

FUNCTIONAL FAMILIES AND DYSFUNCTIONAL LAWS: COMMITTED PARTNERS AND INTESTATE SUCCESSION

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INTRODUCTION

*[I]nheritance law, which at first seems to be a fortress of the legitimate family, appears on closer inspection to be more like a museum.*¹

Intestacy laws dictate succession of an intestate decedent's estate, aiming primarily to honor the presumed donative intent of the decedent.² The court in the oft-cited case *King v. Riffe* maintained that

laws concerning intestate succession are designed to effect the orderly distribution of property for decedents who lacked 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.³

Thus, the effectiveness of the Uniform Probate Code (UPC),⁴ the model for intestacy law nationwide, depends upon the extent to which it fulfills the donative intent of the average intestate decedent.⁵

Family structure, composition, and ideology have changed dramatically in the past fifty years; blended families, single-parent families, and families headed by unmarried adults per-

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1. MARY ANN GLENDON, *THE TRANSFORMATION OF FAMILY LAW: STATE, LAW, AND FAMILY IN THE UNITED STATES AND WESTERN EUROPE* 289-290 (1989).

2. UNIF. PROBATE CODE § 1-102(b)(2) (amended 1993); *King v. Riffe*, 309 S.E.2d 85, 87-88 (W. Va. 1983).

3. 309 S.E.2d at 87-88.

4. UNIF. PROBATE CODE § 1-102(b)(5) (amended 1993) (identifying uniformity among probate law as a primary goal of the Uniform Probate Code); see generally Lawrence H. Averill, *An Eclectic History and Analysis of the 1990 Uniform Probate Code*, 55 ALB. L. REV. 891, 896-901 (1992) (describing the pervasive influence that the Uniform Probate Code exerts over state probate law).

5. Averill, *supra* note 4, at 913; see *infra* Part I.A.

meate the American cultural landscape.⁶ The UPC recognizes and accepts the prevalence of multiple marriages and blended families in contemporary society.⁷ However, the UPC's conspicuous omission of committed, unmarried partners from its default succession scheme frustrates its self-proclaimed goal of honoring donative intent. While many areas of law and policy recognize the increasing prevalence of nontraditional families,⁸ the UPC selectively addresses the needs of only some kinds of nontraditional families, adheres to outmoded assumptions inapplicable to many American families, and consequently supports absurd results.⁹ Consider the following scenarios:

Forty-five years ago, David and Laura jointly purchased a house in which they raised their three children. Rather than participate in a traditional matrimonial ceremony, a ritual meaningless to both because of previous failed marriages and lack of religious conviction, they designed and performed an intimate commitment ceremony. David dies intestate. Because the UPC excludes unmarried, surviving partners from the default inheritance scheme, Laura, despite her long-term, marriage-like relationship with David, inherits nothing.¹⁰

6. Lawrence W. Waggoner, *Spousal Rights in Our Multiple-Marriage Society: The Revised UPC*, 26 REAL PROP. PROB. & TR. J. 683, 685-88 (1992) [hereinafter Waggoner, *Spousal Rights*]; Mary Louise Fellows et al., *Committed Partners and Inheritance: An Empirical Study*, 16 LAW & INEQ. 1, 2-3 (1998) [hereinafter Fellows et al., *Committed Partners*]; Troxel v. Granville, 530 U.S. 57, 63 (2000) (explaining that "[t]he demographic changes of the past century make it difficult to speak of an average American family"); Turner v. Lewis, 749 N.E.2d 122, 125 (Mass. 2001) (finding that "the concept of 'family' is varied and evolving").

7. UNIF. PROBATE CODE art. II, prefatory note at 41 (amended 1993).

8. See James Herbie DiFonzo, *Toward a Unified Field Theory of the Family: The American Law Institute's Principles of the Law of Family Dissolution*, 2001 BYU L. REV. 923; see also Harry D. Krause, *What Family for the 21st Century?*, 50 AM. J. COMP. L. 101, 101 (2002) (recognizing the increasing prevalence of nontraditional families, commending increased legal protection for nontraditional families, and proposing standards for greater legal protection); see also *infra* notes 113-27, 134-65.

9. See generally Fellows et al., *Committed Partners*, *supra* note 6; see generally E. Gary Spitko, *The Expressive Function of Succession Law and the Merits of Nonmarital Inclusion*, 41 ARIZ. L. REV. 1063 (1999). The UPC fails to provide an inheritance right to a surviving committed partner. See UNIF. PROBATE CODE §§ 2-102 to 2-103 (amended 1993) (providing an inheritance right only to blood relatives, legally recognized spouses, and adopted family members).

10. Lawrence W. Waggoner, *Marital Property Rights in Transition*, 59 MO. L. REV. 21, 61-63 (1994) (explaining that a "surviving partner [is treated] as no more a natural object of the decedent's bounty than a complete stranger") [hereinafter Waggoner, *Marital Property Rights*]; see UNIF. PROBATE CODE §§ 2-102 to

Carol and Dani lived together for twenty years in a house upon which they shared a mortgage. Although they would have married if permitted, current laws prohibit legally-recognized marriage between same-sex partners. Thus, an ordained minister performed a commitment ceremony to symbolically consummate their union. They co-parented Carol's two children from a prior marriage. Each has named the other as the primary beneficiary on her life insurance policy. Together, they planned to consult an attorney to design wills, each woman intending to leave her entire estate to the other. However, at age thirty-nine, Dani dies intestate. Despite their long-term, marriage-like relationship, and evidence that Dani would prefer that Carol inherit her entire estate, the UPC denies Carol any inheritance right to Dani's estate.¹¹

Concededly, all competent adults may design testamentary instruments to control distribution of their estate.¹² However, ability to act does not justify discriminately denying protections to unmarried partners for inaction. By definition, intestacy laws provide a default scheme to dispose of a decedent's estate when that person, irrespective of marital status, fails to act.¹³ Although exclusive reliance on marital status easily identifies potential recipients, it provides neither an effective nor a just means of identifying an intestate decedent's desired recipients.¹⁴ An effective and just default distribution scheme should honor the donative intent of the average intestate decedent, whether married or unmarried, thereby offering a fair default plan for estate distribution and supplanting the need for testate succession in typical situations.¹⁵

This comment analyzes the notable absence of provisions for surviving partners of committed relationships¹⁶ in the UPC, and ultimately concludes that inclusion of surviving partners

2-103 (amended 1993) (providing an inheritance right only to blood relatives, legally recognized spouses, and adopted family members).

11. Waggoner, *Marital Property Rights*, *supra* note 10, at 61–63; *see* UNIF. PROBATE CODE §§ 2-102 to 2-103 (amended 1993).

12. UNIF. PROBATE CODE § 2-501 (amended 1993).

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

14. *See generally* Spitko, *supra* note 9; *see also infra* Part II.C.2.b. and accompanying notes.

15. *See* David B. Cruz, *Just Don't Call It Marriage: The First Amendment and Marriage as an Expressive Resource*, 74 S. CAL. L. REV. 925, 932 (2001).

16. As used in this paper, "surviving partners" refers to partners who fulfill specific criteria demonstrating a substantial level of emotional and financial commitment. *See infra* Part III.B.1 for a more complete discussion.

would more aptly effectuate UPC goals. Part I describes contemporary trends relating to married and unmarried partnerships and examines the legal significance accorded to marital status. This analysis challenges the assumed correlation between marital status and substantive commitment. Part II examines the development of intestacy law, focusing specifically on the role of marital status in determining intestate succession. This analysis suggests that, by categorically excluding unmarried partners, the UPC offers an inheritance scheme that frustrates the donative intent of the average, unmarried intestate decedent. Part III describes judicial, legislative, and scholarly responses to inequitable, status-based legal provisions. This section describes developments in family law and real property law that define and identify committed partners and urges the UPC to adopt a functional definition of partnership consistent with contemporary trends. Finally, this section proposes several amendments to the UPC to increase equity in intestate succession.

I. PARTNERSHIP IN FOCUS: BROKEN VOWS AND PERMANENT PROMISES

*To the extent that marriage is rooted in tradition, it provides stability and consistency. To the extent that marriage remains a social institution with vitality and meaning today, it is evolutionary.*¹⁷

Legal traditions similarly provide stability and consistency. As a social institution, however, law responds to social changes and influences subsequent societal developments.¹⁸ The legal recognition afforded marriage transforms it into a favored status, and assumes that it indicates a desirable set of values and characteristics.¹⁹ However, in our divorce-prone,

17. Linda S. Eckols, *The Marriage Mirage: The Personal and Social Identity Implications of Same Gender Matrimony*, 5 MICH. J. GENDER & L. 353, 363 (1999).

18. Mary Louise Fellows, *Pride and Prejudice: A Study of Connections*, 7 VA. J. SOC. POL'Y & L. 455, 466-67 (2000) [hereinafter Fellows, *Pride and Prejudice*]; see Susan S. Silbey & Austin Sarat, *Critical Traditions in Law and Society Research*, 21 LAW & SOC'Y REV. 165, 170 (1987).

19. Lynn D. Wardle, *A Critical Analysis of Constitutional Claims for Same-Sex Marriage*, 1996 BYU L. REV. 1, 39 (asserting that "relations themselves are uniquely valuable . . . [and] are given the preferred status and label of marriage"); Cruz, *supra* note 15, at 932 and accompanying text; see Partners Task Force for Gay & Lesbian Couples, *U.S. Federal Laws for the Legally Married*, at

multiple-marriage society, where unmarried, cohabiting, committed partners constitute a significant and growing segment of the population,²⁰ reliance on marital status as a prerequisite for preferential treatment is fundamentally flawed.

Section A examines the presupposed correlation between characteristics traditionally associated with marriage and marital status. After determining that marital status ineffectively identifies characteristics relating to commitment and family composition, Section B discusses the variety of reasons why couples who possess those characteristics traditionally associated with marriage may not marry.

A. *Marital Status and Substantive Commitment*

Unmarried committed partners comprise an established and increasingly prevalent segment of the American social fabric. The 2000 Census reported that eleven million people identified themselves as unmarried, but living with a partner,²¹ compared to less than one million such partnerships reported in 1960.²² The number of unmarried, cohabiting couples increased seventy-two percent between 1990 and 2000.²³ Assuming current trends continue, unmarried adults will soon head a majority of households,²⁴ with an increasing number of these households headed by unmarried partners.²⁵

Marital status alone fails to characterize the duration and extent of commitment between partners. Cohabitation between unmarried persons tends to be shorter in duration than marriages, primarily because cohabitation often "ends" in mar-

<http://www.buddybuddy.com/mar-fed.html> (2003) (reporting the U.S. General Accounting Office's finding that "the federal government uses marital status as the qualification for more than 1,049 federally regulated rights and responsibilities").

