
COMMENTS

AVOIDING BACKLASH: THE EXCLUSION OF DOMESTIC PARTNERSHIP LANGUAGE IN THE 2008 AMENDMENTS TO THE UNIFORM PROBATE CODE AND THE FUTURE FOR SAME-SEX INTESTACY RIGHTS*

I. INTRODUCTION

You would be surprised to hear the list of uniform laws that have been proposed for uniform adoption but have been adopted only in a handful of states. The Commissioners, of course, are more keenly aware of this possibility than you or I, and we can expect them to labor mightily to keep this result from happening.¹

The gay rights movement has achieved remarkable momentum in recent years, resulting in the dismantling of Don't Ask, Don't Tell,² the passage of same-sex marriage laws in nine states and the District of Columbia, and a series of judicial decisions striking down key parts of the Defense of Marriage Act.³ Despite this progress, same-sex equality is far from complete. Gays and lesbians remain, in many ways, second-class citizens who are frequently denied important rights and benefits by virtue of their sexual orientation. This Comment focuses on one of these rights—inheritance—and the efforts to secure it through reform of the Uniform Probate Code (UPC).

The UPC is one of the most influential uniform laws promulgated by the Uniform Law Commission (ULC). Its purpose, like other uniform law projects, is “to make uniform the law among the various jurisdictions,” in this case the law of probate.⁴ Uniformity is accomplished “only by passage of law in fifty state legislatures.”⁵

* Joseph J. Carroll, J.D., Temple University Beasley School of Law, 2013. Articles Editor, *Temple Law Review*. B.A., University of Pennsylvania. The author expresses his profound gratitude to his faculty advisor, Professor Kathy Mandelbaum, for her invaluable guidance and insight, to the *Temple Law Review* for its patient and meticulous editing, and to his family and friends for their unconditional support.

1. James J. White, *Comments at 1997 AALS Annual Meeting: Consumer Protection and the Uniform Commercial Code*, 75 WASH. U. L.Q. 219, 222 (1997).

2. Ed O'Keefe, *'Don't Ask' is Repealed in Historic Vote*, WASH. POST, Dec. 19, 2010, at A1.

3. Erik Eckholm, *As Victories Pile Up, Gay Rights Advocates Cheer 'Milestone Year'*, N.Y. TIMES, Nov. 8, 2012, at P7; see, e.g., *In re Balas*, 449 B.R. 567, 579 (Bankr. C.D. Cal. 2011) (holding that “DOMA violates the equal protection rights of the Debtors as recognized under the due process clause of the Fifth Amendment”).

4. UNIF. PROBATE CODE § 1-102(5) (amended 2010).

5. White, *supra* note 1, at 221.

Surprisingly, many commentators neglect to consider this somewhat self-evident requirement when making recommendations to reform the UPC, most recently in the context of same-sex inheritance rights. This Comment will address some of the arguments raised in favor of reforming the most recent version of the UPC in 2008 and examine why language recognizing same-sex relationships was properly excluded.

Section II of this Comment provides a history of the uniform law system, the evolution of the UPC, and the various proposals to reform it by providing for same-sex inheritance rights. Section III describes why the UPC is an inappropriate vehicle through which to achieve the objectives regarding same-sex inheritance rights and argues for a more state-based approach, using Hawaii's Reciprocal Beneficiaries System as a model. Finally, Section IV concludes that while gays and lesbians rightfully deserve full intestate succession benefits, reforming the UPC is not currently the appropriate method by which to do this and would ultimately weaken the uniform law system as a whole.

