies?

Under prevailing law, the siblings would receive the decedent's entire estate and the partner would receive nothing.<sup>197</sup>

As was the case when presented with Scenario A,<sup>198</sup> a substantial majority of the respondents gave the surviving partner some share of the estate in Scenario B.<sup>199</sup> Over three-quarters of

196. See Waggoner, *supra* note 16, at 35.

197. See *supra* note 79 and accompanying text.

198. See *supra* p. 37.

199. See Table 4 *infra* p. 43.

the respondents from the general public sample,<sup>200</sup> over four-fifths of the respondents with opposite-sex partners, and all of the respondents with same-sex partners gave the surviving partner some share of the estate. Of respondents in the general public sample, a nearly equal percentage gave half or less of the estate to the partner as gave half or more. Of the respondents with opposite-sex partners, over three-quarters gave the surviving partner half or more. Nearly all of the respondents with same-sex partners gave the surviving partner half or more.

The respondents were slightly more likely to provide a greater share to the surviving partner in Scenario B than they did in Scenario A. Although the large majority of respondents in each sample gave identical distributions for both scenarios (about 70%), about 20% of the respondents gave more to the partner in Scenario B than they did in Scenario A.<sup>201</sup> Among the respondents from the general public sample, the primary difference between their responses to the two scenarios was that a greater proportion of them preferred that the partner receive the entire estate in Scenario B. Among the respondents with opposite-sex partners, the primary difference between their responses to the two scenarios was that a greater proportion of them preferred that the partner receive over half, rather than half, of the estate in Scenario B. Although close to 20% of the respondents with same-sex partners gave more to the partner in Scenario B, responses did not shift enough to make this change apparent within the distributive patterns summarized in Tables 3 and 4. When the respondents were asked if they would distribute the estate differently if the surviving partner was of the same sex as the decedent, the overwhelming majority in each sample indicated that their distributive choices would stay the same.<sup>202</sup>

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200. The margin of error is  $\pm 9.0\%$ .

201. The remaining 10% of the respondents gave less to the partner when the decedent was survived by siblings rather than by parents.

202. Of the respondents in the general public sample, 85.4% ( $\pm 7.8\%$ ) indicated no change in their distributive choices. The same was true for 100% of the respondents with opposite-sex partners and 94.8% of the respondents with same-sex partners. Of those respondents who gave a share of the estate to the surviving partner, 81.0% ( $\pm 10.0\%$ ) of the respondents from the general public sample, 100% of the respondents with opposite-sex partners, and 94.8% of the respondents with same-sex partners indicated that they would not change their distributive choices if the surviving partner were of the same sex as the decedent.

**Table 4. Distribution Patterns for Scenario B: Decedent Survived by Partner and Siblings**

		General Public Sample	Respondents with Oppo- site-Sex Partners	Respondents with Same- Sex Partners
Percent Distribution to:				
Partner	Siblings	(%)	(%)	(%)
100	0	20.0	30.3	68.7
51-99	1-49	9.4	15.2	23.1
50	50	41.2	33.3	6.7
1-49	51-99	7.1	3.0	1.5
0	100	22.4	18.2	0.0
Total N		85	33	134

The survey findings support the basic approaches found in both the Waggoner Working Draft and the Hawaii legislation of treating surviving committed partners as heirs and allowing them to share in the estates of decedents. Public attitudes expressed by the respondents in the general public sample are fairly consistent with the Waggoner Working Draft when the decedent is survived by a partner and parents. Although a minority of the respondents preferred that the partner receive over half and another minority preferred the partner receive less than half, the most prevalent distribution was to give the partner half of the estate. The approach of the Waggoner Working Draft to give the surviving committed partner more than half of the estate when the decedent is survived by a partner and siblings had little support among respondents from the general public sample. The larger share of the estate that would go to same-sex committed partners under the Hawaii legislation under both scenarios received little support in the general public sample. The respondents in the general public sample also did not support the exclusion of opposite-sex committed partners from inheriting under the Hawaii intestacy statute.

Although the scenarios asked respondents to distribute the property of a third party and not their own property, it seems reasonable to assume that their responses reflect their own distributive intent. The Waggoner Working Draft reflects the likely intent

of respondents with opposite-sex partners by providing that over half of the estate passes to the partner when the decedent is survived by a partner and siblings.<sup>203</sup> This group would support modifying the Waggoner Working Draft and increasing the share of the estate passing to the partner to over half of the estate when the decedent is survived by a partner and parents.<sup>204</sup> The Hawaii legislation, which precludes opposite-sex committed partners from inheriting under its intestacy statute, is inconsistent with the likely intent expressed by the respondents with opposite-sex partners.<sup>205</sup>

The majority of respondents with same-sex partners in both scenarios prefer that the partner receive the decedent's entire estate and therefore would support modifying the Waggoner Working Draft to increase the share passing to the surviving partner under both scenarios. The Hawaii legislation reflects the likely intent of this group when the decedent is survived by a partner and siblings by giving the partner the entire estate.<sup>206</sup> It fails to reflect this group's likely intent, however, when the decedent is survived by a partner and parents by giving the partner over half of the estate but not all of it.<sup>207</sup>

Further evidence of the likely intent of the respondents in this group regarding the competing inheritance claims of a committed partner and parents is found in their reporting of their current estate plans. Over 58% of respondents who had parents surviving but no children and who had wills or life insurance designated their partners as their sole beneficiary in their wills or life insurance policies. Too few respondents with wills or life insurance had siblings but no parents or children to draw any conclusions based on the reporting of their current estate plans.<sup>208</sup>

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203. See *supra* notes 121-122 and accompanying text; Table 1, *supra* p. 26.

204. See *supra* notes 121-122 and accompanying text; Table 1, *supra* p. 26.

205. See *supra* note 148 and accompanying text.

206. See HAW. REV. STAT. ANN. § 560:2-102(1)(A) (Michie Supp. 1997).

207. See *id.* § 560:2-102(2).

208. There were too few respondents with opposite-sex partners who had wills or life insurance to draw any conclusions based on their current estate plans.

A substantial number of the respondents with same-sex partners named their partners as beneficiaries in their wills and life insurance policies, even if they did not name their partner sole beneficiary. After respondents were asked if they had a will or life insurance, they were asked who was named as a beneficiary. A list of potential takers that included partner and parents was read. Over 90% of the respondents with same-sex partners who had parents surviving but no children and who had wills or life insurance designated their partner as a beneficiary but not necessarily the sole beneficiary. Data were not collected on the proportion of the estate or proceeds that the partner would receive under the respondent's estate plan.

The distributive preferences expressed by the two sample groups with committed partners reveal considerable differences between persons with opposite-sex committed partners and persons with same-sex committed partners. The differences are likely due in part to the different methods used to generate the two samples.<sup>209</sup> Some of the differences may also be explained by the fact that legal marriage is an option for opposite-sex couples.<sup>210</sup> Opposite-sex couples who may have similar preferences to same-sex couples may be excluded from the comparison because they have married. Furthermore, for those who are unmarried, the nature of the commitment is influenced by the opportunity to gain legal recognition through marriage. Another possible explanation for the differences is that respondents with same-sex partners may be more concerned that partners not be treated unfavorably as compared to legal spouses.<sup>211</sup> The findings of our study are inadequate to assess which if any of these explanations has merit. Further research is necessary to assess whether these or other factors are influencing the two groups' distributive preferences. Based on the differences in distributive preferences expressed by the two groups in this study, it might be argued that donative intent would be furthered if the intestacy share passing to a same-sex committed partner were greater than the share passing to an opposite-sex partner. There was strong agreement among respondents in all three samples, however, that opposite-sex and same-sex partners should be treated the same for purposes of intestacy.<sup>212</sup>

*b. Partner and Children*

When a surviving legal spouse is also the biological or adoptive parent of the decedent's children, there is current widespread

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209. See *supra* note 162 and accompanying text (discussing methods used to generate the sample of same-sex and opposite-sex committed couples).

210. But see Ronald R. Rindfuss & Audrey VandenHeuvel, *Cohabitation: A Precursor to Marriage or an Alternative to Being Single?*, 16 *POPULATION & DEV. REV.* 703, 704-07 (1990). Rindfuss and VandenHeuvel question the assumption in much of the literature that cohabitation is either an alternative form of marriage or the final state in a relationship that leads to marriage. See *id.* They posit that cohabitation by opposite-sex couples might be better understood if it were associated with singlehood rather than marriage. See *id.* at 705. They present data supporting the proposition that attributes of those cohabiting are more similar to persons who are single than persons who are married. See *id.* The authors, however, recognize a substantial diversity among opposite-sex cohabiting couples and agree that for those who have cohabited a substantial amount of time, understanding the relationship as an alternative to marriage may be accurate. See *id.* at 704.

211. See *supra* text accompanying note 39 (recognizing that equal treatment of same-sex couples and married couples has the potential of disrupting systemic subordination based on sexuality).

212. See *supra* notes 193, 202 and accompanying text.

consensus that the spouse should take the entire estate to the exclusion of the children.<sup>213</sup> If the children are minors at the time of the decedent's death, then it is assumed that surviving spouses are in a better position to use the inherited property for the benefit of their children as well as for themselves.<sup>214</sup> If the children are adults at the time of the decedent's death, the assumption is made that the spouses are more likely to have greater economic needs than their children and that any unconsumed portions of the estates will pass to the children when the surviving spouses die.<sup>215</sup> The distributive pattern of giving the entire estate to the surviving spouse when the decedent and spouse have joint children and neither the decedent nor the spouse have any children from prior relationships is supported by a number of empirical studies.<sup>216</sup>

If the decedent dies survived by children from a prior relationship and the legal spouse of a current marriage, the appropriate distribution of the estate between spouse and children is less certain.<sup>217</sup> As legislatures have enacted statutes that provide the entire or a substantial share (over half) of the estate to a surviving spouse, they also have enacted provisions that reduce that share if the decedent dies also survived by children from a prior relationship.<sup>218</sup> The concern arises that surviving spouses will not be generous in providing financial support for their stepchildren if they are minors and will not pass any unconsumed portions of the estates to their stepchildren at their deaths.<sup>219</sup> Legislatures also have enacted provisions that reduce the share passing to the surviving spouse if the spouse has children from a prior relationship.<sup>220</sup> The concern is that the surviving spouse will share at least some of the decedent's property with the decedent's stepchildren at the expense of the decedent's children.<sup>221</sup>

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213. See Waggoner, *supra* note 16, at 36-38.

214. See *id.* at 37.

215. See *id.*

216. See *id.* at 36-37 nn.42-43.

217. See *id.* at 38-41.

218. See, e.g., UNIF. PROBATE CODE § 2-102(4) (amended 1993), 8 U.L.A. 106 (Supp. 1997).

219. See Waggoner, *supra* note 16, at 38.

220. See, e.g., UNIF. PROBATE CODE § 2-102(3) (amended 1993), 8 U.L.A. 106 (Supp. 1997).

221. See Waggoner, *supra* note 16, at 38. The possibility exists that the same conflicts will arise after the decedent's death if the surviving spouse has more children. To take that possibility into account when designing an intestacy law would mean that the surviving spouse should usually receive a limited share. That result does not seem to correspond with public attitudes that favor surviving spouses receiving the entire estate. See *id.* at 38 n.45.



With these intestate succession patterns regarding blended families in mind, we sought to assess public attitudes about distributive patterns to partners when the family units involved children who were not the children of both partners. Immediately below we present findings from scenarios that involved decedents survived by children from a prior relationship and a partner. In Part III, we further consider distributive patterns to surviving partners by assessing public attitudes about treating a partner's child as an heir of the decedent.<sup>222</sup> The interviewers presented the respondents with Scenario C:

[T]he person has a child under 18 from a prior relationship and the opposite-sex partner has no children. When the person dies, how would you divide the estate between the person's child and their partner? What percentage of the estate would you give to the child of the person who dies? What percentage of the estate would you give to the partner of the person who dies?

Under prevailing law, the decedent's child would receive the entire estate and the committed partner would receive nothing.<sup>223</sup>

A minor child was chosen as the competing claimant to the partner because we hypothesized this would be one of the likely situations where the respondents might believe that decedents had an obligation to provide a substantial amount of their estates to their children. Respondents had a variety of distributive preferences for this scenario. The majority of respondents in each sample (62.8% of the general public sample;<sup>224</sup> 69.7% of the respondents with opposite-sex partners; 93.9% of the respondents with same-sex partners) gave the surviving partner some share of the estate.<sup>225</sup> Nearly 56% of the general public sample gave the surviving partner a share that was half or less of the estate but more than zero. Of the respondents with opposite-sex partners, this pattern prevailed two-thirds of the time. Of the respondents with same-sex partners, the majority divided the estate evenly between the partner and the decedent's child (57.3%); 22.1% gave the partner over half of the estate; and 20.6% gave the partner under half. Although a significant proportion of the respondents from the general public sample (37.2%) and of the respondents with opposite-sex partners (30.3%) preferred that the child inherit the entire estate, the most predominant distribution among those respondents

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222. See *infra* Part III.B.1 (discussing the results of the surveys regarding children of committed partners).

223. See *supra* note 78 and accompanying text.

224. The margin of error is  $\pm 10.4\%$ .

225. See Table 5 *infra* p. 49.

who gave the partner some share was to share the estate equally between the partner and the child.<sup>226</sup> Among committed partners, both opposite-sex and same-sex, with children, 90% would give the partner some share of the estate, but only 12% would give the partner over half of the estate. A majority of this group (58%) would share the decedent's estate equally between the partner and the child. When the respondents were asked if they would distribute the estate differently if the surviving partner were of the same sex as the decedent, the overwhelming majority in each sample indicated that their distributive choices would stay the same.<sup>227</sup>

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226. Although the data support an intestacy law that gives a committed partner a share of the estate, it also reveals, once again, that public attitudes toward a surviving committed partner are different from public attitudes toward a surviving legal spouse. See *supra* note 194 and accompanying text. In the 1978 Inheritance Study, see *supra* note 182 and accompanying text, respondents were asked how they would share their estate between a spouse and a minor child from a prior relationship who was living with the former spouse. Fellows et al., *supra* note 182, at 366. A substantial majority (89.1%) of the respondents gave the surviving spouse half or more. *Id.* In the 1978 Inheritance Study the child from a prior marriage lived with the former spouse. *Id.* It is uncertain whether respondents assumed some level of estrangement between the child and the decedent.