20. See *infra* Parts I.A–B.

21. Alternatives to Marriage Project, *Statistics*, at <http://www.unmarried.org/statistics.html> (last visited Jan. 11, 2004) (citing U.S. Census Bureau, 2000) [hereinafter Alternatives to Marriage Project, *Statistics*].

22. *Id.* Same-sex partners account for approximately thirty percent of households headed by unmarried, committed partners. Fellows et al., *Committed Partners*, *supra* note 6, at 3.

23. Alternatives to Marriage Project, *Statistics*, *supra* note 21 (citing 2000 census).

24. Michelle Conlin, *Unmarried America*, BUSINESSWEEK, Oct. 20, 2003, at http://www.businessweek.com/magazine/content/03_42/b3854001_mz001.htm.

25. Alternatives to Marriage Project, *Statistics*, *supra* note 21 (citing 2000 census); Waggoner, *Marital Property Rights*, *supra* note 10, at 64.

riage.²⁶ However, “approximately forty-three percent of first marriages end in separation or divorce within fifteen years,”²⁷ simultaneously ending cohabitation and presumably the values attributed to marital status. Although married partners presently head a narrowing majority of family households,²⁸ “[o]nly one-quarter of American households consist of what most people think of as a ‘traditional family’: a married couple and their children.”²⁹ Many households headed by married partners would more accurately be classified as “blended families,” composed of participants in previously failed marriages.³⁰

B. Lacking Status: Why Committed Partners Do Not Marry

Conceptualizations of marriage and family are changing.³¹ “[Seventy-four] percent of Americans define a family as ‘a group of people who love and care about each other’ regardless of blood relation or marital status.”³² One academic definition of marriage is “[a] committed relationship between two persons, formalized by society . . . with traditional, religious, and legal roots.”³³ Theoretically, “marriage is the social acknowledgement of and support for two people’s commitment to a relationship.”³⁴ Although a marriage certificate alters the status of

26. See Wendy D. Manning & Pamela J. Smock, *Why Marry? Race and Transition to Marriage Among Cohabitors*, 32 DEMOGRAPHY 509, 509–520 (1995).

27. Govspot, *Government Reports on Family*, at <http://www.govspot.com/news/reports/family.htm> (last visited Jan. 11, 2004) (citing Matthew D. Bramlett & William D. Mosher, *First Marriage Dissolution, Divorce, and Remarriage: United States*, <http://www.cdc.gov/nchs/data/ad/ad323.pdf> (May 31, 2001)).

28. Conlin, *supra* note 24.

29. Alternatives to Marriage Project, *Statistics*, *supra* note 21, (citing *The Emerging 21st Century Family*, National Opinion Research Center, Univ. of Chicago (1999)).

30. Fellows et al., *Committed Partners*, *supra* note 6, at 1–3; Susan E. Dalton, *From Presumed Fathers to Lesbian Mothers: Sex Discrimination and the Legal Construction of Parenthood*, 9 MICH. J. GENDER & L. 261, 325–26 (2003).

31. *Troxel v. Granville*, 530 U.S. 57, 63 (2000) (“The demographic changes of the past century make it difficult to speak of an average American family.”); *Turner v. Lewis*, 749 N.E.2d 122, 125 (Mass. 2001) (The court takes “judicial notice of the social reality that the concept of ‘family’ is varied and evolving . . .”).

32. Alternatives to Marriage Project, *FAQ: Frequently Asked Questions, Answer to Question 7*, at <http://www.unmarried.org/faq.html> (last visited Jan. 11, 2004) (relying on Mellman & Lazarus, Mass. Mutual, 1989, national survey of 1,200 adults).

33. Eckols, *supra* note 17, at 359.

34. *Id.* at 360.

committed partnerships, committed partners, irrespective of marital status, exhibit behaviors and emotions similar to married partners.³⁵ Thus, because of the legal benefits available exclusively to married partners, the following question arises: if married and unmarried partners possess so many similar characteristics, why do so many committed partners remain unmarried?

1. Opposite-Sex Partners

Opposite-sex partners are legally permitted to marry, but choose not to for a variety of reasons that range from inopportune timing to ideological convictions. First, many proclaim the intent to marry, but for reasons relating to emotional readiness, financial security, or other factors, postpone marriage.³⁶ Second, many Americans erroneously rely on the common-law marriage doctrine, which no longer exists in most jurisdictions.³⁷ These committed partners are later surprised when the law denies them a right to their partner's estate. Third, partners who have previously married and divorced, for whom marriage may represent an undesirable reminder of a failed relationship, may want to emulate the substance traditionally associated with marriage without adopting its form.³⁸ Fourth, cultural background may influence marital decisions; some social and ethnic groups generally demonstrate a higher incidence of cohabitation and a lower frequency of marriage.³⁹ Finally, for some, marriage represents a discriminatory, patriarchal institution they do not support.⁴⁰ This latter sentiment

35. The lack of statistics available on unmarried partners makes this assertion difficult to support. However, increased litigation between unmarried partners and the increasing number of policies that offer similar protections to both married and unmarried partners suggest that these similarities exist. *See infra* Part III and accompanying notes.

36. *See* AM. L. INST., PRINCIPLES OF THE LAW OF FAMILY DISSOLUTION: ANALYSIS AND RECOMMENDATIONS §6.02 cmt. a (2002) [hereinafter ALI, FAMILY DISSOLUTION].

37. *Id.* (explaining that only eleven states and the District of Columbia recognize common law marriage and no state extends recognition to same-sex partners).

38. *Id.*

39. *Id.*

40. *See* Alternatives to Marriage Project, *FAQ: Frequently Asked Questions, Answer to Question 8*, at <http://www.unmarried.org/faq.html> (last visited Jan. 11, 2004) (listing a variety of reasons committed partners do not marry including re-

reflects criticism of both the contemporary, practical failure of many marriages and laws denying same-sex partners access to this institution.⁴¹

2. Same-Sex Partners

The situation is markedly different for same-sex partners. Legal prohibition of same-sex marriage prevents same-sex partners from acquiring legally-recognized marital status.⁴² Thus, it is difficult to assess the percentage of the population that would, but for this legal prohibition, choose to marry. The legal prohibition of same-sex marriage has unarguably affected the perception of marriage within same-sex communities, and some partners will not join an institution which historically and presently discriminates against them.⁴³

However, a majority of same-sex partners have stated that they would marry if legally permitted.⁴⁴ These partners not only desire social acceptance, but more often desire the legal entitlements and protections incident to marriage to which, but for the prohibition of their union, they would be legally entitled.⁴⁵ A majority of Americans, although they oppose same-sex marriage, support inheritance rights for same-sex partners.⁴⁶

As a fitting conclusory note on the sentiments of opposite- and same-sex partners regarding the role of marriage in their

sentiment for government regulation of marriage and opposition to same-sex marriage prohibitions).

41. *Id.*

42. All fifty states deny same-sex partners the right to marry. *Goodridge v. Dept. of Public Health*, 798 N.E.2d 941, 990 (Mass. 2003) ("No State Legislature has enacted laws permitting same-sex marriages; and a large majority of States, as well as the United States Congress, have affirmatively prohibited the recognition of such marriages for any purpose.") (citations omitted).

43. See generally Thomas B. Stoddard & Paula L. Ettelbrick, *Gay Marriage: A Must or a Bust?*, *OUT/LOOK: NAT'L GAY AND LESBIAN Q.*, Fall 1989, at 8, 8-17.

44. See Partners Task Force for Gay & Lesbian Couples, *Attitudes Toward Legal Marriage*, at <http://www.buddybuddy.com/survey-p.html> (Aug. 1995) ("60 percent [of survey respondents] said they would get legally married if it were possible").

45. See generally Stoddard & Ettelbrick, *supra* note 43, at 8-17; see also Partners Task Force for Gay & Lesbian Couples, *Attitudes Toward Legal Marriage, Sample Responses to Why We Would or Would Not Get Legally Married*, at <http://www.buddybuddy.com/survey-p.html> (Aug. 1995).

46. Partners Task Force for Gay & Lesbian Couples, *Legal Marriage Surveys*, at <http://www.buddybuddy.com/mar-surv.html> (Nov. 2003) (citing a Time/CNN poll Oct. 9-10, 1989).

partnerships, the American Law Institute found that "the absence of formal marriage may have little or no bearing on the character of the parties' domestic relationship."⁴⁷ Just as marital status no longer necessarily implies lifelong commitment, a couple's status as unmarried and committed does not support a presumption that the couple lacks those characteristics traditionally associated with marriage.

II. AN OPTICAL ILLUSION: MARITAL STATUS AS A MEASUREMENT OF DONATIVE INTENT

*[I]ntestacy law not only reflects society's familial norms but also helps to shape and maintain them.*⁴⁸

A. *The History and Development of Intestacy Law*

Probate law develops in response to evolving family structures and social norms.⁴⁹ Initially created in 1969, the UPC responded primarily to the emergence of the nuclear family.⁵⁰ Thus, the UPC abandoned the universal inheritance rule which provided inheritance rights to remote relatives.⁵¹ Additionally, although intestacy law traditionally excluded adopted and non-marital children, the UPC included them in the intestate succession scheme.⁵² Finally, the UPC granted significant rights to surviving spouses who, prior to the development of the UPC, possessed no inheritance rights against blood relatives of the decedent.⁵³

Inclusion of surviving spouses, and adopted and non-marital children, reflects contemporary efforts to define and honor the donative intent of the average intestate decedent.⁵⁴ These inclusions recognize the average decedent's desire to leave his or her estate to individuals the decedent considers

47. ALI, FAMILY DISSOLUTION, *supra* note 36, § 6.02 cmt. a.

48. Spitko, *supra* note 9, at 1100.

49. Fellows et al., *Committed Partners*, *supra* note 6, at 8; Fellows, *Pride and Prejudice*, *supra* note 18, at 466-67.