II. OVERVIEW

A. Purpose of the Uniform Codes

The Uniform Law Commission (sometimes referred to as the "Conference," a shorthand for the National Conference of Commissioners on Uniform State Laws, the body that comprises the Uniform Law Commission), the organization responsible for drafting uniform laws, was founded in 1892 in response to the American Bar Association's recommendation that each state adopt legislation that "promot[ed] . . . uniformity of legislation in the United States."⁶ At the time of the ULC's founding, Congress's ability to regulate interstate commerce was far more limited than it is today, and so uniformity "could be achieved only by some method other than the exercise of congressional power."⁷ The ULC aims to achieve uniformity by "voluntary action of each state government."⁸ Specifically, it "draft[s] and propos[es] specific statutes in areas of the law where uniformity between the states is desirable."⁹ Given its longstanding history and expertise, the ULC is regarded as "perhaps the single most important influence on the content of state legislation."¹⁰

1. What is the ULC?

First conceived of in the aftermath of the Civil War, the early-era ULC aimed to

6. James J. White, *Ex Proprio Vigore*, 89 MICH. L. REV. 2096, 2097 (1991) (quoting W.O. Hart, *The Movement for Uniform State Laws*, 23 CASE & COMMENT 646, 646-47 (1917)).

7. Allison Dunham, *A History of the National Conference of Commissioners on Uniform State Laws*, 30 LAW & CONTEMP. PROBS. 233, 237 (1965).

8. NCCUSL, HANDBOOK OF THE NATIONAL CONFERENCE OF COMMISSIONERS ON UNIFORM STATE LAWS AND PROCEEDINGS OF THE ANNUAL CONFERENCE IN ITS 119TH YEAR 775 (2010) [hereinafter cited as 2010 HANDBOOK].

9. *About the ULC*, UNIFORM LAW COMMISSION, <http://www.uniformlaws.org/Narrative.aspx?title=About%20the%20ULC> (last visited June 18, 2013).

10. Bruce H. Kobayashi & Larry E. Ribstein, *The Non-Uniformity of Uniform Laws*, 35 J. CORP. L. 327, 330 (2009).

create uniformity among state laws at a time when the federal government lacked the power to do so.¹¹ This was a time when “the power of the federal government to legislate uniform rules in most, if not virtually all, areas of law reserved to the states was perceived as quite limited.”¹² Indeed, “the need for the Conference arose because Congress was constitutionally foreclosed from enacting laws concerning a number of matters” believed to be the exclusive domain of the states.¹³ Today, by contrast, courts increasingly define the power of the federal government expansively, calling into question the purpose of a separate uniform law system and further undermining the autonomy of the states.¹⁴ Because of this “federal threat,”¹⁵ the uniform law system plays an increasingly important role in American lawmaking by “removing any excuse for the federal government to absorb powers thought to belong rightfully to the states.”¹⁶

Indeed, the ULC occupies a unique role in our constitutional system by “fill[ing] the void that would otherwise be filled by federal law.”¹⁷ Consequently, uniform laws “strengthen[] state sovereignty and remov[e] any excuse for the federal government to absorb new powers.”¹⁸ As the ULC’s 2010 Handbook makes clear, uniformity of legislation seeks to resolve issues in areas of law over which states traditionally have control, while at the same time working to preserve the federal system.¹⁹ Uniform laws, in the view of the ULC, are essential to “preserving the autonomy of the states.”²⁰

2. Advantages of Uniform Laws

Perhaps the most important purpose of the uniform law process is to “eliminate uncertainty” within our legal system.²¹ Although this objective can be obtained either through the state uniform law process or by federal legislation, uniform laws remain a unique and important instrument within our legal system.²² First, unlike the legislative

11. Fred H. Miller, *The Significance of the Uniform Laws Process: Why Both Politics and Uniform Laws Should Be Local: Perspectives of a Former Executive Director*, 27 OKLA. CITY U. L. REV. 507, 509 (2002).

12. *Id.*

13. White, *supra* note 6, at 2100.

14. *Id.* at 2099–2100. At the apogee of federal encroachment, the Supreme Court upheld a law that regulated the local production of wheat, despite its negligible effect on interstate commerce. *Wickard v. Filburn*, 317 U.S. 111, 128–29 (1942).