227. Of the respondents in the general public, 85.7% (+/-7.6%) indicated no change in their distributive choices. The same was true for 97.0% of the respondents with opposite-sex partners and 98.5% of the respondents with same-sex partners. Of those respondents who gave a share of the estate to the surviving partner, 81.1% (+/-10.8%) of the general public, 95.7% of respondents with opposite-sex partners, and 99.2% of respondents with same-sex partners, indicated that they would not change their distributive choices if the surviving partner were of the same sex as the decedent.

**Table 5. Distribution Patterns for Scenario C: Decedent Survived by Own Child from a Prior Relationship and Partner**

		General Public Sample	Respondents with Opposite-Sex Partners	Respondents with Same- Sex Partners
Percent Distribution to:				
Partner	Person's Child	(%)	(%)	(%)
100	0	4.7	0.0	12.2
51-99	1-49	2.3	3.0	9.9
50	50	38.4	42.4	57.3
1-49	51-99	17.4	24.2	14.5
0	100	37.2	30.3	6.1
Total N		86	33	131

The data obtained when interviewers presented the respondents with Scenario D provide further support for giving a committed partner a share of the estate:

In [this] situation, a retired widow and retired widower enter into a committed relationship and live together without getting married. They both have children from their prior marriages. If the widower dies first, what percentage of the estate, if any, would you give to his partner? If the widow dies first, what percentage of the estate, if any, would you give to her partner?

Under prevailing law, the decedent's children would receive the entire estate.<sup>228</sup>

This scenario was chosen because we hypothesized that this would be one of the most likely situations where respondents might feel that decedents had no obligation to share their estates with their committed partners. By identifying both partners as retired, respondents could be expected to infer that any accumulation of wealth occurred before each partner entered into the relationship. Because both partners had children from prior relationships, respondents could be expected to conclude that disinheritance of both partners would be fair because each would be

228. See *supra* note 78 and accompanying text.

assured that her or his children would receive her or his estate. Notwithstanding all of the reasons why the respondents might conclude it would be appropriate to disinherit the committed partner in Scenario D, only a minority of the respondents in each sample came to that conclusion (28.9% of the general public sample;<sup>229</sup> 24.2% of the respondents with opposite-sex partners; 7.0% of the respondents with same-sex partners).<sup>230</sup> The respondents made virtually no distinction between the circumstances when the widow died first and the widower died first. Of the respondents in the general sample, slightly over 87% of them gave the surviving partner a share that was half or less of the estate.<sup>231</sup> Of the respondents with opposite-sex partners, this pattern prevailed 72.7% of the time. Of the respondents with same-sex partners, about 40% divided the estate evenly between the partner and the decedent's children; nearly one-third gave the partner over half of the estate; and over one-quarter gave the partner under half of the estate. The most predominant distribution among those respondents who gave the partner some share was to share the estate equally between the partner and the children (57.6% of the general public sample; 52.0% of the respondents with opposite-sex partners; 45.0% of the respondents with same-sex partners).

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229. The margin of error is +/- 10.0%.

230. See Table 6 *infra* p. 51.

231. The margin of error is +/- 7.4%.

**Table 6. Distribution Patterns for Scenario D: Widow or Widower Survived by Partner and Children from Prior Relationship**

	General Public Sample		Respondents with Opposite-Sex Partners		Respondents with Same-Sex Partners	
Percent Distribution to:						
	Widower died first	Widow died first	Widower died first	Widow died first	Widower died first	Widow died first
Partner	(%)	(%)	(%)	(%)	(%)	(%)
100	10.8	11.1	21.2	21.2	26.4	26.4
51-99	2.4	2.4	9.1	9.1	6.2	6.2
50	41.0	39.0	39.4	39.4	41.9	40.3
1-49	16.9	17.1	9.1	9.1	18.6	20.2
0	28.9	30.5	24.2	24.2	7.0	7.0
Total N	83	82	33	33	129	129

The survey findings again support the basic approaches of the Waggoner Working Draft and the Hawaii legislation of treating surviving committed partners as heirs and allowing them to share in the estates of decedents. Given the regard for children in inheritance law generally, the findings supporting having children share their parent's estate with their parent's committed partner are significant. The Waggoner Working Draft provides that the surviving committed partner receive half of the intestate estate in Scenarios C and D and that the decedent's child(ren) receive the other half.<sup>232</sup> In both scenarios, at least a plurality of respondents in each of the three samples supports this distributional pattern, although a significant percentage of general public respondents and respondents with opposite-sex partners prefer to have the child(ren) inherit the decedent's entire estate.

For same-sex couples, the Hawaii legislation provides that the surviving committed partner receive \$100,000 plus half of any balance of the intestate estate and that the decedent's child(ren)

232. See Appendix, § (a)(2), *infra* p. 92; UNIF. PROBATE CODE § 2-103 (amended 1993), 8 U.L.A. 107-08 (Supp. 1997).

receive the other half of the balance of the estate.<sup>233</sup> The findings do not support the Hawaii legislation's approach of not permitting an opposite-sex committed partner to inherit. The findings also do not support the distributional pattern of giving a surviving committed partner more than half of a decedent's estate.

## 2. Defining Committed Partners

If an intestacy statute includes committed partners as potential heirs, the statute must provide a definition of who qualifies as a committed partner.<sup>234</sup> In this study, we drew the samples based

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233. See HAW. REV. STAT. ANN. § 2-102(4) (Michie Supp. 1996). The Hawaii legislation does not apply to opposite-sex committed couples and therefore a decedent's opposite-sex committed partner would receive nothing. See *supra* notes 148-50 and accompanying text. Consequently, under the Hawaii legislation, for Scenarios C, see *supra* p. 47, and D, see *supra* p. 49, contrary to the results in this study, the surviving committed partner would receive nothing.

234. The courts and legislative and regulatory bodies have addressed the question of how to define a committed partner. In *Braschi v. Stahl Associates*, 543 N.E.2d 49 (N.Y. 1989), the court held that a surviving committed partner qualified under a rent-control statute as a member of "the deceased tenant's family." *Id.* at 49. In the course of its reasoning, the court suggested the following objective standards to determine whether a family relationship existed, warranting statutory protection under the rent and eviction statute and accompanying regulations:

In making this assessment, the lower courts of this State have looked to a number of factors, including the exclusivity and longevity of the relationship, the level of emotional and financial commitment, the manner in which the parties have conducted their everyday lives and held themselves out to society, and the reliance placed upon one another for daily family services. These factors are most helpful, although it should be emphasized that the presence or absence of one or more of them is not dispositive since it is the totality of the relationship as evidenced by the dedication, caring and self-sacrifice of the parties which should, in the final analysis, control.

*Id.* at 55. Soon after the *Braschi* decision, regulations were issued enlarging the definition of family member. See N.Y. COMP. CODES R. & REGS. tit. 9, § 2500.2[n] (1990). The listed factors in the regulation included the sharing of household expenses, the intermingling of finances, participating in family-type activities, formalizing legal obligations toward each other, holding themselves out as family members, performing family functions and other patterns of behavior demonstrating an intention to create a long-term relationship. See *id.* For qualified family members, noneviction protection generally is available only if the family member lived in the apartment for two years. See *id.*

In *Butch v. Forte*, the court explicitly referred to marriage as the standard by which to evaluate a relationship:

Evidence of the stability and significance of the relationship could be demonstrated by the duration of the relationship; whether the parties have a mutual contract; the degree of economic cooperation and entanglement; exclusivity of sexual relations; whether there is a "family" relationship with children. While the particular items of evidence will vary from case to case, and some of these suggested criteria may be absent, and other different ones present, the plaintiff will bear the burden of demonstrating both that the relationship is stable and that it has those characteristics of significance which one may expect to find in what is essentially

on a self-definition of committed relationship. For the purpose of developing a statutory definition of committed partner, we gathered information about the respondents' committed relationships to assess whether common observable attributes could be used to identify committed partners. We sought respondents' own meaning of commitment by asking: "What is it about your relationship that makes you define it as committed?" To elicit further responses, we asked respondents: "Is there anything else you would say?" Respondents' answers were coded according to the eleven preset responses listed in Table 7.<sup>235</sup> Responses not fitting easily into these preset categories were taken verbatim and placed into the "other" category. Because this approach predictably would elicit spontaneous responses highly salient to the respondents but not necessarily indicating observable attributes, we created another set of questions asking respondents whether an observable attribute applied to their relationships.<sup>236</sup> The purpose of these questions was to assess the frequency with which certain attributes, which could be incorporated easily into a statute, occur among self-defined committed partners.<sup>237</sup>

As Table 7<sup>238</sup> shows, a considerable number of both respondents with same-sex and with opposite-sex partners responded to the open-ended question by indicating a general sense of their feelings of commitment to their partners. Respondents with same-sex partners also often responded by expressing their deep love for their partners. Respondents with same-sex partners also often indicated they had stated their commitment to each other publicly or had participated in a commitment ceremony. Additionally, several responses coded as "other" in the table contained similar ideas indicating public or family acknowledgment of their relationships. Over one-third of the respondents in each group indicated that living together demonstrated their commitment to their partners. Nearly half of the respondents with same-sex partners and approximately one-quarter of the respondents with opposite-sex partners identified monogamy over an extended period of time as a defining characteristic of their committed relationships. Several

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a de facto marriage.

188 Cal. Rptr. 503, 512 (Ct. App. 1983); see also Rebecca L. Melton, *Legal Rights of Unmarried Heterosexual and Homosexual Couples and Evolving Definitions of Family*, 29 J. FAMILY L. 497, 503-06 (1991) (identifying varying requirements for registration in municipalities).

235. See Table 7 *infra* p. 54.

236. See Table 8 *infra* p. 55.

237. These results are presented in Table 8. See Table 8 *infra* p. 55.

238. See Table 7 *infra* p. 54.

responses coded as "other" in Table 7 contained mention of the length of the relationship itself or of monogamy without reference to time. About one-third of the respondents with same-sex partners and a similar proportion of the respondents with opposite-sex partners referred to their financial interdependence with their partners. Another common response among respondents with same-sex partners was the indication that the couple planned their present and/or future together. Less common among both groups were respondents who referred to having had a child together, having executed mutual wills, or having obtained mutual life insurance policies as characteristics that led them to define their relationships as committed. In several responses coded as "other" in Table 7, respondents explicitly compared their commitment to their partners to that of married spouses.

**Table 7. Open-ended responses to "What is it about your relationship that makes you define it as committed?" (Percent giving the response)**

	Respondents with Opposite- Sex Partners	Respondents with Same-Sex Partners
Feel committed	33.3	44.0
Deeply in love	3.3	24.8
Stated commitment		
publicly/commitment ceremony	0.0	21.1
Living together	36.7	35.3
Monogamy over an "extended"		
period of time	26.7	45.1
Financial interdependence	30.0	37.6
Plan present lives together	3.3	29.3
Plan future lives together	6.7	33.1
Have or rear children together	6.7	11.3
Have mutual wills	0.0	4.5
Have mutual life insurance policies	6.7	6.8
Other	26.7	21.5
Total N	30	135



As Table 8 shows, the list of observable attributes capture many of the themes suggested in the respondents' open-ended responses.<sup>239</sup>

**Table 8. Distribution of Observable Attributes of Committed Relationships among Committed Partners (Percent responding "yes")**

	Respondents with Opposite- Sex Partners	Respondents with Same-Sex Partners
Commitment Ceremony	6.7	26.7
Exchange a symbol (ring or other jewelry)	30.0	64.4
Arranged to be buried next to each other	6.7	5.9
Registration of partner with a municipality	0.0	21.5
—where possible	0.0	36.3
Joint charitable gifts	43.3	76.3
Joint bank accounts	36.7	71.1
Joint investment	6.7	37.8
Joint ownership of car or motor vehicle	20.0	42.2
Joint ownership of home	20.0	63.0
—of home owners	35.3	73.3
Joint credit cards	20.0	46.7
Joint ownership of pet	43.3	74.1
Joint debt (other than home)	13.3	20.0
—of those who have debt	28.6	37.0
Having reared or actively rearing child together	23.3	14.8
Partner is health care decisionmaker	26.7	71.1
Partner is a beneficiary of life insurance	33.3	69.6
—of those with life insurance	43.5	88.7
Total N	30	135

239. See Table 8 *infra* p. 55.

Observable symbols of partners' feelings of commitment include the couple having participated in a commitment ceremony; registered their relationship with a municipality; made joint gifts to charity; exchanged a symbol of the relationship, such as a ring or other jewelry; and made arrangements to be buried next to each other.<sup>240</sup> Over 90% of the respondents with same-sex partners and 48.5% of the respondents with opposite-sex partners indicated having done at least one of these symbolic acts. Although several of the symbols of commitment (namely, a commitment ceremony, burial arrangements and registration of relationship with a municipality) were not commonly found within the surveyed groups, their proof might carry significant evidentiary weight because they are associated closely with the intention of making a life-long commitment.

Each of the symbols identified as an attribute has a public aspect to it, suggesting its usefulness in developing statutory criteria for defining a committed relationship. The public aspect, however, should caution us in using this type of symbol as a prerequisite to a finding of a committed relationship for purposes of inheritance. To do so would ignore the continuing discrimination perpetrated against those in the LGBT communities that makes it risky and sometimes dangerous to reveal sexual orientation. Religious and social considerations may also inhibit opposite-sex couples from publicly declaring their relationships as committed. 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.

The theme of current and future planning dynamics between the partners is captured by the observable attributes of the couple owning a pet together, having a child together, sharing parental responsibilities for a child of either partner or naming the partner as health care decisionmaker.<sup>241</sup> Over 90% of the respondents with same-sex partners and over 57% of the respondents with opposite-sex partners indicated current and future planning together in at least one of these ways. Like the symbolic indicators, these provide evidence about the emotional and affective commitment the partners have for each other and the level of trust they place in each other.

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240. See Table 8 *supra* p. 55.