50. See generally GLENDON, *supra* note 1, at 238-240.

51. LAWRENCE W. WAGGONER ET AL., FAMILY PROPERTY LAW 70 (1992).

52. UNIF. PROBATE CODE §§ 2-103, 2-114 (amended 1993); Fellows, *Pride and Prejudice*, *supra* note 18, at 466-67.

53. Fellows, *Pride and Prejudice*, *supra* note 18, at 466-67.

54. *Id.* at 465-67.

"family."⁵⁵ Although these intended recipients may possess a blood-relation to the decedent, the provisions regulating intestate succession among spouses and adopted children recognize and validate changes in family structure. Thus, members of the nuclear family, regardless of blood relationship, are the preferred recipients of an intestate decedent's estate.⁵⁶

B. Contemporary Intestacy Law

This section will explore the rationales that support inclusion or exclusion of various individuals and groups in or from contemporary intestacy law. Section 1 describes recent substantive revisions to the UPC and describes the primary goals of contemporary intestacy laws. Section 2 analyzes both the express and implied secondary goals of intestacy laws. Section 3 examines the role of discretion in the administration of intestacy law.

1. Primary Goals of Intestacy Policies

The 1990 revision to the UPC sought to cure intent-defeating formalism⁵⁷ to more effectively achieve its foremost objective—honoring donative intent.⁵⁸ A survey examining the customary donative intent of married individuals revealed a preference that the surviving spouse inherit most or all of the decedent's estate.⁵⁹ Thus, the 1990 revision significantly increased the spousal intestate share.⁶⁰ The spousal entitlement applies irrespective of the duration or quality of the marriage.⁶¹ However, if a committed partner survives an unmarried, intestate decedent, the decedent's estate will pass exclusively to blood relatives, denying the surviving partner any right to the

55. *Id.*

56. *Id.*

57. UNIF. PROBATE CODE art. II, prefatory note at 41 (amended 1993).

58. *Id.*; see also Waggoner, *Spousal Rights*, *supra* note 6, at 688.

59. Waggoner, *Marital Property Rights*, *supra* note 10, at 36–37.

60. UNIF. PROBATE CODE § 2-102 (amended 1993). See RESTATEMENT (THIRD) OF PROP.: WILLS & DONATIVE TRANSFERS § 2.2 at 61 (1999) ("[T]he surviving spouse takes either the entire intestate estate or a specified lump sum plus a specified percentage of the excess, if any, depending on what other relatives survive the decedent."); Waggoner, *Marital Property Rights*, *supra* note 10, at 37–38.

61. UNIF. PROBATE CODE § 2-202 (amended 1993); Waggoner, *Marital Property Rights*, *supra* note 10, at 62.

decendent's estate.⁶² Absent qualifying blood-related beneficiaries, the estate ultimately escheats to the state, leaving the surviving partner with nothing.⁶³

To effectively honor donative intent, the drafters of the Code sought to "develop sensible [probate] rules adaptable to the ever-changing climate of marital behavior."⁶⁴ The drafters recognized "the advent of the multiple-marriage society, resulting in a significant fraction of the population being married more than once and having stepchildren and children by previous marriages"⁶⁵ Because of this demographic change, the drafters incorporated thirteen different distribution schemes to account, selectively, for contemporary family forms and structures.⁶⁶

2. Secondary Goals of Intestacy Policies

Notwithstanding its primary purpose, legal scholars attribute a variety of secondary goals to intestacy law.⁶⁷ These secondary aims offer social, economic, and administrative justifications for, and reflect desirable consequences of, intestacy law.

Social aims associated with intestacy law include "protecting the financially dependent family"⁶⁸ and encouraging traditional family structure,⁶⁹ while simultaneously adapting to the "changing nature of 'family.'"⁷⁰ These aims reflect an understanding that family provides the "basic unit of social organiza-

62. Waggoner, *Marital Property Rights*, *supra* note 10, at 63 (explaining that a "surviving partner [is treated] as no more a natural object of the decedent's bounty than a complete stranger"); see UNIF. PROBATE CODE §§ 2-102 to 2-103 (amended 1993) (providing an inheritance right only to blood relatives, legally recognized spouses, and adopted family members).

63. See UNIF. PROBATE CODE §§ 2-102 to 2-103 (amended 1993).

64. Waggoner, *Spousal Rights*, *supra* note 6, at 688.

65. UNIF. PROBATE CODE art. II, prefatory note at 41 (amended 1993).

66. Spitko, *supra* note 9, at 1077-78; see UNIF. PROBATE CODE §§ 2-101 to 2-103 (amended 1993).

67. Fellows et al., *Committed Partners*, *supra* note 6, at 12-13; Cristy G. Lomenzo, *A Goal-Based Approach to Drafting Intestacy Provisions for Heirs Other than the Surviving Spouse*, 46 HASTINGS L.J. 941, 947 (1995); see Spitko, *supra* note 9, at 1066.

68. Lomenzo, *supra* note 67, at 947.

69. See *id.*; see also 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, 324 (1978).

70. Spitko, *supra* note 9, at 1066.

tion" and support. Thus, intestacy law both secures and validates familial relationships.⁷¹ Specifically, the revised UPC accepts the partnership theory of marriage, which minimizes the symbolic significance of marriage and emphasizes substantive characteristics of emotional and economic partnerships.⁷²

The economic rationale for intestacy law supports individual "accumulation of property" and aims to reward economic investment.⁷³ Consistent with its support for the partnership theory of marriage,⁷⁴ intestacy law logically assumes that those to whom a person is economically tied during life would be those for whom the decedent intended to provide upon death. Furthermore, this emphasis implies that long-term economic investments and decisions often reflect a desire to provide for self and family both in the present and in the future.

From an administrative standpoint, intestacy law strives to ensure fair distribution of property through a simple, comprehensive scheme.⁷⁵ Reliance on marital status unarguably ensures a simple scheme that clearly includes or excludes potential recipients. To account for the increasing prevalence of multiple marriages and blended families in contemporary society, and to ensure fairness in intestate succession without sacrificing simplicity, the UPC increased the number of provisions used to determine intestate succession.⁷⁶ To most effectively and equitably dispose of an intestate decedent's estate, the re-

71. Alissa Friedman, *The Necessity for State Recognition of Same-Sex Marriage: Constitutional Requirements and Evolving Notions of Family*, 3 BERKELEY WOMEN'S L.J. 134, 134 & n.1 (1988).

72. UNIF. PROBATE CODE art. II, prefatory note (amended 1993). A UPC drafter maintained that:

[T]he ideal to which marriage aspires [is] that of equal partnerships between spouses who share resources, responsibilities and risks. . . .

From a policy standpoint, this partnership framework is desirable both because it encourages cooperative commitments between spouses and because it serves broader egalitarian and caretaking objectives.

. . . [and] promote[s] gender equality.

Waggoner, *Marital Property Rights*, *supra* note 10, at 44 (alteration in original) (quoting Rhode & Minow, *Reforming the Questions, Questioning the Reforms*, in *DIVORCE REFORM AT THE CROSSROADS* 191, 198-99 (Stephen D. Sugarman & Herma Hill Kay, eds. 1990)).

73. Lomenzo, *supra* note 67, at 946-47.

74. UNIF. PROBATE CODE art. II, prefatory note (amended 1993); Waggoner, *Marital Property Rights*, *supra* note 10, at 44.

75. Fellows et al., *Committed Partners*, *supra* note 6, at 3; Spitko, *supra* note 9, at 1066; Lomenzo, *supra* note 67, at 947.

76. Spitko, *supra* note 9, at 1080.

vised UPC outlines thirteen distinct distribution patterns.⁷⁷ The UPC recognizes a variety of family compositions, and provides for distribution patterns that consider the number of persons surviving the decedent, and the relationship of survivors to the intestate decedent.⁷⁸ Once the surviving recipients have been identified, the UPC provides clear instructions to dictate estate distribution.⁷⁹

3. Discretion in Intestacy Law

Although the UPC proclaims honoring donative intent as its primary aim, it does not allow for discretion in individual cases in order to effectuate that aim where its rules mandate inequitable outcomes.⁸⁰

Traditional [intestacy] legislation does not authorize a court to inquire into the harmony or disharmony in the marital relationship. It does not allow for inquiry into the surviving spouse's contribution to the decedent's wealth. It does not allow for any inquiry into the surviving spouse's needs⁸¹

Thus, even where evidence suggests that a married decedent would have denied the surviving spouse a share of the estate, the UPC nonetheless guarantees a share of a married intestate decedent's estate to the surviving spouse. Conversely, even where evidence supports a finding that an unmarried decedent would prefer that the surviving partner take an intestate share of the estate, the UPC denies the surviving partner this right.

C. The Self-Defeating Nature of Contemporary Intestacy Law

The characteristics of contemporary partners relative to the promulgated aims of intestacy law illustrate that the exclusionary marital restriction often mandates ineffective and in-

77. *Id.* at 1077-78; see UNIF. PROBATE CODE §§ 2-101 to 2-103 (amended 1993).

78. See generally UNIF. PROBATE CODE art. II (1993).

79. *Id.*

80. WAGGONER ET AL., *supra* note 51, at 63.

81. *Id.* at 101.

equitable estate distribution where an unmarried, committed partner dies intestate.

1. Donative Intent

By assuming that only marital status indicates a certain quality of committed relationship, the UPC presently adheres to an outmoded idea of family. The resulting UPC intestate succession scheme thus frustrates its self-proclaimed goals and demonstrates the necessity of amendments that adapt to changing family norms. Conspicuously absent from the amended Code is any recognition of, or protection for, unmarried partners who exhibit the characteristics which intestacy policies seek to encourage and reward. This exclusion suggests that the Code erroneously adheres to a paradigm of family in which committed partners do not support or desire to provide for a surviving partner even where the relationship at issue mirrors that of a married couple, but for a marriage certificate.⁸²

A survey aimed at identifying the donative intent of unmarried partners exposed the fallacy of this assumption.⁸³ It revealed that most unmarried partners prefer that their partner inherit their estate were they to die intestate.⁸⁴ Responsively, a UPC drafter designed a proposal to offer limited inheritance rights to surviving committed partners.⁸⁵ Ultimately, the drafters rejected this proposal in favor of one that categorically excludes committed partners from the intestacy code.⁸⁶ The drafters likely abandoned this proposal for fear that it would deter states from adopting the UPC,⁸⁷ despite the fact that the severable nature of UPC provisions enable states to

82. See generally Averill, *supra* note 4, at 911-18 (describing the effect that failure to conduct comprehensive surveys of donative intent has on probate law); UNIF. PROBATE CODE art. II (amended 1993) (explaining that intestacy law aims primarily to honor donative intent, but fails to extend intestacy rights beyond spouses, adopted children, and blood-related survivors); Waggoner, *Marital Property Rights*, *supra* note 10, at 63 (explaining that a "surviving partner [is treated] as no more a natural object of the decedent's bounty than a complete stranger").