15. Kobayashi & Ribstein, *supra* note 10, at 329.

16. Dunham, *supra* note 7, at 237.

17. White, *supra* note 6, at 2102.

18. James J. Brudney, *Mediation and Some Lessons from the Uniform State Law Experience*, 13 OHIO ST. J. ON DISP. RESOL. 795, 805 (1998). Professor Brudney further notes that “a uniform state law approach may offer more stability than a federal regulatory solution. Federal agencies can revisit or change their rules after notice and minimal discussion, whereas a widely adopted uniform law can only be modified by the acts of many state legislatures.” *Id.*

19. 2010 HANDBOOK, *supra* note 8, at 776.

20. Dunham, *supra* note 7, at 237.

21. WALTER P. ARMSTRONG, JR., *A CENTURY OF SERVICE: A CENTENNIAL HISTORY OF THE NATIONAL CONFERENCE OF COMMISSIONERS ON UNIFORM STATE LAWS* 16 (1991).

22. See Nim Razook, *Uniform Private Laws, National Conference of Commissioners for Uniform State Laws Signaling and Federal Preemption*, 38 AM. BUS. L.J. 41, 56 (2000) (noting that “[b]oth uniform state and federally preemptive laws accomplish uniformity, and the characteristics of a federal law—especially national

process which may be stymied by partisan infighting and delay, the uniform law process “forges a consensus by drawing the stakeholders into a deliberative process of dialogue in order to frame legal rules that work for everyone in the broader public interest.”²³ Second, uniform laws are inherently more flexible than federal laws. Whereas federal laws offer a one-size-fits-all package, uniform laws can be modified by state legislatures to accommodate the varying interests of their constituents.²⁴ Finally, the ULC’s more than three hundred members, known as Commissioners, perform their duties pro bono, and serve as politically neutral representatives.²⁵ This lack of political accountability “tend[s] to promote a more competent and sophisticated legislative product”²⁶ because Commissioners, unlike legislators, are more removed from the people, and they are therefore “able to engage in a careful deliberative process.”²⁷

The ULC’s Commissioners include lawyers, judges, legislators, and academics from every state, the District of Columbia, Puerto Rico, and the U.S. Virgin Islands, and are appointed by the governor of each state to serve for a term of three or four years.²⁸ At least one commentator refers to the Commissioners as an “elite group”²⁹ because of the wealth of experience and expertise they bring to bear on a multitude of subjects.³⁰ Simply put, “they are people who have gotten things done and have the capacity to get things done.”³¹

supremacy—might actually foster more uniform interpretation” (footnote omitted)). Among their attributes, uniform laws “strengthen[] the federal system by providing rules and procedures that are consistent from state to state but . . . also reflect the diverse experience of the states”; “keep[] state law up-to-date by addressing important and timely legal issues”; and “reduce the need for individuals and businesses to deal with different laws as they move and do business in different states.” *About the ULC*, *supra* note 9.

23. Carlyle Conwell Ring, Jr., *A New Era: Cooperative Federalism—Through the Uniform State Laws Process*, 33 *HAMLIN L. REV.* 375, 398 (2010).

24. ROGER LEROY MILLER & GAYLORD A. JENTZ, *BUSINESS LAW TODAY: THE ESSENTIALS* 4 (8th ed. 2011) (“[A] state legislature may adopt all or part of a uniform law as it is written, or the legislature may rewrite the law however the legislature wishes. Hence, even though many states may have adopted a uniform law, those states’ laws may not be entirely ‘uniform.’”). *But see* Larry E. Ribstein & Bruce H. Kobayashi, *An Economic Analysis of Uniform State Laws*, 25 *J. LEGAL STUD.* 131, 141 n.32 (1996) (“State legislators are encouraged to adopt uniform laws verbatim rather than tinkering with the language of individual provisions.”).

25. *See* Kathleen Patchel, *Interest Group Politics, Federalism, and the Uniform Laws Process: Some Lessons from the Uniform Commercial Code*, 78 *MINN. L. REV.* 83, 91 (1993) (“[T]he primary defining characteristic of the National Conference of Commissioners on Uniform State Laws is that it is neither a democratically elected representative body, nor one owing allegiance, or having any accountability, to any political body.”).