241. See Table 8 *supra* p. 55.

The theme of financial interdependence, which also reflects current and future planning dynamics between the partners, is captured by the observable attributes of the couple making joint charitable gifts, having joint bank accounts or investments, having joint ownership of a car or home or having joint credit cards or other joint debt.<sup>242</sup> Nearly 95% of the respondents with same-sex partners and over 57% of the respondents with opposite-sex partners indicated financial interdependence in at least one of these ways. This evidence is particularly pertinent to inheritance law because it indicates a willingness to share property. Many of these financial arrangements suggest that partners trust each other to make financial decisions that will reflect the economic interests and values of both partners.

Although the criteria of financial interdependence may not be appropriate for defining a committed relationship for other purposes, it is useful under an intestacy statute that is designed to reflect the likely donative intent of the decedent. Notwithstanding the apparent meaningfulness of indicators of financial interdependence to assist in identifying committed relationships, it risks incorporating the traditional marital model for property ownership and financial control into the definition of nonmarital relationships.<sup>243</sup>

A counterargument for including indicators of financial interdependence in the definition, however, is the high incidence of one or more of these indicators in the relationships of the respondents participating in the study. In any case, because some of these indicators of financial interdependence have a public aspect and because they generally are available only to those persons with economic means, they should not be used as a prerequisite for finding a committed relationship. Evidence of financial interdependence should be available to demonstrate a committed relationship, but lack of such evidence should not be admissible to demonstrate an absence of commitment.

Two other indicators that are particularly germane to a definition of a committed partner for purposes of an inheritance statute are naming the partner as a beneficiary of a life insurance

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242. See Table 8 *supra* p. 55.

243. See *supra* pp. 109-10. But see generally Marjorie Kornhauser, *Love, Money, and the IRS: Family, Income-Sharing, and the Joint Income Tax Return*, 45 HASTINGS L.J. 63, 80-91 (1993) (showing the following based on empirical studies: not all couples pool their assets, pooling is not confined to married couples, financial arrangements change during the course of a relationship and couples are likely to overstate the extent of financial sharing).

policy and making arrangements to be buried next to each other.<sup>244</sup> Both indicators reflect the couple's consideration of each other when planning for their deaths. At least one of these arrangements had been made by 69.9% of the respondents with same-sex partners and 36.4% of the respondents with opposite-sex partners. The naming of the partner as a beneficiary of life insurance has further relevance to an inheritance statute because it reflects one partner's intent to provide for the other partner at death. Other arrangements that reflect a partner's intent to provide for the other partner at death include the joint ownership of homes, cars, investments and bank accounts. Over 92% of the respondents with same-sex partners and over 51% of the respondents with opposite-sex partners indicated having named their partners as life insurance beneficiaries or made at least one of these other arrangements. Although the presence of these deathtime financial arrangements may not be an appropriate criteria for defining a committed relationship for other purposes, it is under an intestacy statute that is designed to reflect the likely donative intent of the decedent.<sup>245</sup>

The duration of the relationship is one indicator that reflects emotional and affective commitment. Table 9 indicates the distribution of respondents based on the length of time the respondents had been in the relationship and the length of time they had been cohabiting.<sup>246</sup> Respondents with opposite-sex partners had been in their relationships and had lived together for a shorter duration than respondents with same-sex partners. For the respondents with same-sex partners, the mean duration of their committed relationships was 8.5 years and the mean duration of cohabiting was 7.5 years. For the respondents with opposite-sex partners, the mean duration of their committed relationships was 5.5 years and the mean duration of cohabiting was 3.9 years.

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244. See Table 8 *supra* p. 55.

245. The deathtime financial arrangements discussed in the text are frequently referred to as "will substitutes," "nonprobate transfers" or "nontestamentary transfers." See WAGGONER ET AL. *supra* note 58, at 403-04. This is to distinguish them from property owned by the decedent that passes through probate and is governed by a will or, in the absence of a will, by an intestacy statute. See *id.* at 15. None of the property subject to nontestamentary transfers is part of a decedent's probate estate, and therefore none of this property is subject to the intestacy law that is the focus of this study. See generally John H. Langbein, *The Nonprobate Revolution and the Future of the Law of Succession*, 97 HARV. L. REV. 1108 (1984) (describing the various types of will substitutes, their increasing importance and the causes for their growing popularity).

246. See Table 9 *infra* p. 59.

**Table 9. Duration of Committed Relationships and Cohabitation**

	Respondents with Opposite-Sex Partners		Respondents with Same-Sex Partners	
	Duration of Relationship (%)	Duration of Cohabitation (of those co-habiting) (%)	Duration of Relationship (%)	Duration of Cohabitation (of those co-habiting) (%)
0-4 years	60.6	54.5	25.2	36.2
5-9 years	21.2	41.0	38.5	33.9
10+ years	18.2	4.5	36.3	29.9
Total N	33	22	135	127

The link between duration and life-long commitment and emotional and affective commitment may be appropriate for some same-sex and opposite-sex committed couples. In the absence of a legally recognized date when a relationship is regarded as coming into existence, looking to duration may seem to be a reasonable statutory substitute. We should remain wary, however, of too great a focus on duration. A lifetime relationship as it is understood within the marriage model may not have the same meaning or importance for many same-sex couples and even for some opposite-sex couples.<sup>247</sup>

Within the context of intestacy law, for which donative intent is a central issue, we analyzed the data to assess whether any of these various observable indicators were associated with a preference for having a committed partner inherit. We compared a respondent's distributive preferences under the scenarios with the observable attributes that were applicable to the respondent's committed relationship. As we argued earlier, although the scenarios asked respondents to distribute the property of a third party and not their own property, it seems reasonable to assume that their responses reflected their preferences for distribution of their own property.<sup>248</sup>

247. See ELIZABETH LAPOVSKY KENNEDY & MADELINE D. DAVIS, *BOOTS OF LEATHER, SLIPPERS OF GOLD: THE HISTORY OF A LESBIAN COMMUNITY* 280 (1993) (suggesting time is a subjective and relative phenomenon within lesbian relationships).

248. See *supra* p. 43.

The relationships between the respondents' distributive preferences and the presence of each indicator were examined using bivariate contingency table analysis. For analysis, distributive preferences were collapsed into categories representing the dominant patterns of each sample group. We performed this analysis with respect to Scenario A,<sup>249</sup> in which the decedent died survived by a partner and parents, and Scenario C,<sup>250</sup> in which the decedent died survived by a partner and decedent's child from a prior relationship.

For the respondents with same-sex partners, the three categories reflecting the dominant preferential patterns in Scenario A included: giving half or less of the estate to the partner, giving over half of the estate to the partner and giving the entire estate to the partner.<sup>251</sup> For this group, the following indicators were each positively associated with a preference for having the partner receive a larger share of the decedent's estate than if that indicator did not apply to the respondent's relationship: exchanging a symbol of the relationship, such as a ring or other jewelry; registering the relationship with a municipality; sharing ownership of a car; sharing ownership of a pet; shared debt; naming a partner as a beneficiary of life insurance; and naming a partner as health care decisionmaker.<sup>252</sup>

Similarly, having been in the relationship for at least five years was positively associated with a preference for having the partner receive a greater share of the decedent's estate. Otherwise, the length of time spent living together had only a weak relationship to the distributive preferences. There were too few cases of respondents making arrangements to be buried next to each other to consider its relationship to the distributive preferences. The remaining indicators either showed weak or no relationship to the distributive preferences of the respondents.

For the respondents with opposite-sex partners, the three categories reflecting the dominant distributive patterns in Scenario A included: giving less than half of the estate to the partner, giving half of the estate to the partner and giving over half of the

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249. See Scenario A *supra* p. 37.

250. See Scenario C *supra* p. 47.

251. See Table 3 *supra* p. 41.

252. Each indicator has the following gamma: exchanged symbol of relationship ( $\gamma=.34$ ); registered committed relationship ( $\gamma=.31$ ); shared ownership of a motor vehicle ( $\gamma=.53$ ); shared ownership of a pet ( $\gamma=.35$ ); shared debt ( $\gamma=.48$ ); named partner a beneficiary of life insurance ( $\gamma=.38$ ); named partner health care decisionmaker ( $\gamma=.31$ ); length of relationship ( $\gamma=.31$ ). See *supra* note 191 (discussing use of gamma).

estate to the partner.<sup>253</sup> For this group, the results indicate several strong relationships between the observable indicators and distributive preferences.<sup>254</sup> The following indicators were each positively associated with a preference for having the partner receive a larger share of the decedent's estate than if that indicator did not apply to the respondent's relationship: exchanging a symbol of the relationship, such as a ring or other jewelry; making joint charitable gifts; owning a joint bank account; naming a partner as beneficiary of life insurance; and naming a partner as health care decisionmaker. Sharing ownership of a pet was also moderately associated with a preference for having the partner receive a greater share of the decedent's estate. Both having been in the relationship for at least five years and having cohabited for at least five years were each strongly related to a preference for having the partner receive a greater share of the decedent's estate. Because there were too few cases to consider several of these indicators alone in the sample of respondents with opposite-sex partners, additional analysis was conducted based on the common themes described above. Having at least one of the symbolic indicators was highly associated with a preference for having the partner receive a greater share of the decedent's estate. The same was true for having at least one of the indicators representing present and future planning and for having at least one of the indicators representing financial interdependence. Having at least one of the deathtime arrangements was highly associated with a preference for having the partner receive a greater share of the estate, as was having at least one of the indicators pertaining to life insurance and joint ownership.

For Scenario C, distributive preferences were again divided into three categories to represent the dominant patterns of each group. For the respondents with same-sex partners, the three categories included: giving less than half of the estate to the partner, giving half of the estate to the partner and giving over half of the estate to the partner.<sup>255</sup> The results indicate that naming a partner as health care decisionmaker or sharing debt were positively associated with a preference for having the partner inherit a

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253. See Table 3 *supra* p. 41.

254. Each indicator has the following gamma: exchanged symbol of the relationship ( $\gamma=.85$ ); made joint charitable gifts ( $\gamma=.61$ ); owned joint bank accounts ( $\gamma=.57$ ); named partner beneficiary of life insurance ( $\gamma=.63$ ); named partner health care decisionmaker ( $\gamma=.62$ ); shared ownership of a pet ( $\gamma=.33$ ); length of relationship ( $\gamma=.52$ ); length of cohabitation ( $\gamma=.69$ ); symbolic indicators ( $\gamma=.79$ ); life planning indicators ( $\gamma=.55$ ); financial interdependence indicators ( $\gamma=.66$ ); deathtime planning indicators ( $\gamma=.70$ ); life insurance and joint ownership indicators ( $\gamma=.68$ ).

255. See Table 5 *supra* p. 49.

greater share of the decedent's estate than if either of these indicators did not apply to the respondent's relationship. Both the duration of the relationship and the time spent cohabiting were positively associated with a preference for having the partner inherit a greater share of the estate. The symbolic indicators, which were associated with distributive preferences for Scenario A, were associated only weakly with the distributive preferences for Scenario C. The remaining observable indicators demonstrated weak or no relationship to the distributive preferences for Scenario C.<sup>256</sup>

For the respondents with opposite-sex partners, the three categories included: giving none of the estate to the partner, giving less than half of the estate to the partner and giving half or more of the estate to the partner.<sup>257</sup> The following indicators were each positively associated with a preference for having the partner receive a larger share of the decedent's estate than if that indicator did not apply to the respondent's relationship: exchanging a symbol of the relationship, such as a ring or other jewelry; acquiring joint credit cards; owning joint bank accounts; and naming the partner as health care decisionmaker.<sup>258</sup> The length of the relationship showed no association to the distributive preferences of the respondents, but time spent cohabiting was positively associated with a preference for having the partner inherit a greater share of the estate. Again, because there were too few cases in this sample group to consider several of the indicators alone, additional analysis was conducted based on the themes described above. Having at least one of the symbolic indicators was positively associated with a preference for having the partner inherit a greater share of the estate. Similarly, having at least one of the indicators of financial interdependence was positively associated with a preference for having the partner inherit a greater share of the estate. Finally, having at least one of the indicators pertaining to life insurance or joint ownership was positively associated with a preference for having the partner inherit a greater share of the estate.

The overall pattern of findings indicates considerable differences between the respondents with same-sex committed partners

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256. Each indicator has the following gamma: named partner as health care decisionmaker ( $\gamma=.31$ ); shared debt ( $\gamma=.31$ ); length of relationship ( $\gamma=.44$ ); length of cohabitation ( $\gamma=.38$ ).

257. See Table 5 *supra* p. 49.

258. Each indicator has the following gamma: exchanged a symbol of the relationship ( $\gamma=.63$ ); acquired joint credit cards ( $\gamma=.42$ ); owned joint bank accounts ( $\gamma=.57$ ); named partner as health care decisionmaker ( $\gamma=.47$ ); length of cohabitation ( $\gamma=.37$ ); symbolic indicators ( $\gamma=.31$ ); financial interdependence indicators ( $\gamma=.37$ ); life insurance and joint ownership indicators ( $\gamma=.30$ ).



and the respondents with opposite-sex partners. The disparities pertain both to the prevalence of the relationship indicators examined and the capacity of the indicators to predict the respondents' distributive preferences regarding the committed partner. As we indicated earlier regarding differences in distributive preferences, we can only speculate on possible explanations for the differences.<sup>259</sup> The dissimilarities that were revealed regarding indicators of a committed relationship raise questions about how we should use the indicators for identifying a committed relationship. They also bolster the need for further research to assess whether same-sex committed relationships can or should be treated the same as opposite-sex committed relationships under an intestacy statute.

Apart from the question of whether committed relationships should be defined the same for same-sex and opposite-sex couples, the findings support the approach adopted in the Waggoner Working Draft for defining a committed relationship.<sup>260</sup> Observable factors closely correspond to self-definitions of a committed relationship and can be associated with a preference for having a committed partner inherit. A comparison of the factors found in the Waggoner Working Draft and those generated from this study show a substantial correspondence. Most notably, the findings support the Draft's use of shared debt and shared ownership of assets as well as the naming of a partner as a beneficiary of life insurance or as health care decisionmaker as factors to be considered in finding a committed relationship.<sup>261</sup> They also support raising a presumption in favor of finding a committed relationship if it is shown that the decedent and the individual shared a common household for at least five years.<sup>262</sup> The study supports modifying the Draft to include more examples of observable symbols of partners' feelings of commitment, such as joint gifts to charity or an exchange of a symbol of the relationship. The findings also support adding one or more of these indicators to the list of those raising a presumption in favor of finding a committed relationship.