83. See generally Fellows et al., *Committed Partners*, *supra* note 6, at 36-52.

84. *Id.*

85. *Id.* at 92-95; see also *infra* Part III.A.2.

86. See generally UNIF. PROBATE CODE §§ 2-102 to 2-103 (amended 1993) (providing an inheritance right only to blood relatives, legally recognized spouses, and adopted family members).

87. Spitko, *supra* note 9, at 1097-98.

adopt "the most politically palatable acts for passage in their jurisdiction. . . . [thereby] increas[ing] the influence of the Code and motivat[ing] more jurisdictions to adopt its reform proposals."⁸⁸

2. Secondary Goals

Scholars have suggested that intestacy laws attempt, via a comprehensive, equitable scheme, to encourage nuclear families, promote traditional family structure, protect economic family ties, and reward and encourage economic investment.⁸⁹ The exclusionary marital restriction similarly frustrates intestacy law's secondary goals.

a. Social and Economic Aims

Intestacy law's social and economic aims reflect an intent to protect financially and emotionally committed family units. The UPC recognizes and encourages the partnership theory of marriage.⁹⁰ The partnership theory of marriage contemplates two persons contributing equally to the maintenance of a life-long relationship, where both individuals contribute to mutual investments.⁹¹ Lawrence Waggoner, a primary contributor to the revised UPC, defends the marital status distinction by asserting that intestacy law seeks to protect and reward emotional commitment and financial interdependence among committed partners.⁹² This assertion implies that it is not marital status itself which justifies intestacy benefits; rather, it suggests that intestacy law seeks to protect and reward partners who possess those characteristics associated with the partnership theory of marriage. The partnership theory of marriage recognizes a lifestyle which may be present among married couples, but is not necessarily achieved consequent to marital status.

Providing inheritance rights to spouses and descendents emphasizes traditional family structure, encourages a social

88. Averill, *supra* note 4, at 900.

89. Lomenzo, *supra* note 67, at 947; Fellows et al., *Committed Partners*, *supra* note 6, at 3; Spitko, *supra* note 9, at 1066.

90. Waggoner, *Spousal Rights*, *supra* note 6, at 715-18.

91. *Id.*; Waggoner, *Marital Property Rights*, *supra* note 10, at 43-44.

92. Waggoner, *Spousal Rights*, *supra* note 6, at 717-18.

preference for nuclear families, and recognizes that persons prefer that immediate family members inherit their property. Significantly, however, intestacy law recognizes the prevalence of multiple marriages and accounts for stepfamilies and non-marital children.⁹³ These inclusions provide telling information regarding new interpretations of intestacy law's secondary goals and also illustrate the feasibility of accommodating the needs of contemporary families.

By recognizing blended families as a significant and legitimate segment of society worthy of recognition in the intestate succession scheme, the UPC validates blended families.⁹⁴ Inclusion also recognizes that the UPC's previous failure to account for blended family members not only mandated inequitable estate distribution, but also affected social perceptions of blended families. Scholars of intestacy law suggest that "legal rules may affect relations between stepfamily members. The lack of clear legal obligations between stepparents and stepchildren may lessen their degree of commitment. Legal ambiguities also perpetuate the uncertain status of stepfamilies in society and may exacerbate adjustment difficulties for family members."⁹⁵ Thus, provisions that account for blended families implicitly recognize that, despite their somewhat nontraditional form, such social units constitute nuclear families and embody legitimate family structure and values. Recognition of blended families and inclusion of non-marital children demonstrates that the new UPC rewards and protects nuclear family structures, regardless of their specific form. These more recent inclusions illustrate that intestacy laws can and should adapt to changing definitions of family.

Families headed by unmarried partners, though nontraditional by label, often constitute nuclear families and embody legitimate family structure and values. Thus, although the UPC aims to protect traditional family structure, the fact that the UPC accepts the partnership theory of marriage and accounts for blended families supports a concern with preserving the substance, as opposed to form, of traditional families. Like

93. See generally UNIF. PROBATE CODE art. II (amended 1993).

94. UNIF. PROBATE CODE art. II, prefatory note (amended 1993); Fellows, *Pride and Prejudice*, *supra* note 18, at 466-67.

95. WAGGONER ET AL., *supra* note 51, at 37 (quoting Note, *The Spousal Share in Intestate Succession: Stepparents Are Getting Shortchanged*, 74 MINN. L. REV. 631, 647-48 (1990)).

blended families prior to the 1990 revisions to the UPC, exclusion of committed partners encourages social and personal perceptions of committed partnerships as less legitimate.⁹⁶

Furthermore, economic interdependence exists between many unmarried partners.⁹⁷ To the extent that unmarried partners's level of economic interdependence may differ from married partners's, much of this discrepancy can be attributed to the lack of social validation of and legal protection for such relationships. Economic interdependence has been declared a social interest that intestacy law seeks to reward.⁹⁸ Including unmarried, committed couples in the intestacy scheme would clearly further this interest by preserving the wealth that partners jointly generate.

Intestacy laws implicitly validate or invalidate various types of relationships to the extent they provide for persons related by blood or affinity to the intestate decedent.⁹⁹ The inheritance rights guaranteed to some family members, such as surviving spouses and adopted children, not only presume the existence of an emotional and financial connection between these family members, but also demonstrate societal approval of such relationships. The conspicuous omission of an entire segment of the population from the UPC does not merely fail to address the needs of this group; it devalues and denies the donative intent of many unmarried intestate decedents.

b. A Simple, Comprehensive Scheme

The UPC strives to achieve its substantive goals through a simple, comprehensive scheme.¹⁰⁰ The UPC intestate succession scheme assumes that reliance on marital status ensures a comprehensive scheme while exclusion of individuals who lack the requisite status ensures its simplicity. A UPC drafter explains that

96. See Spitko, *supra* note 9, at 1064–65, 1100; see also Fellows et al., *Committed Partners*, *supra* note 6, at 8.

97. See *infra* Part III.B.1.b.

98. Fellows et al., *Committed Partners*, *supra* note 6, at 3; Spitko, *supra* note 9, at 1066; Lomenzo, *supra* note 67, at 947.

99. Fellows et al., *Committed Partners*, *supra* note 6, at 8.

100. Spitko, *supra* note 9, at 1066; Lomenzo, *supra* note 67, at 947.

[b]asing [intestacy] rights on status is not only beneficial to the spouse, but also efficient for society. It means that spouses can claim these rights without having to prove anything about the underlying details or commitment of their relationships. The marriage certificate itself qualifies the person for what the law allows.¹⁰¹

Although use of marital status as the exclusive means of establishing a qualifying partnership ensures administrative simplicity, it creates an under-inclusive and inequitable succession scheme. Professor Spitko observed that there is "no express support . . . for the view that the drafters implemented the marital-sharing theory because of a preference for marital relationships as compared to non-marital relationships."¹⁰² Based on the UPC's acceptance of the partnership theory of marriage, it is the partnership, not the marriage, that intestacy law should encourage and reward. Thus, by excluding committed partners to ensure purported simplicity, the UPC fails to provide a comprehensive intestate succession scheme.

Presently, UPC intestacy provisions consider the marital status of the intestate decedent and account for the variety of situations created by the increased prevalence of blended families where a particular decedent may be survived by children from a variety of different unions.¹⁰³ Though based on more intricate provisions than former schemes, the current standards for intestate succession among blended families mandate far more equitable results.¹⁰⁴ A scheme that favors "fairness when dealing with step-families," but purported simplicity when unmarried couples are concerned, "is difficult to justify."¹⁰⁵ Additionally, as noted by an expert in intestacy law, an increase in the number of UPC provisions does not necessarily increase complexity, particularly where a comprehensive and equitable scheme results.¹⁰⁶ Thus, in intestacy law, comprehensive, equitable distribution provisions can contribute to a clear, simple intestate succession scheme.

101. Waggoner, *Marital Property Rights*, *supra* note 10, at 62 (citation omitted).

102. Spitko, *supra* note 9, at 1093.

103. *See generally* UNIF. PROBATE CODE art. II (amended 1993).

104. *Id.*

105. Spitko, *supra* note 9, at 1080.

106. *Id.*

A comprehensive and equitable succession scheme which accounts for surviving partners must identify committed partners to whom a decedent would grant an inheritance right, while simultaneously excluding partners to whom the decedent would grant no such right. A variety of legislative, academic, and judicial developments demonstrate the necessity and feasibility of defining and identifying committed partners.¹⁰⁷ These examples, explored below, provide an excellent foundation from which to design a more equitable and comprehensive intestate succession scheme.¹⁰⁸

III. AN IMAGE OF THE FUTURE: INCLUSION OF COMMITTED PARTNERS IN INTESTACY LAW

*Where the legislature must be most conscientious is in keeping up with the opinions of society so that the definition [it adopts] reflects the most favored set of values and grants benefits to all who can manifest those ideals.*¹⁰⁹

Policies that assume the prevalence of traditional family structures systematize inequitable practices and negate the interests and legitimacy of the increasing number of nontraditional families in the United States. However, public sentiment¹¹⁰ and deficiencies in both the default succession scheme and other legal arenas provide increasing support for granting legal rights to nontraditional families. Consequently, several

107. See *infra* Part III.B.1.

108. *Id.*

109. Eckols, *supra* note 17, at 374–75.

110. Partners Task Force for Gay & Lesbian Couples, *Domestic Partner Statistics, Insurance, Taxes, Court Cases*, at <http://www.buddybuddy.com/d-pngl.html> (2000) (reporting that, although a majority of Americans oppose same-sex marriage, more than 62 percent of Americans support domestic partners receiving equal access to inheritance benefits) (citing NATIONAL GAY AND LESBIAN TASK FORCE POLICY INSTITUTE, DOMESTIC PARTNERSHIP ORGANIZING MANUAL (May 1999)) [hereinafter Partners, *Domestic Partner Statistics*]; Thomas F. Coleman, *The Hawaii Legislature Has Compelling Reasons to Adopt a Comprehensive Domestic Partnership Act*, 5 TUL. J.L. & SEXUALITY 541, 549–50 (1995) (asserting that “[t]he general public is overwhelmingly opposed to the legalization of same-sex marriage,” according to various polls, but there is growing support for domestic partnership rights); Cindy Tobisman, *Marriage vs. Domestic Partnership: Will We Ever Protect Lesbians’ Families?*, 12 BERKELEY WOMEN’S L.J. 112, 118 (1997) (referencing a 1996 exit poll that showed over half of Americans believed gay and lesbian families should have legal protection and inheritance rights, but over half of Americans supported the Defense Of Marriage Act (“DOMA”)).

legislatures, judges, and scholars have proposed or adopted various schemes and standards to offset systematic deficiencies.¹¹¹ Section A examines recent attempts to increase fairness in intestate succession. Although these efforts benefit nontraditional families, they nonetheless perpetuate existing systematic inequities. Section B explores developments in other areas of law and policy which recognize and protect committed partnerships. This section considers these developments and modifies existing policies to propose practical amendments to the UPC.