26. Brudney, *supra* note 18, at 806.

27. Edward J. Janger, *Predicting When the Uniform Law Process Will Fail: Article 9, Capture, and the Race to the Bottom*, 83 *IOWA L. REV.* 569, 583 (1998).

28. 2010 *HANDBOOK*, *supra* note 8, at 775. The Conference receives funding primarily through the state appropriations process. *Id.* at 776.

29. *E.g.*, Patchel, *supra* note 25, at 91 n.35 (quoting White, *supra* note 6, at 2096). Commissioners, as a group, are “much more sophisticated in the law and more interested in long-range questions” than your average legislator. White, *supra* note 6, at 2096; *see also* Ring, *supra* note 23, at 398–99 (“Four U.S. Supreme Court Justices (Rutledge, Brandeis, Rehnquist, and Souter) were commissioners.”).

30. *Cf.* White, *supra* note 6, at 2096 (noting that the Commissioners “have a more intellectual interest in uniform law than would a typical legislator”).

31. Fred H. Miller, *The Future of Uniform State Legislation in the Private Law Area*, 79 *MINN. L. REV.*

3. Areas in Which Uniform Laws May Not Be Effective

The ULC's stated purpose is "to promote uniformity in the law among the several States on subjects as to which uniformity is desirable and practicable."³² Although the ULC has historically eschewed a forward-looking approach with respect to the policies it puts forth, its mission extends beyond "merely codify[ing]" existing law among the states.³³ To date, the ULC has drafted over three hundred uniform laws.³⁴ Many of these laws have been met with widespread enactment,³⁵ while others have failed to achieve adoption by a single state legislature.³⁶ One of the reasons cited for the failures of certain uniform acts, especially in the areas of marriage and divorce, is the high degree of "diversity of local custom among the states."³⁷ Compounding this problem is the fact that Commissioners are not in touch with organized interest groups that shape, for better or worse, the legislative process at the state and federal levels.³⁸ The ULC is thus left to draft laws "without explicit current input from interested constituents, and, in some cases, without even a clear understanding of the identity of all the interested parties."³⁹

Of the more than 300 uniform acts published, 107 have been enacted in fewer than 10 states.⁴⁰ A study also revealed that "[o]n average, an NCCUSL proposal is adopted by just over 20 (out of a possible 53) states or territories."⁴¹ This study goes on to find that the "median number of adoptions is 17" and "only 8 of the 103 proposals have been adopted by 50 or more states."⁴² There are currently uniform laws in place for, *inter alia*, commercial transactions, marriages and divorces, and simultaneous death.⁴³

Although uniform legislation can be beneficial in many instances, the ULC has generally been careful not to propose uniformity in areas of the law that remain unsettled.⁴⁴ Ideally, uniform laws are designed to "represent the 'best' way in which to

861, 866 (1995).

32. UNIFORM LAW COMMISSION CONST., art. I, § 2.

33. White, *supra* note 6, at 2099.

34. *Frequently Asked Questions*, UNIFORM LAW COMMISSION, <http://www.uniformlaws.org/Narrative.aspx?title=Frequently%20Asked%20Questions> (last visited June 18, 2013).

35. See, e.g., Kobayashi & Ribstein, *supra* note 10, at 330 (referring to the universally adopted Uniform Commercial Code as the NCCUSL's "signature product"); see also *Frequently Asked Questions*, *supra* note 34 ("Among the most widely adopted uniform acts are the Uniform Commercial Code, Uniform Anatomical Gift Act, Uniform Fraudulent Transfer Act, Uniform Interstate Family Support Act, Uniform Enforcement of Foreign Judgments Act, and the Uniform Transfers to Minors Act.").

36. Marion W. Benfield, Jr., *Wasted Days and Wasted Nights: Why the Law Acts Failed*, 20 NOVA L. REV. 1037, 1040 (1996).