Relying on the indicators specified in this study and those that may be generated by future studies enhances the likelihood that meaningful characteristics of committed relationships will be used. The indicators developed in this study are based on the re-

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259. See *supra* p. 45.

260. See *supra* notes 127-139 and accompanying text (describing the approach taken in the Waggoner Working Draft to define a committed relationship).

261. See Appendix, § (d), *infra* p. 92-93.

262. See Appendix, § (e), *infra* p. 93.

spondents' self-defining characteristics as well as our own preconceived characteristics of a committed relationship. The combination of methods means that the identified indicators reflect the lived experiences of opposite-sex and same-sex partners and not just characteristics that we have superimposed on committed relationships. This technique provides a partial response to the concerns that are likely to arise concerning assimilation and the use of marriage as the standard for determining commitment.<sup>263</sup> We want to be cautious, however, not to overstate the benefit of relying on empirical studies for this purpose. Reporting findings inevitably emphasizes predominating responses and obscures outlying ones with the result that the latter have little influence in developing the factors for defining committed relationships. Because synthesis of empirical results tends to prefer similarities and to explain away deviations from prevailing patterns, we need to be careful about how we use the results within this highly contested context.

The Hawaii approach, relying nearly exclusively on self-identification, avoids having to develop defining characteristics of a committed relationship.<sup>264</sup> It has the further advantage of keeping the state from invading the privacy of committed couples in the process of determining whether sufficient evidence exists to conclude that a claimant was a committed partner of a decedent. It does so, however, at the cost of leaving those who, for whatever reason, fail to sign a declaration of reciprocal beneficiary relationship unprotected by an intestacy statute. One response might be to create a dual system in which a state adopts a registration system but also provides inheritance rights to a claimant who can otherwise show that a committed relationship existed between the claimant and the decedent.<sup>265</sup> Although a dual system may seem to embrace the advantages of both systems, it may also perpetuate the disadvantages of each. Further study is necessary to assess how a dual system might operate. Several questions should be investigated: How would the option to sign a declaration affect committed relationships? Will the effects differ depending on whether the relationship is same-sex or opposite-sex? Should a partner of a committed relationship for which there is a signed

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263. See *supra* pp. 109-10 (discussing social and political implications of treating a committed partner as an heir); *supra* p. 27 (discussing implications of using "marriage-like relationship" as a standard for evaluating same-sex and opposite-sex relationships).

264. See HAW. REV. STAT. ANN. §§ 572C -4 to-5 (Michie Supp. 1997).

265. See Waggoner, *supra* note 16, at 86-87 (considering the effect of state-wide registration of committed relationships).

declaration receive a greater share of the intestate estate than a partner of a committed relationship for which there is no signed declaration?

### III. Children of Committed Partners

To evaluate more fully public attitudes about the committed partner and committed relationships, we engaged in a broader inquiry about family units headed by committed partners by including questions involving a partner's child. One purpose in asking these questions was to assess the appropriate share, if any, passing to the surviving partner when the partner has children who are not also the children of the decedent.<sup>266</sup> Another purpose of this line of inquiry was to determine whether further studies should be conducted regarding treating a partner's child as an heir. Section A describes the current law regarding parent-child relationships to clarify who is considered a child of the decedent and who is considered a child of the partner for inheritance purposes. Section B describes the public attitudes about treating a partner's child as an heir and the implications of those findings for treating a committed partner as an heir.

#### A. *Legal Treatment of Parent-Child Relationships within Family Units Headed by Committed Partners*

Committed partners may have children from prior relationships, children together or both. Children whom the couple has together may include children who are the biological or adopted children of both partners.<sup>267</sup> Committed couples also may have a child who is conceived or adopted by one partner during the relationship with the intention that the child would be reared by both partners. The law in most states may not recognize the other partner as a parent, and other legal constraints prevent the other partner from adopting the child.<sup>268</sup> This section describes how the current law of intestacy and related statutes define parent-child relationships in terms of biological, adoptive and marital ties with

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266. For discussion of treatment of legal spouses under inheritance law in the context of blended families, see *supra* notes 217-221 and accompanying text.

267. For an extended discussion of the law regarding parent-child relationships within family units headed by same-sex partners, see Christensen, *supra* note 1, at 1391-1414.

268. This probably occurs more frequently, but not exclusively, in family units headed by same-sex partners. Opposite-sex partners who marry can avoid many of the problems that otherwise arise for unmarried committed partners trying to have both partners recognized as the legal parent of their child.

the effect of denying recognition of parent-child relationships based exclusively on social ties.<sup>269</sup>

When one partner has a biological or adopted child from a prior relationship, the other partner's relationship to the child resembles a stepparent relationship. That partner is not a stepparent, however, because the partners are not legally married.<sup>270</sup> In general, stepchildren do not inherit from stepparents, and committed partners' children from prior relationships are treated similarly. In both family situations, the child is not given inheritance rights to the estate of the spouse or partner of the child's parent.<sup>271</sup> That is true even though the decedent may have participated in the rearing of the child for a substantial number of years, contributed financially to the support of the child or otherwise become involved emotionally in the well-being of the child while the child was a minor, after the child attained adulthood or both.<sup>272</sup>

When an opposite-sex committed couple has a biological child together, the child is considered a nonmarital child of each partner.<sup>273</sup> Although historically the common law labeled the nonmarital child as "filius nulus" (the child of no one), in most states today

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269. The issue of parent-child relationships affects the share going to a decedent's legal spouse and is relevant in designing the share to a committed partner. See *supra* notes 219-221 and accompanying text (discussing treatment of legal spouses under inheritance law). It also concerns the question of whether a person can inherit from the decedent as the decedent's child. In addition, it raises the question of whether a person can inherit from the decedent as decedent's parent, sibling or other collateral heir. In other words, recognition of a parent-child relationship determines the reciprocal heirship rights of the child and the parent as well as the reciprocal heirship rights of the child and other family members of the parent. See, e.g., UNIF. PROBATE CODE § 2-114 (amended 1993), 8 U.L.A. 114-15 (Supp. 1997) (establishing the circumstances under which a parent-child relationship exists and the circumstances in which a parent may inherit from a child).

270. See UNIF. ADOPTION ACT § 1-101(14), 9 U.L.A. 6 (Supp. 1997) (defining stepparent).

271. See, e.g., UNIF. PROBATE CODE § 2-114 (amended 1993), 8 U.L.A. 114-15 (Supp. 1997) (excluding by omission stepchildren from definition of parent-child relationship).

272. See *id.* California, however, has enacted a statute that entitles a stepchild to inherit from or through stepparents if "the relationship of parent and child" began "during the person's minority and continued throughout the [parties'] joint lifetimes" and if "[i]t is established by clear and convincing evidence that the . . . stepparent would have adopted the person but for a legal barrier." CAL. PROB. CODE § 6454 (West Supp. 1997).

A strict interpretation of the term stepparent would preclude this type of statute from applying to a committed partner's child from a prior relationship.

273. See WILLIAM M. MCGOVERN, JR., ET AL., WILLS TRUSTS AND ESTATES 32-40 (1988) (describing history and policy regarding nonmarital children and inheritance law).

a nonmarital child may inherit from both parents' estates upon proof of parentage.<sup>274</sup>

Obtaining legal recognition of parent-child relationships can be more difficult when committed couples have a child through assisted conception. The Uniform Status of Children of Assisted Conception Act (hereinafter USCACA)<sup>275</sup> represents one of the most comprehensive statutes addressing parent-child relationships arising from assisted conception.<sup>276</sup> The parent-child relationship determined under the USCACA controls for purposes of intestate succession.<sup>277</sup> It provides that the gestational mother is the child's mother, removing any question about the parent-child relationship between the gestational mother and the child.<sup>278</sup> The mother's partner is not recognized as a parent of the child. Only "the husband of a woman who bears a child through assisted conception" is regarded as the father of the child.<sup>279</sup> It is unlikely that courts

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274. See UNIF. PROBATE CODE § 2-114(a) (amended 1993), 8 U.L.A. 114-15 (Supp. 1997) ("[F]or purposes of intestate succession . . . an individual is the child of his [or her] natural parents, regardless of their marital status."); Ralph C. Brashier, *Children and Inheritance in the Nontraditional Family*, 1996 UTAH L. REV. 93, 113-16 (explaining that nonmarital child must prove paternity to inherit from father); Michael J. Dale, *The Evolving Constitutional Rights of Nonmarital Children: Mixed Blessings*, 5 GA. ST. U. L. REV. 523, 541-44 (1989) (explaining that the United States Supreme Court does not allow discrimination of nonmarital children as compared to marital children in inheritance cases, although it allows statutory limitations on nonmarital children's rights if paternity is not established). Proof of parentage is unlikely to arise under these circumstances because both parents are receiving the child into their home and openly holding the child out as their own. See UNIF. PARENTAGE ACT § 4(a)(4), 9B U.L.A. 299 (1987) (listing specific circumstances that include the alleged father having received the child into his home and having openly held the child out as his natural child).

The parents are also heirs of the child in this situation because both parents are openly treating the child as theirs and neither are refusing to support the child. See, e.g., UNIF. PROBATE CODE § 2-114(c) (amended 1993), 8 U.L.A. 115 (Supp. 1997) (establishing criteria for parents to be able to inherit from their children).

275. UNIF. STATUS OF CHILDREN OF ASSISTED CONCEPTION ACT §§ 1-16, 9B U.L.A. 198-210 (Supp. 1997).

276. To date, only North Dakota and Virginia have adopted the USCACA. See N.D. CENT. CODE §§ 14-18-01 to -07 (1991); VA. CODE ANN. §§ 20-156 to -159 (Michie Supp. 1997).

277. See UNIF. STATUS OF CHILDREN OF ASSISTED CONCEPTION ACT §10, 9B U.L.A. 209 (controlling for purposes of probate law exemptions, allowance and other protections for children in a parent's estate as well as for determining class gift membership).

278. See *id.* §2, 9B U.L.A. 199.

279. See *id.* §3, 9B U.L.A. 199; cf. UNIF. PARENTAGE ACT § 5, 9B U.L.A. 301-02 (1987) (stating that if a woman is artificially inseminated by a man not her husband, "the husband is treated in law as if he were the natural father of a child thereby conceived").

would be willing to treat a partner as the equivalent of a spouse under these types of statutes.<sup>280</sup>

Gay couples face other legal problems when they want one of the partners to be the biological father of a child they intend to rear together. They not only have to rely on assisted conception, but they also have to enter into surrogacy arrangements with the

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280. See Chambers, *supra* note 94, at 465-69 (describing legal problems faced by lesbian and gay couples having a child by artificial insemination or through the use of a surrogate mother and arguing for the same automatic registering of parenthood available to married couples); Emily McAllister, *Defining the Parent-Child Relationship in an Age of Reproductive Technology: Implications for Inheritance*, 29 REAL PROP. PROB. & TR. J. 117-18 (1994) (proposing a statute that would acknowledge a parent-child relationship between the partner of the birth parent and the child).

A second issue concerning donor insemination is the legal relationship, if any, of the sperm donor to the child born of assisted conception. If a woman chooses anonymous donor insemination, questions concerning the father-child relationship are unlikely to arise. If a woman chooses a known donor, issues regarding a genetic father's legal obligations and rights can arise. Similar questions could also arise regarding egg donors. The USCACA, § 4(a), 9B U.L.A. 200 (Supp. 1997), precludes any relationship between the sperm donor and the child; in contrast, the UPA, § 5(b), 9B U.L.A. 301-02 (1987), by its statutory terms, only precludes a parent-child relationship where, the artificial insemination procedure was performed by a licensed physician and the woman inseminated was married. Proof of genetic paternity, under many inheritance statutes, including the UPC, § 2-114(a), 8 U.L.A. 114 -15 (Supp. 1997), might be sufficient to permit inheritance by the child from or through a known donor. See McAllister, *supra*, at 79-83; *cf.*, *e.g.*, Jhordan C. v. Mary K., 224 Cal. Rptr. 530, 531, 538 (Ct. App. 1986) (holding that the sperm donor's parental rights were not extinguished under the state statute where donor provided sperm directly to a child's mother without physician assistance and awarding visitation rights to sperm donor for child being reared by a birth mother and her lesbian partner); *In re R.C.*, 775 P.2d 27, 27 (Colo. 1989) (holding that an agreement between an unmarried woman and a sperm donor to treat donor as father of the child could override a statute intended to protect the woman from a paternity claim of the donor and remanding the case to determine if such an agreement existed); *Hartman v. Stassis*, 504 N.W.2d 129, 130-31 (Iowa Ct. App. 1993) (ordering child support upon petition of a lesbian mother on behalf of her two children born to her as a result of sexual intercourse with defendant); *Thomas S. v. Robin Y.*, 618 N.Y.S.2d 356, 357 (App. Div. 1994) (awarding order of filiation to a sperm donor who was known to his child as her father over objections of the child's lesbian mothers); *McIntyre v. Crouch*, 780 P.2d 239, 240 (Or. Ct. App.), *cert. denied*, 495 U.S. 905 (1989) (holding that statute excluding sperm donor's parental rights applies even though artificial insemination was not performed by a doctor, but acknowledging that if there is an agreement between mother and sperm donor stating their intention to allow parental rights to sperm donor, then statute violates donor's constitutional due process rights). See generally Fred A. Bernstein, *This Child Does Have Two Mothers . . . And a Sperm Donor with Visitation*, 22 REV. L. & SOC. CHANGE 1, 52-58 (1996) (proposing that legal recognition should be given to relationships between sperm donors and their children where the mother gives consent); Nancy D. Polikoff, *Brief, The Social Construction of Parenthood in One Planned Lesbian Family*, 22 N.Y.U. REV. L. & SOC. CHANGE 203, 203 (1996) (discussing author's involvement in *Thomas S. v. Robin Y.* litigation, 618 N.Y.S.2d. 356, and arguing that parenthood can be defined by a child in a lesbian family without regard to biology).

gestational mother. The legality of surrogacy agreements between biological fathers and gestational mothers varies widely among the states, reflecting a host of ethical concerns about these agreements.<sup>281</sup> Even if a surrogacy arrangement is successful, the non-biological partner is not recognized as the child's parent.<sup>282</sup>

Similar problems can arise if committed couples decide to adopt. The majority of jurisdictions currently do not allow unmarried couples to adopt a child jointly but do allow unmarried adults to adopt.<sup>283</sup> Therefore, the couple is left with the option of having one partner adopt the child, leaving the other partner with no legal ties to the child.<sup>284</sup>

When presented with situations in which one partner becomes a parent by assisted conception or adoption and the other partner seeks parental status to the child through adoption, some

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281. See UNIF. STATUS OF CHILDREN OF ASSISTED CONCEPTION ACT §§ 5-9, alt. §5, 9B U.L.A. 201-07 (Supp. 1997); Chambers, *supra* note 94, at 468-69 (noting that some states render surrogacy agreements unenforceable, some do not acknowledge surrogacy agreements but do not prohibit them if parties agree to carry it out, and others enforce them if parties meet state requirements); Maria J. Hollandsworth, *Gay Men Creating Families Through Surro-Gay Arrangements: A Paradigm for Reproductive Freedom*, 3 AM. U. J. GENDER & L. 183, 201-07 (1995) (explaining that USCACA is the foundation for the three different types of state surrogacy statutes and describing states' various approaches).