A. Existing Alternatives

Several states have adopted, and an intestacy scholar has proposed, methods to remedy deficiencies in the UPC.¹¹² These methods identify the larger societal issues that the UPC's exclusionary structure implicates. They also demonstrate the feasibility of designing and implementing alternatives to the present scheme.

1. State Action

Four states have independently offered intestate succession rights to surviving, committed partners who fulfill pertinent criteria.¹¹³ These criteria range from evidence of formal

111. See *infra* Part III.B.1.

112. See VT. STAT. ANN. tit. 15, § 1204 (2002) (extending to parties to civil unions identical benefits, protections, and responsibilities under law as granted to married partners); see also HAW. REV. STAT. § 560:2-102 (1997) (treating surviving reciprocal beneficiaries and surviving spouses as "spouses" for purposes of intestate succession); see also Waggoner, Working Draft (Jan. 20, 1995) (proposing to provide limited intestate succession rights to de facto partners) (*excerpted in* Fellows et al., *Committed Partners*, *supra* note 6, at 92-95) [hereinafter Waggoner, Working Draft].

113. VT. STAT. ANN. tit. 15, § 1204(a) (2002) (extending to parties to civil unions identical benefits granted married partners); HAW. REV. STAT. §§ 572C-1, 560:2-102 (Supp. 2001) (treating surviving reciprocal beneficiaries and surviving spouses as "spouses" for purposes of intestate succession); CAL. PROB. CODE § 6401(c) (West Supp. 2003) (treating domestic partners and spouses equally for purposes of intestate succession); N.H. REV. STAT. ANN. § 457:39 (1992). Although states that recognize common law marriage treat qualifying partners as surviving spouses for purposes of intestate succession, the common law marriage doctrine exists in only eleven states and no state extends recognition to same-sex partners. ALL, FAMILY DISSOLUTION, *supra* note 36, § 6.02 cmt. a.

registration to evidence of a minimum level of substantive commitment.

In Vermont, opposite-sex and same-sex partners may consummate their relationship in a civil union, which provides rights almost identical to those incident to marriage.¹¹⁴ Among the bundle of rights granted in a civil union is the right to inherit from an intestate decedent partner.¹¹⁵ In Hawaii, the legislature developed a reciprocal beneficiary scheme to provide benefits to persons otherwise prohibited from marrying.¹¹⁶ Hawaii treats reciprocal beneficiaries as spouses for purposes of intestate succession.¹¹⁷ Likewise, California recently approved domestic partner registration, entitling surviving registrants and surviving spouses to identical intestate shares.¹¹⁸ New Hampshire grants a surviving partner who cohabited with an intestate decedent of the opposite sex for a minimum of three years, a right equivalent to that of a surviving spouse for purposes of intestate succession.¹¹⁹

The recognition of systematized inequities by several states, and their various policies to cure these deficiencies, demonstrate the feasibility of such changes. Because the UPC advocates liberal interpretation of its provisions to most effectively achieve the goals of intestacy policy,¹²⁰ all states could

114. In 1999, the Vermont Supreme Court determined that exclusion of same-sex couples from the benefits and protections incident to marriage under state law violated the common benefits clause of the Vermont State Constitution. *Baker v. State*, 744 A.2d 864, 887 (Vt. 1999). The court instructed the legislature to either legally recognize same-sex marriage or amend statutory provisions that unconstitutionally endorsed favoritism of married partnerships. *Id.* Subsequently, Vermont enacted legislation authorizing civil unions. VT. STAT. ANN. tit. 15, § 1204 (2002). These unions are not federally recognized, thus federal benefits are inapplicable. See 1 U.S.C. § 7 (2000) (asserting that "the word 'marriage' means only a legal union between one man and one woman as husband and wife, and the word 'spouse' refers only to a person of the opposite sex who is a husband or a wife").

115. VT. STAT. ANN. tit. 15, § 1204 (2002).

116. HAW. REV. STAT. § 572C (Supp. 2001).

117. HAW. REV. STAT. § 560:2-403 (Supp. 2001). This interpretation is justified because the UPC advocates liberal construction of its provisions to best "promote its underlying purposes and policies." UNIF. PROBATE CODE § 1-102(a) (amended 1993).

118. CAL. PROB. CODE § 6401 (West Supp. 2003).

119. N.H. REV. STAT. ANN. § 457:39 (1993) ("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.").

120. UNIF. PROBATE CODE § 1-102(a) (amended 1993).

feasibly interpret "spouse" to include committed partners.¹²¹ Alternatively, states could enact independent legislation to cure systematic deficiencies. Although states could provide a model for the UPC to adopt, the UPC, as a uniform model code, should offer an equitable and efficient intestate succession scheme to the states.¹²²

2. A Practical Proposal¹²³

A proposed but rejected amendment to the UPC ("Waggoner's Proposal") would have provided limited inheritance rights to an intestate decedent's surviving partner.¹²⁴ The proposed amendment would have applied to all unmarried couples regardless of sex or sexual orientation.¹²⁵ However, while the proposal recognizes two problems, it offers only one solution.

Both implicitly and explicitly, the proposal recognizes that many couples demonstrate a level of emotional commitment and economic reliance sufficient to justify intestacy guarantees. It also recognizes that laws prohibit same-sex partners from achieving the status required to receive spousal benefits and that, absent legal prohibition, same-sex partners might marry and thus establish an entitlement to the spousal intestate share. The proposal thus provides a means to determine a status, distinct from that established pursuant to marriage, to guarantee an intestate share to unmarried surviving partners.¹²⁶

121. The federal government passed the Defense Of Marriage Act ("DOMA") which declares that when interpreting Acts of Congress, the "word 'spouse' refers only to a person of the opposite sex who is a husband or a wife." 1 U.S.C. § 7 (2000). Although inheritance law is traditionally a matter of state concern, and thus, preemption concerns are not likely to apply directly, expansive definitions of "spouse" will probably face challenges. The federal stance expressed in DOMA may further restrict state interpretations of "spouse."

122. UNIF. PROBATE CODE § 1-102(b)(5) (amended 1993) (identifying uniformity among probate law as a primary goal of the Uniform Probate Code); see generally Averill, *supra* note 4, at 896-901 (describing the pervasive influence that the Uniform Probate Code exerts over state probate law).

123. See *infra* Part III.B.1.d.i for further discussion.

124. Waggoner, Working Draft, *supra* note 112, app., at 92-94. This proposal was likely not adopted for fear that it would deter states from adopting the UPC. Spitko, *supra* note 9, at 1097-98.

125. See Waggoner, Working Draft, *supra* note 112.

126. See *id.* For a discussion of the criteria used to identify qualifying partners, see *infra* notes 149-52.

However, by providing fewer rights to surviving partners than those guaranteed to surviving spouses, the proposal assumes and implies that such partnerships lack qualities presumed present in marriage. This assumption fails to recognize that many unmarried partners, who may not marry because of ideological opposition or legal prohibition, possess exactly those characteristics which intestacy law seeks to protect and reward.¹²⁷ Likewise, the proposal fails to recognize that married partnerships may lack those characteristics. By indiscriminately providing greater benefits to married partners, the proposal reinforces existing flaws.

Although Waggoner's proposal more effectively recognizes and honors the donative intent of intestate decedents, it does not truly effectuate intestacy policy's goals and, in some instances, reinforces its shortcomings.

B. *A New Model*

As the model for nationwide probate law, the UPC should develop an equitable and comprehensive intestate succession scheme that accommodates the needs of contemporary American families. The UPC can and should sever the symbolic status of marriage from its legal significance for purposes of intestate succession.¹²⁸ A proposal that includes committed partners in the intestate succession scheme must both define and identify qualifying partners. Section 1 looks to other areas of law and policy for criteria used to identify committed partners entitled to benefits traditionally extended only to married partners. Section 2 proposes practical models for inclusion of unmarried, committed partners in Article II of the UPC.

127. See *supra* Part I.B; see also *supra* Part II.C.

128. See Fellows, *Pride and Prejudice*, *supra* note 18, at 465–66. She explains that

[t]he function of heirship laws is to accomplish a decedent's donative intent in the absence of a will, and they do that in a way that reflects society's view of fairness and its commitment to promote familial-type ties. . . . [H]eirship laws can accomplish their function if they conform to the notion of family as it evolves sociologically and not if they are tied exclusively to a definition of family determined through legally recognized marriages. Support for this functional view can be derived from the development of the law of inheritance itself.

1. Defining Committed Partners

Opponents of providing unmarried, committed partners with benefits traditionally incident to marriage question the wisdom of equating unmarried partnerships with married partnerships.¹²⁹ They also rely heavily on the presumed difficulty of distinguishing committed partnerships, worthy of legal recognition and protection, from less stable partnerships.¹³⁰ Historically, these concerns account for the decreasing influence of common law marriage.¹³¹

Although recent legislative and judicial developments recognize these concerns, they clearly demonstrate the feasibility and desirability of identifying and protecting committed partners for limited purposes, thereby avoiding the more pervasive challenges presented by common law marriage.¹³² These developments range from offering employment benefits, to expanding existing legal doctrine to accommodate the needs of nontraditional partners, to providing for equal recognition among all committed partners, regardless of marital status.¹³³ These trends recognize the inequity of marital-status based benefits and serve as potential models for defining and identifying committed partners in intestacy law.

a. Legislative and Administrative Policies

Many public and private entities have extended benefits traditionally limited to married partners to persons involved in committed relationships.¹³⁴ Specifically, developments in the

129. See generally William C. Duncan, "Don't Ever Take a Fence Down": The "Functional" Definition of Family—Displacing Marriage in Family Law, 3 J.L. & FAM. STUD. 57 (2001).