37. Dunham, *supra* note 7, at 245.

38. See Patchel, *supra* note 25, at 128–30 (listing the ways in which the NCCUSL suffers from its low interest group visibility and accessibility).

39. White, *supra* note 6, at 2131.

40. *Id.* at 2103.

41. Ribstein & Kobayashi, *supra* note 24, at 134.

42. *Id.* at 134–35.

43. U.C.C. (amended 2012); UNIF. MARRIAGE & DIVORCE ACT (amended 1973), 9A U.L.A. 147 (1996); UNIF. SIMULTANEOUS DEATH ACT, 8 U.L.A. 557 (amended 1993).

44. See Miller, *supra* note 31, at 867 (noting that the ULC avoids legislating subjects where experience

regulate the particular subject matter involved.”⁴⁵ Subjects that feature wide disagreement among the states, raise novel questions of law, or are inherently controversial are generally not appropriate uniform law candidates.⁴⁶ In its Statement of Policy Relating to Consideration of Acts, the ULC notes that when considering new uniform laws it should “avoid consideration of subjects that are . . . controversial because of disparities in social . . . or political policies or philosophies among the states.”⁴⁷ Additionally, and most importantly, uniform law proposals should have a sufficiently strong chance of getting adopted by a majority of state legislatures before being introduced.⁴⁸

B. The Evolution of the Uniform Probate Code

As one author notes, “[t]he primary purpose of the UPC is to serve as a device for achieving statutory reform.”⁴⁹ Historically, the country’s probate system has resembled a hodgepodge of state laws that often involved highly complex procedures for settling estates.⁵⁰ Because individuals tended to remain in one state for the majority of their lives, the need for similar probate laws among the states was not considered a worthwhile endeavor.⁵¹ With advances in transportation and technology, however, states became more socially and economically interdependent leading to an increased emphasis on uniform probate laws.⁵²

1. The Need for Uniform Probate Law

The divergent state probate laws also poorly reflected the contemporary realities of a more modern society.⁵³ This lack of uniformity among the various states not only caused “unjust results but also an inherent confusion and distrust among a very mobile

is unavailable).

45. Patchel, *supra* note 25, at 92.

46. Miller, *supra* note 31, at 866–67.

47. *Criteria for New Projects*, UNIFORM LAW COMMISSION, <http://www.uniformlaws.org/Narrative.aspx?title=Criteria%20for%20New%20Projects> (last visited June 18, 2013).

48. Miller, *supra* note 31, at 866 (“[A] proposed law must be perceived to have a reasonable probability of enactment in a substantial number of jurisdictions or the potential to promote uniformity indirectly through case law or legal education.”).

49. Roger W. Andersen, *The Influence of the Uniform Probate Code in Nonadopting States*, 8 U. PUGET SOUND L. REV. 599, 601 (1985).

50. Richard V. Wellman, *The Uniform Probate Code: Blueprint for Reform in the 70’s*, 2 CONN. L. REV. 453, 455–56 (1970).

51. *Cf.* 2010 HANDBOOK, *supra* note 8, at 775 (identifying the rise of “interstate transportation” as a primary motivation for uniformity amongst the states).

52. *See id.* at 775–76 (explaining that a “confusion or difference of laws” could lead to “a deterrent to the free flow of goods, credit, services, and persons among the States; restrain full economic and social development; disrupt personal planning; and generate pressures for federal intervention to compel uniformity”).

53. *See* Lawrence H. Averill, Jr., *An Eclectic History and Analysis of the 1990 Uniform Probate Code*, 55 ALB. L. REV. 891, 895 (1992) (commenting on the various changes American society has undergone including urbanization, greater frequency of divorce and remarriage, and a greater emphasis on “ownership of personal property and other contractual relationships”).

lay populace.”⁵⁴ Although “poor communication and family immobility were the order of the day” a century ago, by midcentury the country increasingly demanded a more uniform and predictable state probate system.⁵⁵