282. It is possible for opposite-sex couples to enter into surrogacy arrangements, but they can avoid the legal problems described in the text by marrying.

283. Most state statutes do not expressly prohibit joint adoptions by unmarried couples, but courts rarely allow such adoptions. See HAYDEN CURRY ET AL., A LEGAL GUIDE FOR LESBIAN AND GAY COUPLES 3-4 to 3-5 (7th ed. 1993). Most state adoption statutes confer standing to adopt on "any adult," "husband and wife together," "unmarried adult," or similar language. See, e.g., ALA. CODE § 26-10A-5 (1992) (any person may adopt, including a single parent); ALASKA STAT. § 25.23.020 (Michie 1996) ("Husband and wife together; unmarried adult" may adopt); W. VA. CODE § 48-4-2 (1984) ("any person not married . . . or any husband and wife jointly" may adopt); WIS. STAT. ANN. § 48-82(1)(a), (b) (West 1997) ("[a] husband and wife jointly" or "[an] unmarried adult" may adopt); see also UNIF. ADOPTION ACT, § 1-102, 9 U.L.A. 7 (Supp. 1997) ("[a]ny individual may adopt"). But see Adoption of Tammy, 619 N.E.2d 315, 321 (Mass. 1993) (holding that the state adoption statute does not prohibit same-sex committed partners from jointly adopting a child who is the biological child of one of the partners); *In re Jacob*, 660 N.E.2d 397, 398 (N.Y. 1995) (holding that a couple, homosexual or heterosexual, does not have to be married to adopt together a child who is the biological child of one of the partners); Corky Siemaszko, *N.J. Gay Pair Adopt Boy*, DAILY NEWS, Oct. 23, 1997, at 10 (describing holding of a New Jersey Superior Court allowing a gay couple to adopt a child simultaneously).

284. In this case the individual partner most typically would be adopting the child in the conventional manner, meaning adopting a child with whom the adoptive parent had no previous relationship. When a conventional adoption occurs, the biological parents relinquish all parental rights and responsibilities. See Marc E. Elovitz, *Adoption by Lesbian and Gay People: The Use and Mis-Use of Social Science Research*, 2 DUKE J. GENDER L. & POL'Y 207, 207 (1995). Thus, in a conventional adoption, the adoptive family completely substitutes for the biological family.

courts have been willing to construe existing adoption statutes broadly to permit both partners to be recognized as the parents of the child for all purposes, including inheritance.<sup>285</sup> The adoption and related statutes typically provide that an adoption terminates the parental rights of the child's legal parent unless the petitioner is the child's stepparent.<sup>286</sup> Although some courts refuse to allow the adoption because the petitioner fails to qualify as a stepparent, other courts refuse to read the statute "literally and restrictively where to do so would defeat the best interests of the children and produce a wholly absurd and untenable result."<sup>287</sup>

The Uniform Adoption Act<sup>288</sup> (UAA) is one of the few instances in which a legislative attempt was made to facilitate joint parenting arrangements between committed couples.<sup>289</sup> The UAA

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285. See, e.g., *In re Baby Z.*, No. 105695, 1996 Conn. Super. LEXIS 1091, at \*36 (Conn. Super. Ct. Apr. 24, 1996); *Adoption of Tammy*, 619 N.E.2d, at 321 (Mass. 1993); *In re Adoption of Two Children by H.N.R.*, 666 A.2d 535, 536 (N.J. Super. Ct. App. Div. 1995); *In re Adoption of Evan*, 583 N.Y.S.2d 997, 997 (Sur. Ct. 1992); *Adoption of B.L.V.B.*, 628 A.2d 1271, 1276 (Vt. 1993). But see, e.g., *In re Adoption of T.K.J. & K.A.K.*, 931 P.2d 488, 490 (Colo. Ct. App. 1996); *In re Angel Lace M.*, 516 N.W.2d 678, 686 (Wis. 1994). When allowing second-parent adoptions, the courts have not distinguished between family situations in which one of the parents is biologically related to the child and those in which one of the parents had previously adopted the child. Compare *In re M.M.D. & B.H.M.*, 662 A.2d 837, 840 (D.C. 1995) (holding that a gay man may adopt a child jointly with his partner where that partner had previously adopted that child) with *Adoption of Tammy*, 619 N.E.2d 315 (Mass. 1993) (holding that a lesbian may adopt a child jointly with her lesbian partner where the child is the biological child of that partner born as a result of reproductive technology).

Second-parent adoption is the term frequently used in the literature to refer to an adoption by the committed partner of the child's legal parent that does not result in the termination of the legal parent's relationship with the child. See Maxwell S. Peltz, *Second-Parent Adoption: Overcoming Barriers to Lesbian Family Rights*, 3 MICH. J. GENDER & L. 175, 176 (1995). The term is used to contrast it with stepparent adoption. See *id.* at 181.

286. See, e.g., D.C. CODE ANN. § 16-312 (a) (1997) (adoption statute terminating rights of parent except in case of stepparent adoption). UNIF. PROBATE CODE § 2-114 (b) (amended 1993), 8 U.L.A. 114-15 (Supp. 1997) (inheritance statute terminating right to inherit by parent except in case of stepparent adoption).

287. *In re Adoption of Two Children by H.N.R.*, 666 A.2d at 538.

288. 9 U.L.A. 6-114 (1994).

289. In contrast, a few legislatures have enacted statutes banning adoptions by lesbians and gay men. See, e.g., FLA. STAT. ANN. § 63.042(3) (West 1985); N.H. REV. STAT. ANN. §§ 170-B:2 (XV), B:4, F:6 (1994); see also *Cox v. Florida Dep't of Health & Rehabilitative Serv.*, 656 So. 2d 902 (Fla. 1995) (rejecting a constitutional challenge to FLA. STAT. ANN. § 63.042(3)); *In re Opinion of the Justices*, 530 A.2d 21 (N.H. 1987) (rejecting a constitutional challenge to N.H. REV. STAT. ANN. §§ 170-B:2 (XV), B:4, F:6); Victor Epstein, *Is Adoption Ruling Appeal-Proof?*, BROWARD DAILY BUS. REV., Aug. 5, 1997, at A1 (describing *Amer v. Florida*, No. 92-14370 (11) (Fla. Cir. Ct. July 27, 1997), which rejected a constitutional challenge to the Florida statute).

The Hawaii legislation addresses this problem. The Hawaii statute having to do with parent-child relationships for inheritance purposes was amended to pro-



provides that "[f]or good cause shown, a court may allow an individual who [is not a stepparent], but has the consent of the custodial parent of a minor to file a petition for adoption," and that "[a] petition allowed under this subsection must be treated as if the petitioner were a stepparent."<sup>290</sup> Through this approach, the UAA avoided defining a committed partner and left it to the courts to determine whether "good cause" is shown to warrant treating a petitioning committed partner as a stepparent.<sup>291</sup> Extending the right to adopt may not be a satisfactory response for purposes of intestacy. Intestacy laws are designed for persons who have not exercised their private law-making opportunities, such as executing a will or will substitutes.<sup>292</sup> Those same persons might not

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vide that adoption by the reciprocal beneficiary of a biological or adopting parent has no effect on the relationship between the child and that biological or adopting parent or the child's right to inherit from or through the other biological or adopting parent. See HAW. REV. STAT. ANN. § 560:2.114(b) (Michie Supp. 1997). The legislation, however, fails to extend Hawaii's antilapse statute to children of a reciprocal beneficiary. It continues to apply only to stepchildren. See *id.* at § 560:2.603(b) (1997). The statute provides that, if the testator fails to provide otherwise, the lineal descendants of a stepchild who predeceases the testator take the stepchild's share. For a child of a reciprocal beneficiary who predeceases the testator, the devise to the child will fail and not pass to the child's lineal descendants.

290. UNIF. ADOPTION ACT § 4-102, 9 U.L.A. 67.

291. It cannot be doubted that the drafters intended to reach adoption by a committed partner of a child's parent.

In addition to permitting individuals who are within the formal definition of "stepparent" to adopt a minor stepchild under this Article, Section 4-102 allows an individual who is a *de facto* stepparent, but is not, or is no longer, married to the custodial parent, to adopt as if he or she were a *de jure* stepparent. To file a petition under this Article, the *de facto* stepparent or "second parent" has to have the consent of the court and the custodial parent, whose parental rights will not be terminated by an adoption under this Article. In addition, for the court to grant the petition, the other requirements of this Article have to be met, including the court's determination that the adoption is in the minor adoptee's best interests.

*Id.* § 4-102 cmt. 67 (citing *Matter of Evan*, 583 N.Y.S.2d 997 (Sur. Ct. 1992), and *Adoption of B.L.V.B.*, 628 A.2d 1271 (Vt. 1993)).

For further discussion of second-parent adoptions, see Suzanne Bryant, *Second Parent Adoption: A Model Brief*, 2 DUKE J. GENDER L. & POL'Y 233 (1995); Elovitz, *supra* note 284; Deborah Lashman, *Second Parent Adoption: A Personal Perspective*, 2 DUKE J. GENDER LAW & POL'Y 227 (1995); Charlotte J. Patterson, *Adoption of Minor Children by Lesbian and Gay Adults: A Social Science Perspective*, 2 DUKE J. GENDER LAW & POL'Y 191 (1995); Charlotte J. Patterson, *Children of Lesbian and Gay Parents*, 63 CHILD DEVELOPMENT 1025 (1992); Peltz, *supra* note 285; Nancy D. Polikoff, *This Child Does Have Two Mothers: Redefining Parenthood to Meet the Needs of Children in Lesbian-Mother and Other Nontraditional Families*, 78 GEO. L.J. 459 (1990); Wendell Ricketts & Roberta Achtenberg, *Adoption and Foster Parenting for Lesbians and Gay Men: Creating New Traditions in Family*, in HOMOSEXUALITY AND FAMILY RELATIONS 83 (Frederick W. Bozett & Marvin B. Sussman eds., 1990); Carmella Stella, *When a Mother is a Legal Stranger to Her Child: The Law's Challenge to the Lesbian Nonbiological Mother*, 1 UCLA WOMEN'S L.J. 135 (1991).

pursue adoption, even when it is available, raising the question of whether the intestacy statute should rely exclusively on adoption and other related statutes to define parent-child relationships.<sup>293</sup>

As this discussion demonstrates, the law's failure to recognize committed relationships leads to a failure to recognize parent-child relationships. The attention traditionally paid to the best interests of the children probably explains the relative success that partners have enjoyed in obtaining legal ties to their children through adoption.<sup>294</sup> The effect of these recent legal developments, however, is to confer legal status upon family units headed by committed partners and to recognize ongoing committed relationships.<sup>295</sup>

### *B. Findings*

#### 1. Scenarios

This subsection first describes the respondents' distributive preferences when interviewers presented them with scenarios in which the decedent's partner had predeceased the decedent leaving a child who was unrelated to the decedent biologically or through adoption. The subsection then describes the respondents' distributive preferences when interviewers presented them with scenarios in which the decedent was survived by a partner as well as by the partner's child. For both sets of scenarios, the findings reveal public attitudes toward family units headed by committed partners that implicate the treatment of a committed partner as an heir.

*Partner Predeceased the Decedent Leaving a Child.* To assess public attitudes about the heirship of a child whom the decedent's partner conceived or adopted during the relationship and whom the partner and decedent reared together, the interviewers presented respondents with Scenario E:

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292. See *supra* notes 56-57 and accompanying text; see also *supra* note 245 (discussing will substitutes).

293. Cf. WAGGONER ET AL., *supra* note 58, at 131 (discussing the scope of the court-made doctrine of equitable adoption, which permits children who have not been formally or legally adopted to inherit by intestacy from their foster parents).

294. See Peltz, *supra* note 285, at 177-78.

295. See *id.* at 177-78, 187 (making these points specifically regarding lesbian committed couples). The legal developments discussed in the text are distinguishable from the growing body of law discussed earlier that allocates rights and obligations between partners once their relationship has terminated. See *supra* notes 96-112 and accompanying text. When courts address property divisions upon the termination of a relationship, to a large extent, rather than recognizing the legal status of family units headed by committed partners, they are protecting individual claimants and not ongoing family units.

In the next situation, suppose that the opposite-sex partner conceived or adopted a child during the relationship and that the person who dies had no biological or adoptive relationship to the child. However, the couple raised the child together as their own. In addition, the person who dies had a child from a prior relationship who had also lived in the couple's household. Both children are now over 18. When the person dies, their partner had already died and only the two children are living. What percentage of the estate would you give to the person's child from the prior relationship? What percentage of the estate would you give to the deceased partner's child that the couple raised together?