130. Marissa J. Holob, Note, *Respecting Commitment: A Proposal to Prevent Legal Barriers from Obstructing the Effectuation of Intestate Goals*, 85 CORNELL L. REV. 1492, 1515 (2000).

131. Common law marriage has been abolished in thirty-nine states largely because of "tremendous proof problems, interpretation issues, and judicial calls for reconsideration of the legislation." Lynn D. Wardle, *Deconstructing Family: A Critique of the American Law Institute's "Domestic Partners" Proposal*, 2001 BYU L. REV. 1189, 1221.

132. See *infra* Part III.B.1.a–d.

133. See *id.*

134. See *Partners, Domestic Partner Statistics*, *supra* note 110, which states: Domestic partnership benefits are available to employees at more than 570 companies, 141 colleges and universities, and more than 87 city,

public sphere increasingly recognize and consequently validate nontraditional partnerships. Growing numbers of municipalities, and the state of California, have adopted domestic partner registration schemes.¹³⁵ Domestic partner registration extends symbolic recognition and limited legal rights to registrants.¹³⁶ However, because state law governs intestate succession, municipal domestic partner statutes do not affect the traditional exclusion of committed partners from intestacy law.¹³⁷

b. Judicial Responses

Because of increased legislative and administrative recognition, validation, and protection of committed partners, and because of the increased incidence of cohabitation between unmarried partners, nontraditional partners more frequently seek judicial resolution of disputes. Thus, courts have been called upon to apply laws which, like the intestacy codes, generally fail to provide standards to resolve conflict between nontraditional partners.¹³⁸ Consequently, some courts have formalistically adhered to precedent, thereby supporting blatantly inequitable results. Conversely, other courts have instrumentally stretched existing doctrine or formulated new standards to reach more equitable outcomes. Regardless, case law not only illustrates the need to recognize committed partnerships,¹³⁹ but also provides a variety of standards to identify partnerships the law should protect. Case law has developed an instrumental, multi-factor analysis to define the level of commitment justifying entitlement to benefits traditionally incident to marriage.¹⁴⁰

For example, to extend marital rights to two same-sex partners challenging eviction, a New York court defined a fam-

county and state governments. Currently, more than ten percent of all employers offer domestic partner benefits. Among companies with more than 5,000 employees, almost one quarter offer these benefits.

135. *Id.*

136. *Id.*

137. *Id.*

138. ALI, FAMILY DISSOLUTION, *supra* note 36, § 6.01 cmt. a.

139. See *Univ. of Alaska v. Tumeo*, 933 P.2d 1147, 1157 (Alaska 1997) (holding that the refusal of the university to provide health and other job benefits to domestic partners of its employees was illegal marital status discrimination in violation of the state's civil rights act).

140. *Braschi v. Stahl Assocs. Co.*, 543 N.E.2d. 49, 55 (N.Y. 1989).

ily as "two adult lifetime partners whose relationship is long term and characterized by an emotional and financial commitment and interdependence."¹⁴¹ The court found a level of commitment sufficient to entitle the partners to marital benefits by considering "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."¹⁴²

Similarly, a Washington court devised a "meretricious relationship" standard to guide division of property upon the dissolution of a qualifying relationship.¹⁴³ To qualify, the partners must share a common household and establish that they maintain a "stable, marital-like relationship."¹⁴⁴ To determine the character of a relationship, the court considered "cohabitation, duration of the relationship, purpose of the relationship, pooling of resources and services for joint projects, and the intent of the parties."¹⁴⁵

Some courts invoke equitable doctrines rather than stretch the limits of existing law to resolve conflict among nontraditional families. In the context of a property dispute, the oft-cited opinion from *Marvin v. Marvin* "recognize[d] the well-established public policy [of] foster[ing] and promot[ing] the institution of marriage, [but found the] perpetuation of judicial rules which result in an inequitable distribution of property accumulated during a nonmarital relationship neither a just nor an effective way of carrying out that policy."¹⁴⁶ To justify its emphasis on an equitable result that extended marital rights to the unmarried partners involved in the dispute, the court determined that the "parties may well expect that property will be divided in accord with the parties' own tacit understanding and that in the absence of such understanding the courts will fairly apportion property accumulated through mutual effort."¹⁴⁷

141. *Id.* at 54.

142. *Id.* at 55.

143. *Connell v. Francisco*, 898 P.2d 831, 834 (Wash. 1995).

144. *Id.*

145. *Id.*

146. *Marvin v. Marvin*, 557 P.2d 106, 122 (Cal. 1976) (citation omitted).

147. *Id.* at 121.

In *Wilbur v. DeLapp*, the Oregon Court of Appeals held that it

may distribute property owned by the parties in a non-marital domestic relationship. The primary consideration in distributing such property is the intent of the parties. . . . [The court was] not precluded from exercising [its] equitable powers to reach a fair result based on the circumstances of each case.¹⁴⁸

c. *International Recognition of Committed Partners*

Other countries also increasingly recognize the need to provide "marriage-like" legal entitlements to unmarried partners. In British Columbia and Ontario, Canada, legally married persons as well as cohabitants qualify as "spouses" for purposes of spousal-support obligations.¹⁴⁹ New South Wales extends intestate succession rights to parties in a *de facto* relationship, which it defines as a "relationship between two adult persons . . . who live together as a couple, and . . . who are not married to one another . . ."¹⁵⁰ Thus, international practices also exemplify the propriety and feasibility of defining and identifying committed partnerships that deserve legal protection.

d. *Academic Proposals*

A UPC drafter and the American Law Institute have independently offered criteria to define committed partners for limited purposes.

148. 850 P.2d 1151, 1153 (Or. Ct. App. 1993).

149. A "spouse" includes: "either of a man and woman who are not married to each other and have cohabited, (a) continuously for a period of not less than three years, or (b) in a relationship of some permanence, if they are the natural or adoptive parents of a child." Ontario Family Law Reform Act of 1986, R.S.O., ch. F-3, §§ 29-30 (1990) (Can.) (citations omitted); *see also* Family Relations Act of British Columbia, R.S.B.C., ch. 128, § 1 (1996) (Can.) (for purposes of spousal support, a "spouse" includes a person who "lived with another person in a marriage-like relationship for a period of at least 2 years . . . and, for purposes of this Act, the marriage-like relationship may be between persons of the same gender").

150. New South Wales Property (Relationships) Legislation Amendment Act 1999, no. 4, § 4 (Austl.), [http://www.parliament.nsw.gov.au/prod/parlment/nswbills.nsf/0/719a5271ce2bf6ed4a25676f0028dd46/\\$FILE/1999-4.pdf](http://www.parliament.nsw.gov.au/prod/parlment/nswbills.nsf/0/719a5271ce2bf6ed4a25676f0028dd46/$FILE/1999-4.pdf).

i) Waggoner's Proposal

Waggoner's rejected proposal to the UPC provided criteria to identify unmarried partners entitled to limited intestate succession rights. To qualify as a committed partner eligible to inherit from an intestate decedent, the surviving partner could not have been married to someone else or prohibited from marrying the decedent because of a "blood-relationship."¹⁵¹ Additionally, the surviving partner must have shared a "common household with the decedent in a marriage-like relationship."¹⁵²

The proposal provided a variety of factors to define and establish a sufficiently "marriage-like relationship."¹⁵³ A relationship that fulfills the enumerated criteria establishes a pre-

151. Waggoner, Working Draft, *supra* note 112, at 92.

(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.

Id.

152. *Id.*

153. *Id.*

(d) [Marriage-like Relationship; Factors.] . . . 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. Although 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

Id. at 92-93.

sumption subject to rebuttal that the character of the relationship justifies the surviving partner's inheritance.¹⁵⁴ The enumerated factors, which examine social, financial, and formal aspects of the partnership, include factors traditionally associated with marriage.¹⁵⁵ The chosen identification criteria provide unmarried partners with an opportunity to demonstrate that their partnership fulfills the ideal that the partnership theory of marriage embraces.¹⁵⁶

ii) The American Law Institute's Proposal

In an attempt to resolve the blatant discrepancy between existing legal doctrine and the needs of contemporary families, the ALI recently published the "Principles of Family Dissolution" ("Principles"). The treatise maintains that a "complete treatment of family dissolution cannot limit itself to relationships entered [into] according to the procedures and ceremonies

154. *Id.* at 93.

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

- (1) during the [six] year period preceding 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 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.

Id.

(f) [Force of the Presumption]. If a presumption arises . . . 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.

Id. at 93-94.

155. *Id.*

156. *Id.*

required to create a lawful marriage"¹⁵⁷ The Principles also explain that "a rapidly increasing percentage of Americans form domestic relationships without such formalities [and that] few of these couples make explicit contracts to govern their relationship or its termination."¹⁵⁸

This revolutionary treatise not only recognizes the prevalence of unmarried, committed partners, it also elevates this traditionally devalued class to a status equivalent to marriage for purposes of family dissolution.¹⁵⁹ The Principles rely on a status classification, determined by fulfillment of enumerated criteria, to guarantee property claims and support obligations to Domestic Partners "without [significant or intrusive] inquiry into each couple's particular arrangement."¹⁶⁰ Generally, unmarried partners must "share a primary residence and life together as a couple."¹⁶¹ To determine whether partners share life as a couple, the ALI mandates reference to living arrangements, public and private declarations and perceptions of the partnership, financial arrangements, and, if applicable, parental responsibilities.¹⁶² The ALI recommends that the legisla-

157. ALI, FAMILY DISSOLUTION, *supra* note 36, § 6.02 cmt. a.

158. *Id.*

159. *See id.* § 6.

160. *Id.* § 6.03 cmt. b.