2. The 1946 Model Probate Code

The first attempt at a national uniform system of probate laws came in the form of the Model Probate Code in 1946 (Model Code).⁵⁶ The Model Code was the result of a joint project between the American Bar Association’s Section of Real Property, Probate, and Trust Law and the University of Michigan Law School.⁵⁷ Several reasons were cited for the need to improve the country’s piecemeal probate system.⁵⁸ Most notably, the Model Code’s drafters focused on states’ “outmoded judicial organization[s]” and their effects on “breed[ing] delay and injustice” on the country’s judicial system.⁵⁹ As Norman Dacey famously argued in his groundbreaking book, *How to Avoid Probate*, “probate law and procedure are archaic, needlessly complex, and exist principally for the benefit of lawyers and probate judges.”⁶⁰ The Model Code responded to the concerns raised by Dacey and others by focusing primarily on “the improvement of probate procedure wherever revision of probate legislation is sought.”⁶¹ As one author noted, the Model Code was “a major effort to bring some national order out of [the country’s] chaotic probate laws.”⁶² While the Model Code was silent on the goal of uniformity, it was a necessary first step towards the ultimate promulgation of the UPC in 1969.⁶³

3. The 1969 Uniform Probate Code

Unlike the Model Probate Code, the UPC aimed to be “more comprehensive in coverage” and “offered a more viable package for influencing and affecting modern probate legislation.”⁶⁴ The UPC drafting process began in full in 1962 as a joint enterprise between the Real Property, Probate, and Trust Law Section of the American Bar Association (ABA) and the ULC. The project marked “the first major effort at

54. Lawrence H. Averill, Jr., *Wyoming’s Law of Decedents’ Estates, Guardianship and Trusts: A Comparison with the Uniform Probate Code—Part I*, 7 LAND & WATER L. REV. 169, 170 (1972) (footnote omitted).

55. *Probate Code Summary*, UNIFORM LAW COMMISSION, <http://www.uniformlaws.org/ActSummary.aspx?title=Probate%20Code> (last visited June 18, 2013); see also Ribstein & Kobayashi, *supra* note 24, at 150 (noting that the UPC has reduced the cost of determining what state law applies at death).

56. MODEL PROBATE CODE (1946).

57. Max Rheinstein, *The Model Probate Code: A Critique*, 48 COLUM. L. REV. 534, 534 (1948).

58. LEWIS M. SIMES & PAUL E. BASYE, PROBLEMS IN PROBATE LAW: INCLUDING A MODEL PROBATE CODE 9 (1946).

59. *Id.*

60. Richard V. Wellman, *Uniform Probate Code: A Possible Answer to Probate Avoidance*, 44 IND. L.J. 191, 192 (1969). See NORMAN F. DACEY, *HOW TO AVOID PROBATE!* 23–30 (5th ed. 1993).

61. SIMES & BASYE, *supra* note 58, at 10.

62. Richard V. Wellman, *The New Uniform Probate Code*, 56 A.B.A. J. 636, 637 (1970).

63. SIMES & BASYE, *supra* note 58, at 10.

64. Averill, *supra* note 53, at 896.

serious promotion of the policy of uniformity among state family property laws.”⁶⁵ Ultimately, the 1969 UPC aimed to “provide suitable rules for the person of modest means who relies on the estate plan provided by law,”⁶⁶ and resolve conflicting legal issues among the states.

A secondary purpose motivating the desire for probate uniformity was the country’s strong “antiprobate sentiment” during the 1960s.⁶⁷ Many Americans associated the probate process with inefficiency, waste, and undue expense.⁶⁸ As one reporter noted in the *National Observer*, “probate is a lackluster, death-oriented subject, and that could be the biggest obstacle to reform in most states. . . . [It] looks so cumbersome and complicated that most state legislators are terrified of tampering with it.”⁶⁹ Cognizant of the overwhelmingly negative perception of the probate process, the ULC promulgated its 1969 proposal in the hopes of reforming intestacy law to better reflect donative intent and ease of estate administration.⁷⁰ Despite being adopted by just twenty states, the UPC is frequently cited as one of the ULC’s most successful uniform law projects.⁷¹ This relatively low number of state adoptions should not, however, be viewed as a failure; rather, many states which declined to adopt the UPC as a whole have relied extensively on the UPC as a model in updating their own probate laws.⁷²