Under prevailing law, the decedent's child from a prior relationship would inherit the entire estate.<sup>296</sup>

The decedent's child from a prior relationship who was reared in the committed couple's household was chosen as the competing claimant to the child conceived or adopted by the decedent's partner during the relationship because we hypothesized that this would be the most likely case where the respondents would not share the estate with the partner's child. Traditionally, both legally and socially, biological or adopted children are viewed as having a superior claim over anyone else to inherit.<sup>297</sup>

The overwhelming response in each sample was to distribute the decedent's estate equally between the two children.<sup>298</sup> When the respondents were asked if they would distribute the estate differently if the partners had been the same sex, the overwhelming majority in each sample indicated that their distributive choices would stay the same.<sup>299</sup>

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296. See UNIF. PROBATE CODE § 2-103(1) (amended 1993), 8 U.L.A. 107 (Supp. 1997); see also *supra* notes 276-84 and accompanying text (describing law that prevents a decedent from being treated as a parent of a partner's child).

297. Under prevailing inheritance laws, the children do share with the decedent's legal spouse. See Waggoner, *supra* note 16, at 36-38 (explaining the intestacy pattern of providing for the spouse by reducing, and in some instances eliminating, the share passing to the children on the basis of relative financial need and that the spouse plays the role of conduit to the children by providing for the children's needs during their minority and giving them any unconsumed portion at death).

298. See Table 10 *infra* p. 74.

299. Of the respondents in the general public, 92.7% (+/-5.8%) indicated no change in their distributive choices. The same was true for 97.0% of the respondents with opposite-sex partners and 100% of the respondents with same-sex partners. Of those respondents who gave a share of the estate to the partner's child, 93.2% (+/-5.8%) of the general public, 96.8% of respondents with opposite-sex partners, and 100% of respondents with same-sex partners, indicated that they would not change their distributive choices if the partners had been the same sex.

**Table 10. Distribution Patterns for Scenario E: Decedent Survived by Own Child From a Prior Relationship and Partner's Child that the Couple Reared Together**

		General Public Sample	Respondents with Opposite-Sex Partners	Respondents with Same- Sex Partners
Percent Distribution to:				
Person's Child	Partner's Child, reared together	(%)	(%)	(%)
100	0	10.5	6.1	0.8
51-99	1-49	4.7	0.0	3.0
50	50	80.2	87.9	90.2
1-49	51-99	3.5	3.0	6.0
0	100	1.2	3.0	0.0
Total N		86	33	133

In Scenario E,<sup>300</sup> the committed couple's relationship began before the birth or adoption of the partner's child. To test further the public attitudes about treating a partner's child as an heir, Scenario F involved a situation in which the committed couple's relationship began after the birth or adoption of the partner's child:

The person and their opposite-sex partner each had a child from a prior relationship. Both children had lived in the couple's household and are now over 18. Suppose that when the person dies, the partner had already died and only the two children are living. What percentage of the estate would you give to the child of the person who dies? What percentage of the estate would you give to the deceased partner's child who had lived in the couple's household?

Under prevailing law, the decedent's child from a prior relationship would inherit the decedent's entire estate.<sup>301</sup>

300. See Scenario E *supra* p. 73.

301. See UNIF. PROBATE CODE § 2-103(1) (amended 1993), 8 U.L.A. 107 (Supp. 1997); see also *supra* notes 270-272 and accompanying text (describing law that prevents a decedent from being treated as a parent of a partner's child for inheritance purposes).

Again, the decedent's child from a prior relationship who had lived in the committed couple's household was chosen as the competing claimant to the partner's child because we hypothesized that this would be the most likely case where the respondents would not share the estate with the partner's child. A substantial majority of respondents in each sample divided the estate equally between the two adult children (72.1% of the general public sample; 81.8% of the respondents with opposite-sex partners; 90.2% of the respondents with same-sex partners).<sup>302</sup> A comparison of the results of Scenarios E and F indicates that the respondents did not distinguish between the partner's child conceived or adopted during the relationship and the partner's child from a prior relationship who had lived in the couple's household. Over two-thirds of the respondents in each sample gave the partner's child 50% of the estate in both scenarios (68.6% of the general public sample, 75.8% of the respondents with opposite-sex partners and 82.4% of the respondents with same-sex partners). When the respondents were asked if they would distribute the estate differently if the partners had been the same sex, the overwhelming majority in each sample indicated that their distributive choices would stay the same.<sup>303</sup>

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302. See Table 11 *infra* p. 76.

303. Of the respondents in the general public, 89.2% (+/-8.0%) indicated no change in their distributive choices. The same was true for 100% of the respondents with opposite-sex partners and 99.3% of the respondents with same-sex partners. Of those respondents who gave a share of the estate to the partner's child, 89.6% (+/-9.0%) of the general public, 100% of respondents with opposite-sex partners, and 100% of respondents with same-sex partners indicated that they would not change their distributive choices if the partners had been the same sex.

**Table 11. Distribution Patterns for Scenario F: Decedent Survived by Own Child from a Prior Relationship and Partner's Child from a Prior Relationship**

		General Public Sample	Respondents with Opposite-Sex Partners	Respondents with Same-Sex Partners
Percent Distribution to:				
Person's Child	Partner's Child	(%)	(%)	(%)
100	0	18.6	12.1	3.0
51-99	1-49	8.1	6.1	6.0
50	50	72.1	81.8	90.2
1-49	51-99	1.2	0.0	0.0
0	100	0.0	0.0	0.8
Total N		86	33	133

The respondents were asked to consider one more situation in which the decedent's partner predeceased the decedent. The interviewers presented the respondents with Scenario G:

[T]he opposite-sex partner died leaving a child from a prior relationship who had lived in the couple's household. This child is now over 18 and the couple had no other children. Suppose that when the person dies, their partner had already died and only their own parents and the partner's child are living. What percentage of the estate would you give to the parents of the person who dies? What percentage of the estate would you give to the deceased partner's child who had lived in the couple's household?

Under prevailing law, the decedent's parents would inherit the entire estate.<sup>304</sup>

Given the respondents' willingness to share the decedent's estate between the decedent's own child and the partner's child, it is not surprising that a substantial majority of the respondents with opposite-sex partners (75.8%) and nearly all of the respondents with same-sex partners (90.2%) gave the partner's child half or

304. See UNIF. PROBATE CODE § 2-103(2) (amended 1993), 8 U.L.A. 107 (Supp. 1997); see also *supra* notes 270-272 and accompanying text (describing law that prevents a decedent from being treated as a parent of a partner's child for inheritance purposes).

more of the decedent's estate when the competing claimant was the decedent's parents. A substantial majority of the respondents in the general public sample (79.1%) gave the partner's child a share of the estate.<sup>305</sup> They were equally likely to give half or less of the estate to the partner's child as to give half or more. When the respondents were asked if they would distribute the estate differently if the partners had been the same sex, the overwhelming majority in each sample indicated that their distributive choices would stay the same.<sup>306</sup>

**Table 12. Distribution Patterns for Scenario G: Decedent Survived by Partner's Child from a Prior Relationship and Decedent's Parents**

		General Public Sample	Respondents with Opposite-Sex Partners	Respondents with Same-Sex Partners
Percent Distribution to:				
Deceased Partner's Child	Deceased Partner's Parents	(%)	(%)	(%)
100	0	20.9	21.2	33.1
51-99	1-49	10.5	18.2	23.3
50	50	37.2	36.4	33.8
1-49	51-99	10.5	9.1	8.3
0	100	20.9	15.2	1.5
Total N		86	33	133

For all three of the scenarios that included a partner's child as a potential taker, Scenarios E,<sup>307</sup> F,<sup>308</sup> and G,<sup>309</sup> the respondents

305. The margin of error is +/-10.0%.

306. Of the respondents in the general public, 87.7% (+/-9.6%) indicated no change in their distributive choices. The same was true for 100% of the respondents with opposite-sex partners and 97.0% of the respondents with same-sex partners. Of those respondents who gave a share of the estate to the partner's child, 90.6% (+/-10.8%) of the general public, 100% of respondents with opposite-sex partners, and 96.9% of respondents with same-sex partners, indicated that they would not change their distributive choices if the partners had been the same sex.

307. See Scenario E *supra* p. 73.

in all three groups consistently gave the partner's child a share of the decedent's estate. The results are inconsistent with current law, which provides that the partner's child receives no share of a decedent's estate.<sup>310</sup> For Scenarios E and F, the results are inconsistent with a basic principle of intestacy law that treats the decedent's child as an exclusive heir, unless the decedent is survived by a legal spouse.<sup>311</sup> Based on Scenarios E and F one might conclude that public attitudes support treating the partner's child as a child of the decedent for all purposes under the intestacy law. The results of Scenario G, however, cast doubt on that conclusion. If the respondents were treating the partner's child as a child of the decedent, one would have expected that they would have given the entire estate to the partner's child in Scenario G, in which they were asked to distribute the estate between the partner's child and the decedent's parents. Perhaps the reason the partner's child received half of the estate in both Scenarios E and F is because the respondents embraced a principle of equality among children, rather than a view that the status of the children is irrelevant. The principle of equality among children may explain the respondents' tendency not to treat any child unfavorably.

The favorable treatment of the partner's child is further revealed by comparing the responses to Scenarios A<sup>312</sup> and G. In both scenarios, the decedent's parents are the competing claimants to the members of the family unit—the partner in Scenario A and the partner's child in Scenario G—that had been headed by committed partners. Although over 48% of the respondents in the general public sample gave the same share to the partner's child in Scenario G as they gave to the partner in Scenario A, nearly 32% of them gave the partner's child in Scenario G more than they gave the partner in Scenario A. Similarly, although over 42% of the respondents with opposite-sex partners gave the same share to the partner's child in Scenario G as they gave to the partner in Scenario A, over 33% of them gave the partner's child in Scenario G more than they gave the partner in Scenario A. This counter-intuitive preference for the partner's child over the partner by a substantial minority of respondents in these two sample groups

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308. See Scenario F *supra* p. 74.

309. See Scenario G *supra* p. 76.

310. See *supra* notes 270-284 and accompanying text.

311. See *supra* text accompanying notes 78, 213-221.

312. See Scenario A *supra* p. 37.



reinforces the conclusion that the respondents did not view the partner as the equivalent of a legal spouse.<sup>313</sup>

Of the respondents with same-sex partners, over 42% gave the same share to the partner's child in Scenario G as they gave to the partner in Scenario A. Their responses differed from those obtained from the other two samples, however, in that over 53% of them gave more to the partner in Scenario A than they did to the partner's child in Scenario G. This difference in responses is due largely to those respondents with same-sex partners who gave the partner the entire estate but who gave the partner's child half or more of the estate, but not all of it.

*Partner and Partner's Child Survive the Decedent.* To assess further what respondents are signifying when they include a committed partner as an heir or when they include a partner's child as an heir, the interviewers presented the respondents with Scenario H:

[T]he person and their opposite-sex partner had a child together, which means that they both have an adoptive or biological relationship to this child. In addition, the partner had a child from a prior relationship who had also lived in the couple's household. Both children are now over 18. When the person dies, how would you divide the estate between the couple's child, the partner's child, and the partner? What percentage of the estate would you give to the couple's child? What percentage of the estate would you give to the partner's child who had also lived in the couple's household? What percentage of the estate would you give to the partner of the person who dies?

Under prevailing law, the decedent's child, who is also the child of the decedent's partner, would receive the entire estate.<sup>314</sup>

This scenario was chosen because we wanted a scenario that reflected the complexity found in family units headed by committed partners. The scenario presents a situation where respondents might be likely to give a substantial share to the partner. Because the couple had a child together, the respondents might be less likely to discount the committed nature of the relationship. In addition, because the decedent's child is also a child of the partner, the respondents might be less concerned about the decedent's child

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313. See *supra* note 194 and accompanying text (comparing public attitudes toward committed partners as heirs with public attitudes toward legal spouses as heirs).

314. See UNIF. PROBATE CODE § 2-103(1) (amended 1993), 8 U.L.A. 107 (Supp. 1997); See also *supra* text accompanying notes 78, 270-272 (describing law that prevents a decedent from being treated as a parent of a partner's child for inheritance purposes).

subsequently being disinherited by the partner. The presence of the partner's child from a prior relationship, however, might be a reason for respondents to limit the share passing to the partner.

Although there was great variation in respondents' distributive preferences, several conclusions can be drawn. A substantial majority of respondents in each of the samples gave something to the partner (72.4% of the general public,<sup>315</sup> 84.4% of the respondents with opposite-sex partners and 97.7% of the respondents with same-sex partners).<sup>316</sup> Similarly, a substantial majority of respondents in each of the samples gave something to the partner's child from a prior relationship (77.0% of the general public sample,<sup>317</sup> 81.3% of the respondents with opposite-sex partners and 69.2% of the respondents with same-sex partners). The majority of the respondents in each sample gave a share of the estate to each of the three survivors (59.8% of the general public sample; 71.9% of the respondents with opposite-sex partners; and 66.9% of the respondents with same-sex partners).

As under earlier scenarios, the majority of respondents gave each child something and treated the children equally (60.9% of the general public; 62.5% of the respondents with opposite-sex partners; and 64.7% of the respondents with same-sex partners). The proportion of respondents who treated the children equally increases if respondents who disinherited both children and gave the entire estate to the surviving partner are also considered (5.7% of the general public; 6.3% of the respondents with opposite-sex partners; and 24.8% of the respondents with same-sex partners).<sup>318</sup>

Given our previous findings, it is not surprising that the respondents gave the surviving partner and the partner's child from a prior relationship a share of the decedent's estate. It is surprising, however, that when the shares given to each in Scenario H are combined, a majority of the respondents in each sample gave the partner and the partner's child from a prior relationship over half of the estate, leaving the decedent's own child (the couple's child)

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315. The margin of error is +/- 9.6%.