161. *Id.* § 6.03(1). "For the purpose of defining relationships to which this Chapter applies, domestic partners are two persons of the same or opposite sex, not married to one another, who for a significant period of time share a primary residence and a life together as a couple." *Id.*

162. *Id.* § 6.03(7).

Whether persons share a life together as a couple is determined by reference to all the circumstances, including:

- (a) the oral or written statements or promises made to one another, or representations jointly made to third parties, regarding their relationship;
- (b) the extent to which the parties intermingled their finances;
- (c) the extent to which their relationship fostered the parties' economic interdependence, or the economic dependence of one party upon the other;
- (d) the extent to which the parties engaged in conduct and assumed specialized or collaborative roles in furtherance of their life together;
- (e) the extent to which the relationship wrought change in the life of either or both parties;
- (f) the extent to which the parties acknowledged responsibilities to each other, as by naming the other the beneficiary of life insurance or of a testamentary instrument, or as eligible to receive benefits under an employee-benefit plan;

ture and the judiciary accord Domestic Partners rights and entitlements identical to those guaranteed to married partners, for purposes of family dissolution.¹⁶³

By providing committed partners with rights traditionally incident to marriage, these public and private entities reconcile the notion that unmarried and married partners often possess similar characteristics, with the reality that many unmarried partners will not or cannot marry. These changes demonstrate increased social acceptance of nontraditional partnerships and recognize that such partnerships, substantively identical to married partnerships, deserve similar benefits.

The definitions of committed partners adopted nationally and internationally, by public and private entities, and by academic, legislative, and judicial bodies illustrate the capacity of legal doctrine to adapt to changing family norms; just as the family has evolved, so must the law.

2. Replacing Status with Substance in Intestacy Law

*When the reason for the law ceases, the law itself ought likewise to cease.*¹⁶⁴

An intestate succession policy that relies exclusively on marital status to determine estate distribution reflects neither social norms nor serves contemporary familial needs. It has been found that “[c]ommitted relationships for purposes of . . .

-
- (g) the extent to which the parties’ relationship was treated by the parties as qualitatively distinct from the relationship either party had with any other person;
 - (h) the emotional or physical intimacy of the parties’ relationship;
 - (i) the parties’ community reputation as a couple;
 - (j) the parties’ participation in a commitment ceremony or registration as a domestic partnership;
 - (k) the parties’ participation in a void or voidable marriage that, under applicable law, does not give rise to the economic incidents of marriage;
 - (l) the parties’ procreation of, adoption of, or joint assumption of parental functions toward a child;
 - (m) the parties’ maintenance of a common household, as defined by Paragraph (4).

Id.

163. *Id.* § 6.04.

164. *The Essentia Book of Knowledge*, at <http://www.essentia.com/book/quotes/law.htm> (last visited Jan. 11, 2004).

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."¹⁶⁵ Responsively, Section 2.a selects portions of both Waggoner's Proposal and the ALI Principles to offer a comprehensive, administratively feasible definition of qualifying partners for purposes of intestate succession. Section 2.b offers five distinct proposals to dictate estate distribution among both married and unmarried partners.

*a. Defining Committed Partners for Purposes of
Intestate Succession*

The legal developments and identification criteria previously discussed logically extend to committed partners for purposes of intestate succession. The ALI's criteria for identifying partners who demonstrate significant emotional commitment and financial interdependence would likewise identify committed partners deserving inclusion in a more equitable intestate succession scheme. After considering the sentiments expressed in case law relative to intestacy goals, the following proposals rely primarily on the ALI criteria which place an equal emphasis on both emotional and financial aspects of partnerships.¹⁶⁶

Although the proposals rely primarily on the ALI criteria, they adopt the Waggoner proposal presumption. The Waggoner presumption applies to a surviving partner who has been in a relationship in which the couple fulfilled at least one of the following criteria:

during the [six] year period next preceding the decedent's death . . . shared a common household for periods totaling at least [five] years;

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 termi-

165. Fellows et al., *Committed Partners*, *supra* note 6, at 89.

166. Although Waggoner's proposal also emphasizes the partners' emotional and financial relationship, it places greater emphasis on economic aspects, whereas the ALI criteria reflect the values expressed in the case law discussed *infra* Part III.B.1 by placing essentially equal emphasis on both emotional and financial characteristics.

nating or purporting to terminate the registration or designation;

[participated] in a marriage or a commitment ceremony conducted and contemporaneously certified in writing by an organization;

is the parent of a child of the decedent, or is or was 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 decedent¹⁶⁷

A partner who fulfills one of the enumerated criteria establishes a presumption of qualification that can be rebutted by a preponderance of evidence.¹⁶⁸ A partner who fulfills more than one of the pertinent criteria establishes a presumption that can only be rebutted by clear and convincing evidence.¹⁶⁹

By adopting a substantive and structural amalgam of both the ALI criteria and the Waggoner proposal, the following proposals further both the primary and secondary goals of intestacy law. As previously discussed, mere inclusion of surviving partners in intestate succession would more effectively honor the donative intent of the average intestate decedent, and would further the economic and social aims of intestacy law.¹⁷⁰ Providing surviving partners with a presumptive means of establishing a qualifying status creates an administratively simple scheme.¹⁷¹ The substance and structure of this definition balances the need for simplicity with the interest in fairness. Including committed partners who fulfill pertinent criteria remedies the UPC's currently under-inclusive structure and simultaneously guards against over-inclusion.

b. Inclusive Proposals

To more effectively achieve the purported goals of intestacy law, the following proposals postulate that the UPC should rely on the substance of committed partnerships to identify recipi-

167. Waggoner, Working Draft, *supra* note 112, at 93.

168. *Id.*

169. *Id.*

170. *See supra* Part II.C.

171. *Id.*

ents of an intestate decedent's estate.¹⁷² The following chart summarizes the similarities and differences between the proposals.¹⁷³

	Maintains the current spousal pro- vision	Adds domestic partner to the current provi- sion	Replaces spouse with domestic partner in the current provision	Adds a new provi- sion that relies on an accrual approach
Proposal I	Yes	No	No	No
Proposal II	No	Yes	No	No
Proposal III	Yes	No	No	Yes
Proposal IV	No	Yes	Yes	No
Proposal V	No	No	No	Yes

i) Proposal I

The first inclusive proposal maintains the present structure and language of the UPC spousal provision, which provides:

The intestate share of a decedent's surviving spouse is:

(1) the entire 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 spouse and there is no other descendant of the surviving spouse who survives the decedent;

(2) the first [\$200,000], plus three-fourths of any balance of the intestate estate, if no descendant of the decedent survives the decedent, but a parent of the decedent survives the decedent;

172. Significantly, the ALI found it both appropriate and feasible to substantially increase equity in family dissolution and absorb the costs associated with domestic partner identification. See generally ALI, FAMILY DISSOLUTION, *supra* note 36, § 6.

173. See *infra* Parts III.B.2.b.i-iv for a more detailed discussion of these proposals.

(3) the first [\$150,000], plus one-half of any balance of the intestate estate, if all of the decedent's surviving descendants are also descendants of the surviving spouse and the surviving spouse has one or more surviving descendants who are not descendants of the decedent;

(4) the first [\$100,000], plus one-half of any balance of the intestate estate, if one or more of the decedent's surviving descendants are not descendants of the surviving spouse.¹⁷⁴

Although Proposal I preserves the current UPC content and structure, it adopts Hawaii's standards for interpreting and applying this provision. Hawaii's intestacy laws are identical to the UPC; however, for purposes of intestate succession, reciprocal beneficiaries qualify as spouses and receive identical treatment.¹⁷⁵ Although the proposed UPC domestic partner criteria differ significantly from the qualification requirements for reciprocal beneficiaries,¹⁷⁶ this proposal would follow Hawaii's example and, although it would not add the phrase "domestic partner" to the UPC's exclusionary spousal provision, it would equate domestic partner status with spousal status. Under this scenario, a surviving spouse would automatically inherit from an intestate decedent spouse; a surviving partner would have to establish domestic partner status to qualify as a spouse for purposes of intestate succession.

This proposal would require that the UPC recommend an expansive interpretation of the term "spouse" to the states. The states would ultimately choose whether to abide by the recommended expansive interpretation or adhere to the presently exclusionary interpretation. This proposal would thus

174. UNIF. PROB. CODE § 2-102 (amended 1993).

175. HAW. REV. STAT. § 560:2-402 (1997).

176. HAW. REV. STAT. § 572C-4 provides:

In order to enter into a valid reciprocal beneficiary relationship, it shall be necessary that:

- (1) Each of the parties be at least eighteen years old;
- (2) Neither of the parties be married nor a party to another reciprocal beneficiary relationship;
- (3) The parties be legally prohibited from marrying one another under chapter 572;
- (4) Consent of either party to the reciprocal beneficiary relationship has not been obtained by force, duress, or fraud; and
- (5) Each of the parties sign a declaration of reciprocal beneficiary relationship as provided in section 572C-5.

Conversely, qualification for domestic partner status would focus on substantive characteristics of a relationship signifying commitment.

address the UPC drafters' concerns about deterring states from adopting its provision by offering, but not imposing, a more equitable intestate succession scheme.¹⁷⁷

This proposal recognizes the substantive similarity of committed partnerships irrespective of marital status. However, by preserving the term "spouse," this proposal implicitly suggests that although committed partners deserve protection, they do not deserve formal recognition. Thus, despite providing greater protection for such partnerships, including them under the ambit of "spouse" marginalizes these partnerships.¹⁷⁸ In addition to its expressive consequences, recent trends suggest that expansive interpretations of "spouse" may potentially fall subject to judicial and legislative limitation, ultimately excluding those temporarily protected.¹⁷⁹

ii) Proposal II

Proposal II follows California's example and adds the phrase "domestic partner" to the provision distributing the share of the surviving spouse.¹⁸⁰ This Proposal offers the following provision:

The intestate share of a decedent's surviving spouse [or domestic partner] is:

(1) the entire 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 spouse [or domestic partner] and there is no other

177. See Spitko, *supra* note 9, at 1087-88 (suggesting that the UPC rejected a more inclusive intestate succession scheme which would have accounted for committed partners because of the fear that states would be less likely to adopt such a provision).

178. *Id.* at 1064-65, 1100.