4. The 1990 UPC

Although the 1969 UPC was generally effective in standardizing the various probate systems among the states, it failed to keep up with the country’s changing social norms, particularly the evolving definition of “family.” In the Code’s most significant revision since its adoption,⁷³ the 1990 UPC sought to address this problem by “bringing [intestacy law] into line with *developing public policy*.”⁷⁴ More specifically, the 1990 UPC aimed to “refin[e] the 1969 Uniform Probate Code’s

65. *Probate Code Summary*, *supra* note 55.

66. UNIF. PROBATE CODE art. II, pt. 1, gen. cmt. (Supp. 2011).

67. PAULA A. MONOPOLI, *AMERICAN PROBATE: PROTECTING THE PUBLIC, IMPROVING THE PROCESS* 61 (2003).

68. *See* Averill, *supra* note 53, at 894 (“The perception of a substantial percentage of non-lawyers is that the word ‘probate’ refers to a system reeking of unnecessary costs and delays.” (footnote omitted)); UNIFORM PROBATE CODE PRACTICE MANUAL xi (Richard V. Wellman ed., 2d ed. 1977) (“[T]he UPC is intended to provide ways in which the time [involved in probating a will or administering an estate] may be substantially shortened, the procedure simplified and the expense lessened.”).

69. ARMSTRONG, *supra* note 21, at 99.

70. UNIF. PROBATE CODE art. II, pt. 1, gen. cmt., 8 U.L.A. 271 (1969).

71. 2010 HANDBOOK, *supra* note 8, at 977 (providing a chart detailing the number of state enactments of the UPC as of September 30, 2010). Currently, eight states have adopted the UPC in full, nine have enacted an amended version, and three have enacted a substantially similar version. *Id.*

72. *See* NCCUSL, HANDBOOK OF THE NATIONAL CONFERENCE OF COMMISSIONERS ON UNIFORM STATE LAWS AND PROCEEDINGS OF THE ANNUAL CONFERENCE IN ITS 117TH YEAR 775 (2008) [hereinafter 2008 HANDBOOK] (noting that the “Uniform Probate Code [has] served as a model or an inspiration for [nearly all] jurisdictions”).

73. *See* Lawrence W. Waggoner, *The Multiple-Marriage Society and Spousal Rights Under the Revised Uniform Probate Code*, 76 IOWA L. REV. 223, 225 (1991) (claiming that the “revisions of Article II are far reaching”).

74. UNIF. PROBATE CODE art. II, pt. 1, gen. cmt. (emphasis added).

intestacy provisions so that the intestacy scheme reflect[ed] the realities of modern families and the wishes of decedents who lived in such families.”⁷⁵ An equally important goal of the revisions was to promote “simplicity and certainty in succession law.”⁷⁶

One of the more prominent changes between the 1969 and 1990 versions involved the increase in a surviving spouse’s elective share. The 1969 UPC provided a surviving spouse with one-third of the decedent’s augmented estate.⁷⁷ By contrast, the 1990 UPC was modified “to reflect changing marital patterns and to incorporate the economic partnership theory of marriage into the UPC.”⁷⁸ Consistent with this more modern view that spouses contribute equally to the marital unit, the 1990 UPC increased the surviving spouse’s elective share to fifty percent of the couple’s augmented estate.⁷⁹

The 1990 UPC also highlighted four themes on which it intended to focus reform.⁸⁰ The third theme, and the one most relevant to this Comment, addressed the “advent of the multiple-marriage society.”⁸¹ Although the drafters were primarily concerned with the increased prevalence of second marriages and, specifically, the rights of stepchildren that result from such marriages,⁸² one commentator noted, more broadly, that “[o]ne of the main objectives of the project was to develop sensible probate rules for the altered and ever-changing climate of marital behavior.”⁸³

5. The 2008 UPC

In 2008, the UPC was revised once again, this time with speculation that it would

75. E. Gary Spitko, *The Expressive Function of Succession Law and the Merits of Non-Marital Inclusion*, 41 ARIZ. L. REV. 1063, 1070 (1999).