316. See Table 13 *infra* p. 82.

317. The margin of error is +/- 9.0%.

318. The principle of equality among children was also detected in an earlier empirical study that considered stepparent-stepchild relationships. See Contemporary Studies Project, *A Comparison of Iowans' Dispositive Preferences with Selected Provisions of the Iowa and Uniform Probate Codes*, 63 IOWA L. REV. 1041, 1094-95 (1978). Survey participants treated a decedent's child from a prior relationship the same as decedent's child from a current relationship when presented with a scenario in which the decedent was survived by a legal spouse, an adult child from the decedent's current marriage and an adult child from a prior relationship. See *id.*

inheriting less than half of the estate (55.2% of the general public sample; 68.8% of the respondents with opposite-sex partners; and 91.7% of the respondents with same-sex partners).<sup>319</sup> Among respondents with committed partners, 86.0% of those who have children gave over half of the estate to the partner and the partner's child from a prior relationship; 77.8% of those whose partners have children that are not the respondents' own gave over half of the estate to the partner and the partner's child from a prior relationship. These results probably do not reflect the respondents' preference for the partner and the partner's child from a prior relationship over the decedent's child (the couple's child). Instead, they may be a byproduct of the respondents' preference for treating children in the family unit equally. If we had presented a scenario in which the decedent had more than one child and the partner had only one child from a prior relationship, then it is likely that the share of the estate going to the partner and the partner's child from a prior relationship would be reduced as respondents divided some portion of the estate equally among all of the children in the family unit. When the respondents were asked if they would distribute the estate differently if the surviving partner were of the same sex as the decedent, the overwhelming majority in each sample indicated that their distributive choices would stay the same.<sup>320</sup>

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319. The margin of error is  $\pm 10.5\%$ .

320. Of the respondents in the general public, 84.3% ( $\pm 7.8\%$ ) indicated no change in their distributive choices. The same was true for 98.5% of the respondents with opposite-sex partners and 97.0% of the respondents with same-sex partners. Of those respondents who gave a share of the estate to the surviving partner, 82.0% ( $\pm 9.8\%$ ) of the respondents from the general public sample, 99.2% of the respondents with opposite-sex partners, and 96.3% of the respondents with same-sex partners did not change their distributive choices when the surviving partner was of the same sex as the decedent.

**Table 13. Distribution Patterns for Scenario H: Decedent Survived by Couple's Child, Partner's Child from a Prior Relationship and Partner**

			General Public Sample	Respondents with Oppo- site-Sex Partners	Respondents with Same- Sex Part- ners
Percent Distribution to:					
Couple's Child	Partner's Child	Partner	(%)	(%)	(%)
100	0	0	10.3	6.3	0.0
50	50	0	13.8	9.4	1.5
50	0	50	4.6	6.3	4.5
50	25	25	10.3	9.4	1.5
33	33	33	24.1	28.1	18.0
25	25	50	23.0	12.5	30.8
0	0	100	5.7	6.3	24.8
Other Pattern <sup>1</sup>			8.0	21.9	18.8
Total N			87	32	133

<sup>1</sup>For the 7 respondents in the general public sample in the other pattern, 6 gave less than 50% to the partner, although 4 gave something to the partner's child. For the 7 respondents with opposite-sex partners in the other pattern, 5 gave less than 50% to partner, although all 7 gave something to the partner. All 7 gave something to the partner's child. For the 25 respondents with same-sex partners in the other pattern, 18 gave 50% or more to the partner, 24 gave something to the partner, and 23 gave something to the partner's child.

The Waggoner Working Draft provides that the surviving committed partner receive half of the intestate estate in Scenario H and that the decedent's child receive the other half.<sup>321</sup> For same-sex couples, Hawaii provides that the surviving committed partner receive \$150,000 plus half of any balance of the intestate estate and that the decedent's child receive the other half of the balance of the estate.<sup>322</sup> Under both of these intestacy schemes,

321. See Appendix, § (a)(2), *infra* p. 92; cf. UNIF. PROBATE CODE §2-103(1) (amended 1993), 8 U.L.A. 107 (Supp.1997).

322. See HAW. REV. STAT. ANN. § 560:2-102(4) (Michie Supp. 1997). The Hawaii legislation does not apply to opposite-sex committed couples and, therefore, a decedent's opposite-sex committed partner would receive nothing. See *supra* notes 148-150 and accompanying text.

the fact that the surviving committed partner has a child from a prior relationship is a basis for increasing the share that the decedent's children would otherwise receive and decreasing the share that the partner would otherwise receive. This reduction is based on the common assumption that decedents would not want committed partners to receive as great a share because they are likely to provide for a child from a prior relationship at the expense of a decedent's child.<sup>323</sup>

The findings, however, indicate public support for a partner's child from a prior relationship sharing in the decedent's estate, suggesting the need to reconsider the reduction of the share to the committed partner. The consistent preference for having a partner's child share in the estate under a variety of family circumstances indicates that decedents might be quite supportive of committed partners using their inheritance from the decedents to provide for their own children and that committed partners might be unlikely to disinherit the children of predeceased partners. These conclusions remain provisional without further consideration of the nature of the family units and the different types of relationships that may exist between committed partners and their respective children.

Although the purpose of presenting this set of scenarios was to place the question of committed partner as heir within the context of the complex family arrangements in which the legal change would operate, the findings show substantial support for treating a committed partner's child as an heir. Notwithstanding the preliminary nature of the findings, three tentative conclusions can be drawn from the results: (1) most respondents preferred to treat children in family units headed by committed partners equally; (2) most respondents did not want to disinherit a partner's child who was not a child of the decedent; and (3) most respondents did not want to treat the partner's child from a prior relationship as if that child were a child of the decedent. The most important result from this part of the study is that it reveals a number of issues that require further empirical study.<sup>324</sup>

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323. For discussion of intestacy share passing to legal spouses in the context of blended families, see *supra* text accompanying notes 217-221.

324. The respondents' preferences for including a partner's child who is not a child of the decedent as an heir raise obvious questions about the current law's treatment of stepchildren and blended families. Public attitudes regarding children in family units headed by married couples may be different from attitudes regarding children in family units headed by committed couples. The results from this study suggest, however, that the treatment of stepchildren under the inheritance law should be the subject of empirical study. See Contemporary Studies Project, *supra* note 318, at 1094-95, 1117-19 (addressing some of the inheritance

Further investigation is necessary to answer questions about inheritance rights from or through the partner's child and from or through the decedent's other family members.<sup>325</sup> Further investigation is also necessary to consider the effect on heirship if the committed relationship terminates other than by death of one of the partners or, if subsequent to the first partner's death, the surviving partner repartners or marries. Should a partner's child only be able to inherit from a decedent's estate if there is evidence of a relationship between the decedent and that child? These questions are part of the broader issue of the nature of the relationship between a partner and the other partner's child. Very little information was obtained in this empirical study in relation to that issue. The next subsection presents those limited findings.

## 2. Qualifying Relationships between Committed Partners and Each Other's Children

If an intestacy statute were to take into account the couple's relationship with each other's children when determining the share passing to a committed partner, criteria would have to be established for identifying qualifying partner-partner's child relationships. This same line of inquiry might ultimately prove useful in identifying criteria for having a partner's child take as an heir under a decedent's estate. This study provides only minimal and preliminary information for developing that criteria.

As described earlier, two situations can arise in which a child of the family unit can be a partner's child without being a child of the decedent.<sup>326</sup> The first situation is when a child is born to or adopted by the decedent's partner during the committed couple's relationship and then reared by the decedent and partner together in their household. The second situation is when the partner has a child from a prior relationship. These two situations raise differ-

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issues regarding stepparents and stepchildren). Another issue raised by the findings in this empirical study is whether the decedent's children would agree that including the partner's child as an heir represents a fair distribution of the decedent's estate. This issue would seem to be particularly important within the context of an intestacy statute that is striving to promote familial harmony.

325. An empirical study might be designed to assess public attitudes about the following types of issues: If a partner's child fails to survive the decedent, should that child's lineal descendants share in the decedent's estate? Should a partner be able to inherit as a parent from the other partner's child? Should a partner's child be able to inherit from or through the other partner's family, such as the other partner's children, siblings or ancestors?

326. See *supra* notes 270-291 and accompanying text (describing law that prevents a decedent from being treated as a parent of a partner's child for inheritance purposes).

ent issues for purposes of determining heirship rights of the committed partner and the child.

In the first situation, under prevailing law in many states the parent-child relationship between the decedent and the child is not recognized.<sup>327</sup> The findings of Scenario E<sup>328</sup> show overwhelming public support for allowing this child to inherit from the decedent.<sup>329</sup> To consider changing the intestacy statute to reach this result, however, seems to obscure the real issues. The problem appears to lie in the definition of parent found in statutes having to do with assisted conception and in restrictions on adoption by unmarried committed couples.<sup>330</sup> Statutory change is called for, but the solution should be made broader than just adjustment of the intestacy laws.<sup>331</sup>

The second situation involving a partner's child from a prior relationship raises a number of difficult issues.<sup>332</sup> In general, in scenarios having to do with an adult child of the partner from a prior relationship who lived in the couple's household as a minor, the respondents treated that child as an appropriate heir of the decedent.<sup>333</sup> We speculated that a partner's child from a prior relationship who did not live in the couple's household might be treated less favorably by respondents. We reasoned that respondents might use the distinction between living inside and outside the household as an indirect way of evaluating the nature of the relationship between the decedent and the partner's child. Therefore, immediately following Scenario H,<sup>334</sup> we presented respondents with another scenario that was the same as Scenario H, except that it indicated that the partner's child from a prior relationship had not lived in the couple's household. When the partner's child lived in the household, only 23.0% of the respondents in the general public sample,<sup>335</sup> 18.7% of the respondents with opposite-sex partners and 30.8% of the respondents with same-sex partners gave the partner's child nothing. When the partner's child did not live in the household, the percentage of respondents who gave the partner's child nothing significantly in-

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327. See *supra* notes 270-291 and accompanying text.

328. See Scenario E *supra* p. 73.

329. See *supra* note 298 and accompanying text.

330. See *supra* notes 267-295 and accompanying text.

331. See *supra* notes 276-293 and accompanying text.

332. For a discussion of the legal treatment of the relationship between a partner and her or his partner's child, see *supra* notes 270-272.

333. See *supra* notes 302-320 and accompanying text.

334. See Scenario H *supra* p. 79.

335. The margin of error is +/-9.0%.

creased (51.6% of respondents from the general public sample; 59.4% of the respondents with opposite-sex partners; and 53.8% of the respondents with same-sex partners).

A substantial number of respondents in each of the sample groups gave more to the partner's child in Scenario H than they gave to the partner's child under the modified version of Scenario H. Over 47% of the respondents in the general public sample, over 56% of the respondents with opposite-sex partners and nearly 36% of the respondents with same-sex partners gave less to the partner's child when the child never lived in the couple's household than when the child did live in the couple's household. Among general public respondents who gave less to the partner's child, the most common adjustment was to increase the share to the couple's child (45.0%).

In the other two groups, there were several prevalent patterns of change in the distribution. Among the respondents with opposite-sex partners, the most common adjustment was to increase the shares of both the partner and the couple's child (27.8%) and the next most common adjustments were either to increase the share to the couple's child or to decrease the share to the couple's child and increase the share to the partner (22.2% each). Among the respondents with same-sex partners, the most common adjustment was to increase the share to the couple's child (38.3%) and the next most common adjustment was to increase the shares to the couple's child and the partner (29.8%).

These findings suggest that whether the child lived in the committed couple's household might be a relevant factor in determining the share passing to the committed partner. If either a decedent or a surviving committed partner had a child from a prior relationship who did not live in the household, then that might be a basis for decreasing the intestacy share passing to a committed partner. Whether the child lived in the couple's household also might be a relevant factor in determining the share, if any, passing to the child. The survey, however, did not examine respondents' subjective interpretations of what it means for a child to be "living in the household." For some it might have meant that the decedent had significant contact with the child. For others, it might have meant that the decedent actively participated in the rearing of the child, including financial support. For yet others, it might have meant that the decedent had the same emotional and affectionate attachments to the child as most parents would for their biological or adopted children. Given the uncertainty of the significance of whether children were reared inside or outside of the



household, further study is necessary. Future research should focus on the actual nature of the relationship between a decedent and a partner's child from a prior relationship.

In addition, consideration might also be given to the nature of the committed couple's relationship when identifying qualifying partner-partner's child relationships. For this purpose, it is useful to reconsider the observable indicators characterizing a committed couple's relationship that were discussed earlier.<sup>336</sup> Although these are indicators characterizing the couple's relationship, they may nevertheless relate well to the nature of the decedent's relationship with a partner's child from a prior relationship. We examined the association of the indicators to the distributive preferences for a partner's child using Scenario G,<sup>337</sup> in which the respondents were asked to distribute the estate between the decedent's parents and the partner's child from a prior relationship. Again, we collapsed the distributive preferences of each sample group, according to the dominant preference patterns of each, and tested for an association with the observable indicators using bivariate contingency table analysis. For respondents with same-sex partners, the three categories reflecting the dominant preferential patterns included: giving half or less of the estate to the partner's child, giving over half of the estate to the partner's child and giving all of the estate to the partner's child. For respondents with opposite-sex partners, the three categories reflecting the dominant preferential patterns included: giving less than half of the estate to the partner's child, giving half of the estate to the partner's child and giving over half of the estate to the partner's child.

For both sample groups, there were only a few observable relationship indicators that were associated with the distributive preferences. For respondents with same-sex partners, the following indicators were each positively associated with a preference for having the partner's child receive a larger share of the decedent's estate than if that indicator did not apply to the respondent's committed relationship: naming a partner as health-care decisionmaker; exchanging a symbol of the relationship, such as a ring or other jewelry; and registering the committed relationship.<sup>338</sup> For respondents with opposite-sex partners, the following indicators were each positively associated with a preference for having

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336. See *supra* notes 238-247 and accompanying text.

337. See Scenario G *supra* p. 76.

338. Each indicator has the following gamma: named partner as health care decisionmaker ( $\gamma=.34$ ); exchanged a symbol of the relationship ( $\gamma=.35$ ); registered the committed relationship ( $\gamma=.49$ ).

the partner's child receive a larger share of the decedent's estate than if that indicator did not apply to the respondent's committed relationship: naming a partner as health-care decisionmaker; exchanging a symbol of the relationship, such as a ring or other jewelry; and making joint charitable contributions.<sup>339</sup> For this sample group, the duration of the relationship was also positively associated with a preference for giving the partner's child a greater share of the estate. Although there were too few cases to consider several of these indicators alone for the respondents with opposite-sex partners, additional analysis was conducted based on the common themes described earlier.<sup>340</sup> All five themes were positively associated with a preference for having the partner's child receive a greater share of the estate. In other words, having at least one of the symbolic indicators, one of the indicators representing present and future planning, one of the indicators of financial interdependence, one of the deathtime arrangements or one of the indicators pertaining to life insurance and joint ownership was positively associated with a preference for having the partner's child receive a greater share of the decedent's estate.