179. The federal government passed the Defense Of Marriage Act ("DOMA") which declares that when interpreting Acts of Congress, the "word 'spouse' refers only to a person of the opposite sex who is a husband or a wife." 1 U.S.C. § 7 (2000). Although inheritance law is traditionally a matter of state concern, and thus, preemption concerns are not likely to apply directly, expansive definitions of "spouse" have had limited success. The federal stance expressed in DOMA may further restrict state interpretations of "spouse."

180. CAL. PROB. CODE § 6401 (West 2002).

descendant of the surviving spouse [or domestic partner] who survives the decedent;

(2) the first [\$200,000], plus three-fourths of any balance of the intestate estate, if no descendant of the decedent survives the decedent, but a parent of the decedent survives the decedent;

(3) the first [\$150,000], plus one-half of any balance of the intestate estate, if all of the decedent's surviving descendants are also descendants of the surviving spouse [or domestic partner] and the surviving spouse [or domestic partner] has one or more surviving descendants who are not descendants of the decedent;

(4) the first [\$100,000], plus one-half of any balance of the intestate estate, if one or more of the decedent's surviving descendants are not descendants of the surviving spouse [or domestic partner].¹⁸¹

This Proposal would thus provide identical rights to both spouses and domestic partners. By equating the rights and interests of domestic partners and spouses, this proposal would avoid the expressive consequences of Proposal I because it would recognize and equate both marital status and domestic partner status. Furthermore, by expressly including the phrase "domestic partner" in the intestate provision, it would avoid the potential challenges to an expansive definition of spouse presented by Proposal I.

. iii) Proposal III

Proposal III would preserve the present spousal distribution scheme, but would add a new provision to the current intestacy code that addresses the needs of unmarried partners. Under this scheme, the intestate share of an unmarried partner would correlate to the duration of the partnership.¹⁸² This distribution scheme could be expressed, as suggested by Professor Spitko,¹⁸³ in a separate provision that applies exclusively to domestic partners, thereby preserving the spousal provision

181. See UNIF. PROB. CODE § 2-102 (1993).

182. See E. Gary Spitko, *An Accrual/Multi-Factor Approach to Intestate Inheritance Rights for Committed Partners*, 82 OR. L. REV. 255, 291 (2002). This proposal would also require that the UPC devise a scheme to distribute the remainder of the estate to surviving recipients other than the domestic partner.

183. See *id.*

in its present form. Professor Spitko suggests the following distribution based on the duration of a committed partnership:

If the decedent and the surviving committed partner cohabitated in a partnership <i>for a period of:</i>	The unreduced intestate share percentage is:
at least 3 years but less than 4 years	18% of the intestate estate
at least 4 years but less than 5 years	24% of the intestate estate
at least 5 years but less than 6 years	30% of the intestate estate
at least 6 years but less than 7 years	36% of the intestate estate
at least 7 years but less than 8 years	42% of the intestate estate
at least 8 years but less than 9 years	48% of the intestate estate
at least 9 years but less than 10 years	54% of the intestate estate
at least 10 years but less than 11 years	60% of the intestate estate
at least 11 years but less than 12 years	68% of the intestate estate
at least 12 years but less than 13 years	76% of the intestate estate
at least 13 years but less than 14 years	84% of the intestate estate
at least 14 years but less than 15 years	92% of the intestate estate
at least 15 years or more	100% of the intestate estate ¹⁸⁴

Like Proposal II, this proposal recognizes and consequently validates committed partnerships.¹⁸⁵ However, because this distribution scheme would frequently grant a surviving partner an intestate share smaller than that of a similarly situated surviving spouse, this proposal distinguishes committed partnerships from married partnerships, implying that unmarried partnerships are less legitimate than married partnerships.¹⁸⁶ This is particularly problematic because of laws that prevent all individuals from acquiring legally-recognized marital status.

iv) Proposals IV and V

Proposals IV and V fundamentally alter the present scheme by replacing the word "spouse" with "domestic partner." Proposal IV preserves the distribution patterns of the current spousal provision, but requires that all partnerships, married

184. *See id.*

185. *See Spitko, supra* note 9, at 1100.

186. *Id.*

and unmarried, qualify as domestic partners. Proposal IV offers the following provision:

§ 2-102. Share of Surviving [Domestic Partner]

The intestate share of a decedent's surviving [domestic partner] is:

- (1) the entire 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 [domestic partner] and there is no other descendant of the surviving [domestic partner] who survives the decedent;
- (2) the first [\$200,000], plus three-fourths of any balance of the intestate estate, if no descendant of the decedent survives the decedent, but a parent of the decedent survives the decedent;
- (3) the first [\$150,000], plus one-half of any balance of the intestate estate, if all of the decedent's surviving descendants are also descendants of the surviving [domestic partner] and the surviving [domestic partner] has one or more surviving descendants who are not descendants of the decedent;
- (4) the first [\$100,000], plus one-half of any balance of the intestate estate, if one or more of the decedent's surviving descendants are not descendants of the surviving [domestic partner].¹⁸⁷

Proposal V offers a fundamentally different distribution scheme. After replacing "spouse" with "domestic partner," Proposal V eliminates the spousal distribution scheme altogether and applies Proposal III's accrual provision to both married and unmarried partnerships. Proposal V recommends estate disbursement among committed partners based on the duration of the relationship according to the following table:

187. UNIF. PROBATE CODE § 2-102 (amended 1993).

If the decedent and the surviving committed partner cohabitated in a partnership for a period of:	The unreduced intestate share percentage is:
at least 3 years but less than 4 years	18% of the intestate estate
at least 4 years but less than 5 years	24% of the intestate estate
at least 5 years but less than 6 years	30% of the intestate estate
at least 6 years but less than 7 years	36% of the intestate estate
at least 7 years but less than 8 years	42% of the intestate estate
at least 8 years but less than 9 years	48% of the intestate estate
at least 9 years but less than 10 years	54% of the intestate estate
at least 10 years but less than 11 years	60% of the intestate estate
at least 11 years but less than 12 years	68% of the intestate estate
at least 12 years but less than 13 years	76% of the intestate estate
at least 13 years but less than 14 years	84% of the intestate estate
at least 14 years but less than 15 years	92% of the intestate estate
at least 15 years or more	100% of the intestate estate ¹⁸⁸

The significant difference between these alternatives and those previously described is that all partnerships, regardless of marital status, would have to qualify for entitlement to the intestate decedent's estate. Either a marriage certificate or one of the four domestic partner evidentiary criteria presented in Waggoner's Proposal would create a presumption subject to rebuttal that the surviving spouse or partner qualifies as a domestic partner.¹⁸⁹ The marital presumption may be refuted by clear and convincing evidence that the couple lacked a level of commitment sufficient to justify estate distribution in favor of the survivor. The burden of proof required to rebut the domestic partner presumption among unmarried partners would vary according to the number of evidentiary criteria that the partnership fulfills. These proposals recognize not only changes among unmarried partners, but also recognize that married partners may not fulfill the ideals that the partnership theory of marriage embraces.

188. See E. Gary Spitko, *An Accrual/Multi-Factor Approach to Intestate Inheritance Rights for Committed Partners*, 82 OR. L. REV. 255, 291 (2002). This proposal would also require that the UPC devise a scheme to distribute the remainder of the estate to surviving recipients other than the domestic partner.

189. See *supra* note 154.

Proposals IV and V, which rely primarily upon the substantive characteristics of a committed partnership irrespective of marital status, suggest that the substance rather than the status of committed partnerships should serve as the basis for providing or denying benefits.¹⁹⁰ Because these proposals presume the existence of a committed partnership among partners possessing a marital certificate, they do not deny the suggestive aspect of a marital certificate; rather, they merely consider marital status one of several substantive characteristics sufficient to establish a domestic partnership. These proposals thus also recognize and account for the fact that legal and ideological barriers may prevent acquisition of a marital certificate, but do not necessarily comment on the substantive quality of a partnership.

The needs and characteristics of contemporary families necessitate amendments to the UPC. An effective and equitable intestate succession policy must offer an administratively feasible scheme that permits substantive inquiry into potential recipients' relationship with the decedent. Proposal II, which adds domestic partner to the current spousal provision, would increase equity in an administratively feasible manner. However, because it considers only the existence of other survivors and not the duration of the relationship, it will likely lead, in some instances, to results which are contrary to the intent of the intestate decedent. Proposal V, which rejects the distinction between married and unmarried partners, and distributes intestate shares that reflect the duration of the relationship, would likely provide a scheme that comports most directly with intestacy goals. However, Proposal V would require that the UPC alter its underlying structure by abandoning its exclusive reliance on marital distinctions in intestate succession. Although Proposal V offers the most desirable alternative in terms of expressive and practical consequences, it would require that the UPC take a progressive stance which, as a model code, may be less desirable than the more conservative, nonetheless equitable, alternative of Proposal II.

The aforementioned proposals would further both the primary and secondary goals of intestacy law. These proposals would more effectively honor the donative intent of intestate decedents. Furthermore, inclusion of committed partners

190. Spitko, *supra* note 9, at 1100.

would contribute to a comprehensive, administratively feasible intestate succession scheme that furthers the social and economic aims of intestacy law.

CONCLUSION

The needs and characteristics of both married and unmarried partners have changed dramatically in the past fifty years. Notwithstanding these developments, intestacy law, in a stark departure from its accommodating history, has failed to adapt to these changes despite the existence of workable alternatives. Proposals to amend intestacy laws to more accurately reflect changing family structures would greatly improve the current system. The heretofore proposed, but not adopted, amendment to the UPC would create a domestic partner class entitled to some of the benefits currently guaranteed to surviving spouses. Trends in other areas of law and policy, particularly the Principles of the Law of Family Dissolution, provide criteria for identifying domestic partners, and illustrate the propriety of equating unmarried partnerships with married partnerships for limited purposes. The UPC should follow these examples and adopt one of the aforementioned proposals to insure a more comprehensive and equitable intestate succession.

Drafters of the revised UPC proclaimed that

the 1990 UPC is presented as a reasonable package, one that is well thought out and whose individual parts add up to a coherent whole . . . [it] provides suitable responses to the multiple marriage society and is destined to be the model for American law deep into the next century.¹⁹¹

However, this model overlooks the existence and needs of an increasingly significant segment of society. Consequently, it denies unmarried partners inheritance rights to which they are entitled. To provide a truly suitable response to guide us into the next century, the UPC can and should be amended to account for the needs and interests of unmarried partners.

191. Waggoner, *Spousal Rights*, *supra* note 6, at 685.