The findings suggest that the nature of the committed relationship may play a role in the nature of the relationship between a decedent and a partner's child from a prior relationship. This study further shows that an investigation of both the relationship of the committed couple and the relationship of the decedent to the partner's child is necessary for developing an intestacy statute that is responsive to family units headed by committed partners. The Waggoner Working Draft recognizes these interconnections when it includes co-parenting arrangements as a factor for finding a committed relationship.<sup>341</sup> The correctness of this direction taken by the Draft cannot be doubted. Several issues need more extensive investigation: (1) what factors about the committed relationship and the relationship between the decedent and the partner's child should affect the share passing to a committed partner; (2) what parent-child relationship factors, other than co-parenting arrangements, should be taken into account in defining a committed relationship; and (3) what factors about the committed rela-

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339. Each indicator has the following gamma: named partner as health care decisionmaker ( $\gamma=.76$ ); exchanged a symbol of the relationship ( $\gamma=.67$ ); made joint charitable gifts ( $\gamma=.68$ ); length of relationship ( $\gamma=.37$ ); symbolic indicators ( $\gamma=.83$ ); financial interdependence indicators ( $\gamma=.69$ ); life planning indicators ( $\gamma=.48$ ); deathtime plans indicators ( $\gamma=.57$ ); life insurance and joint ownership indicators ( $\gamma=.41$ ).

340. See *supra* notes 238-247 and accompanying text.

341. See Appendix, §§ (d)(4), (e)(4), *infra* p. 93.

tionship and the relationship between the decedent and the partner's child might justify including a partner's child as an heir?

## Conclusion

Table 14, which immediately follows the Appendix, summarizes the results of the empirical study through a comparison of the intestate share to the committed partner under the Hawaii legislation, the Waggoner Working Draft and the plurality preferences of the respondents in each sample group. There are four major findings of the empirical study designed to assess public attitudes about including a committed partner as an heir:

1. A substantial majority of the respondents in each sample group consistently preferred the partner to take a share of the decedent's estate. Respondents with same-sex partners, however, were consistently more generous to partners than were respondents from the general public sample or the respondents with opposite-sex partners.

2. The respondents in each sample group consistently preferred same-sex and opposite-sex committed couples to be treated the same under the inheritance laws.

3. Committed 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.

4. The respondents consistently recognized the social ties between the decedent and the partner's child for inheritance purposes.

Nearly every area of the law treats married persons differently than single persons. Whether we look to the law of taxation, immigration, welfare, evidence, property, employee benefits or torts, the marital status of a person frequently determines legal outcome.<sup>342</sup> The law in most states generally ignores committed relationships and family units headed by committed partners.<sup>343</sup> To be legally invisible means that the law treats committed partners as if they were strangers to each other. Sometimes, to protect the individual economic interests of one partner, the courts have accorded partners the status of business associates, but they often

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342. See generally Chambers, *supra* note 94 (describing the legal consequences of marriage and considering the effects these laws would have on same-sex couples if they had the right to marry).

343. But see, e.g., 42 U.S.C. § 1382c(d)(2) (1994) (recognizing opposite-sex committed couples, but reducing the amount of Supplemental Security Income (SSI) that would otherwise be available to the partners if each applied separately).

do so by severing the intimate nature of the relationship from the parties' economic entanglements.<sup>344</sup> This Article looked at one type of state regulation, the intestacy law, and explored the question of recognizing committed partners as heirs.

In some respects, a change in the intestacy statute has only limited implications for other areas of inheritance law and other areas of the law in general. It may, for example, affect the interpretation of other statutory provisions that refer to "heirs," such as section 2-711 of the Uniform Probate Code, which adopts a rule of construction for determining heirs under a statute or governing instrument.<sup>345</sup> For the most part, however, in the absence of further statutory change, other aspects of the inheritance law would remain unaffected. For example, giving a committed partner heirship rights does not mean that the partner would be protected from disinheritance under conventional statutes having to do with the elective share<sup>346</sup> or the omitted spouse.<sup>347</sup>

In other respects, however, changing 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

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344. See *supra* notes 96-97 and accompanying text (explaining how the law treats committed relationships at the time of dissolution). For cases taking into account the intimate nature of the relationship, see *supra* note 234.

345. Section 2-711 of the Uniform Probate Code defines heirs of a designated person to mean those persons who would inherit under the applicable intestacy statute if the designated individual died when the disposition is to take effect in possession or enjoyment. UNIF. PROBATE CODE § 2-711 (amended 1993), 8 U.L.A. 203-04 (Supp. 1997). This construction avoids having the property distributed to persons who predeceased the time of possession or enjoyment. See *id.* Notably, the statute provides that "[i]f the designated individual's surviving spouse is living but is remarried at the time the disposition is to take effect in possession or enjoyment, the surviving spouse is not an heir of the designated individual." *Id.* In the absence of statutory amendment, this statutory limitation on the legal spouse's right to take would not apply to a committed partner who marries. In the absence of a statutory amendment, this limitation would not apply to either a legal spouse or a committed partner who enters into a committed relationship subsequent to the individual person's death. The Hawaii legislature has amended its statute to apply to a reciprocal beneficiary. See HAW. REV. STAT. ANN. § 560:2-711 (Michie Supp. 1997) (addressing the situation where the spouse or the reciprocal beneficiary marries after the decedent's death, but not where the spouse or reciprocal beneficiary enters into a reciprocal beneficiary relationship after the decedent's death).

346. See, e.g., UNIF. PROBATE CODE § 2-201 to -214 (amended 1993), 8 U.L.A. 121-46 (Supp. 1997).

347. See, e.g., *id.* § 2-301, 8 U.L.A. 46-47.

definition of family itself.<sup>348</sup> Gender equality would be unthinkable within a legal system that embraced primogeniture. Recognition of adopted children as heirs of an adopting parent's ancestors and collateral relatives ultimately broke the stranglehold blood ties had on the definition of family and makes it possible for this Article to even speculate on the possibility of including as an heir of a decedent a partner's child who is not a child of the decedent.<sup>349</sup>

Allowing a committed partner to inherit under an intestacy statute would not only have an effect on how others view family units headed by committed partners, but it would likely have an effect on how members of the family unit view themselves. 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.<sup>350</sup> Although the full extent of the effect of this change on family units headed by committed partners is difficult to know, what is easy to predict is that it will be profound in different ways for opposite-sex and same-sex couples.

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348. Cf. Jane S. Schacter, "Counted Among the Blessed:" *One Court and the Constitution of Family*, 74 TEX. L. REV. 1267, 1270 (1996). Although Professor Schacter acknowledges the "perils" of establishing criteria based on traditional heterosexual families for second-parent adoptions, she recognizes that linking same-sex couples to traditional family rhetoric is necessary for "creating social and legal conditions that can support an evolving array of diversely configured lesbian and gay—and other—families." See *id.*

349. See, e.g., UNIF. PROBATE CODE § 2-114(a) (amended 1993), 8 U.L.A. 114-15 (Supp. 1997) (providing for reciprocal inheritance rights between adopted children and their adoptive families).

350. Interviewers asked respondents with opposite-sex partners two questions to assess how a change in the intestacy law might affect their willingness or unwillingness to marry. In the first question, the interviewers asked: "If a new law gave you the same rights to inherit that married couples have, would you be more likely to marry, less likely to marry or would it have no effect?" In the second question, the interviewers asked: "If instead a new law gave you some but not all of the rights to inherit that married couples have, would you be more likely to marry, less likely to marry or would it have no effect?" The overwhelming majority of the respondents for both questions (90.6%) indicated that it would have no effect.

## Appendix

### Waggoner Working Draft

#### Intestate Share of Committed Partner

(January 20, 1995)

(a) [Amount.] If an unmarried, adult decedent dies without a valid will and leaves a surviving committed partner, the decedent's surviving committed partner is entitled to:

(1) the first [\$50,000], plus one-half of any balance of the intestate estate, if:

(i) no descendant or parent of the decedent survives the decedent; or

(ii) all of the decedent's surviving descendants are also descendants of the surviving committed partner and there is no other descendant of the surviving committed partner who survives the decedent;

(2) one-half of the intestate estate, in cases not covered by paragraph (1).

(b) [Committed Partner; Requirements.] To be the decedent's committed partner, the individual must, at the decedent's death: (i) have been an unmarried adult; (ii) not have been prohibited from marrying the decedent under the law of this state by reason of a blood relationship to the decedent; and (iii) have been sharing a common household with the decedent in a marriage-like relationship. Only one individual can qualify as the decedent's committed partner for purposes of this section.

(c) [Common Household.] For purposes of subsections (b) and (e), "sharing a common household" or "shared a common household" means that the decedent and the individual shared the same place to live, whether or not one or both had other places to live and whether or not one or both were physically residing somewhere else at the decedent's death. The right to occupy the common household need not have been in both of their names.

(d) [Marriage-like Relationship; Factors.] For purposes of subsection (b), a "marriage-like relationship" is 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. Al-

though no single factor or set of factors determines whether a relationship qualifies as marriage-like, the following factors are among those to be considered:

(1) the purpose, duration, constancy and degree of exclusivity of the relationship;

(2) the degree to which the parties intermingled their finances, such as by maintaining joint checking, credit card, or other types of accounts, sharing loan obligations, sharing a mortgage or lease on the household in which they lived or on other property, or titling the household in which they lived or other property in joint tenancy;

(3) the degree to which the parties formalized legal obligations, intentions and responsibilities to one another, such as by one or both naming the other as primary beneficiary of life insurance or employee benefit plans or as agent to make health care decisions;

(4) whether the couple shared in co-parenting a child and the degree of joint care and support given the child;

(5) whether the couple joined in a marriage or a commitment ceremony, even if the ceremony was not of a type giving rise to a presumption under subsection (e)(3); and

(6) the degree to which the couple held themselves out to others as married or the degree to which the couple held themselves out to others as emotionally and financially committed to one another on a permanent basis.

(e) [Presumption.] An individual's relationship with the decedent is presumed to have been marriage-like if:

(1) during the [six] year period next preceding the decedent's death, the decedent and the individual shared a common household for periods totaling at least [five] years;

(2) the decedent or the individual registered or designated the other as his [or her] domestic partner with and under procedures established by an organization and neither partner executed a document terminating or purporting to terminate the registration or designation;

(3) the decedent and the individual joined in a marriage or a commitment ceremony conducted and contemporaneously certified in writing by an organization; or

(4) the individual is the parent of a child of the decedent, or is or was a party to a written co-parenting agreement with the decedent regarding a child, and if, in either case, the child lived before the age of 18 in the common household of the decedent and the individual.

(f) [Force of the Presumption]. If a presumption arises under subsection (e) because only one of the listed factors is established, the presumption is rebuttable by a preponderance of the evidence. If more than one of the listed factors is established, the presumption can only be rebutted by clear and convincing evidence.

**Table 14: A Comparison of the Intestate Share to the Spouse under the UPC, to the Spouse and Same-Sex Partner under the Hawaii Probate Code, to the Partner under the Waggoner Working Draft, and to the Partner under the Plurality Preferences of the Respondents in Each Sample Group**

Family Circumstances	UPC § 2-102 Share to Spouse HAW. REV. STAT. ANN. § 560:2-102 Share to Same-Sex Partner and Spouse	Waggoner Working Draft Share to Partner	General Public Sample Share to Partner	Respondents with Opposite-Sex Partners Share to Partner	Respondents with Same-Sex Partners Share to Partner
No children or parent (Scenario B)	the entire estate	\$50,000 plus one-half of any balance of the estate <sup>1</sup>	one-half of the estate (41.2%)	one-half of the estate (33.3%)  the entire estate (30.3%)	the entire estate (68.7%)
All decedent's children are also children of the spouse/partner and the spouse/partner has no other children	the entire estate	\$50,000 plus one-half of any balance of the estate	n/a	n/a	n/a
No children but parent (Scenario A)	\$200,000 plus three-fourths of any balance of the estate	one-half of the estate	one-half of the estate (45.3%)	one-half of the estate (42.4%)  the entire estate (30.3%)	the entire estate (64.7%)

1. For intestate decedents with relatively modest estates, their committed partners receive all or nearly all of their estates.



All decedent's children are also children of the spouse/partner and the spouse/partner also has other children (Scenario H)	\$150,000 plus one-half of any balance of the estate	one-half of the estate	<p>one-half of the estate (27.6%)</p> <p>none (27.6% with nearly two-thirds of this proportion of the respondents giving some share to the partner's child)</p> <p>one-third of the estate with the other two-thirds divided equally between own child and child of partner (24.1%)</p>	<p>one-third of the estate with other two-thirds divided equally between own child and child of partner (28.1%)</p> <p>one-half of the estate (18.8%)</p>	<p>one-half of the estate (36.1%)</p> <p>the entire estate (24.8%)</p>
<p>One or more of the decedent's children are not children of the spouse/partner (Scenario C)</p> <p>(Scenario D)</p>	\$100,000 plus one-half of any balance of the estate	one-half of the estate	<p>one-half of the estate (38.4%)</p> <p>none (37.2%)</p> <p>Widower/Widow died first: one-half of the estate (41.0%/39.0%)</p> <p>Widower/Widow died first: none (28.9%/30.5%)</p>	<p>one-half of the estate (42.4%)</p> <p>none (30.3%)</p> <p>less than half of the estate but more than zero (24.2%)</p> <p>Widower/Widow died first: one-half of the estate (39.4%/39.4%)</p> <p>Widower/Widow died first: none (24.2%/24.2%)</p> <p>Widower/Widow died first: the entire estate (21.2%/21.2%)</p>	<p>one-half of the estate (57.3%)</p> <p>Widower/Widow died first: one-half of the estate (41.9%/40.3%)</p> <p>Widower/Widow died first: the entire estate (26.4%/26.4%)</p> <p>Widower/Widow died first: less than half of the estate but more than zero (18.6%/20.2%)</p>