76. *Id.* at 1076; see also Mary Louise Fellows, *Traveling the Road of Probate Reform: Finding the Way to Your Will (A Response to Professor Ascher)*, 77 MINN. L. REV. 659, 660 (1993) (noting that “two of the primary goals of probate reform are to reduce litigation and to facilitate estate planning”).

77. UNIF. PROBATE CODE art. II, pt. 2, gen. cmt.

78. G. Bryan Ulmer III, *Trusts & Estates—Spousal Disinheritance—Intervivos Trusts and Wyoming’s Spousal Elective Share*. *Briggs v. Wyoming National Bank*, 836 P.2d 263 (Wyo. 1992), 29 LAND & WATER L. REV. 323, 332 (1994).

79. See UNIF. PROBATE CODE art. II, pt. 1, gen. cmt. (1990) (noting that under the partnership theory of marriage, “the economic rights of each spouse are seen as deriving from an unspoken marital bargain under which the partners agree that each is to enjoy a half interest in the fruits of the marriage”).

80. UNIF. PROBATE CODE art. II, prefatory note. The four themes cited include:

(1) the decline of formalism in favor of intent-serving policies; and (2) the recognition that will substitutes and other inter-vivos transfers have so proliferated that they now constitute[d] a major, if not the major, form of wealth transmission; (3) the advent of the multiple-marriage society, resulting in a significant fraction of the population being married more than once and having stepchildren and children by previous marriages and (4) the acceptance of a partnership or marital-sharing theory of marriage.

Id. See also UNIF. PROBATE CODE § 1-102(b) (2012) (noting that “(t)he underlying purposes and policies of this Code are: (1) to simplify and clarify the law concerning the affairs of decedents . . . ; (2) to discover and make effective the intent of a decedent in distribution of his property; (3) to promote a speedy and efficient system for liquidating the estate of the decedent and making distribution to his successors; (4) to facilitate use and enforcement of certain trusts; (5) to make uniform the law among the various jurisdictions”).

81. UNIF. PROBATE CODE art. II, prefatory note (amended 2010).

82. *Id.*

83. Waggoner, *supra* note 73, at 224–25.

potentially address the increasing presence of same-sex couples in American society.⁸⁴ The revisions further focused on the changing definition of “family,” specifically with respect to artificial reproductive technology and adoption.⁸⁵ However, the UPC skirted the issue of including domestic partnerships and same-sex couples in its intestacy provisions, despite the recognition that the UPC needed to do more for “developing . . . family relationships.”⁸⁶ Many wondered how the UPC could ignore the obvious progress same-sex couples had made in terms of societal acceptance and state-sanctioned protection for such relationships.⁸⁷ For example, since the UPC’s last major revision in 1990, several states had legalized gay marriage and/or enacted other “relationship recognition laws,” including those sanctioning civil unions and domestic partnerships.⁸⁸ To some, the “exclusion [of same-sex couples] suggest[ed] that the [UPC] erroneously adhere[d] 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.”⁸⁹

C. *Intestacy Rights for Same-Sex Couples*

Before analyzing how intestacy statutes have failed to accommodate the interests of same-sex committed partners, it is necessary to first describe the intestacy system itself. The Supreme Court defines intestacy as a “statutory creation”⁹⁰: state law governs how property will distribute after the death of an individual who failed, for whatever reason, to execute a valid will, or executed a will which failed to successfully dispose of all of her property.⁹¹ In other words, intestacy laws are “designed to effect the orderly distribution of property for decedents who lacked either the foresight or the diligence to make wills.”⁹² These laws are meant to effectuate the typical decedent’s

84. See UNIF. PROBATE CODE art. II, pt. 1, gen. cmt (amended 2010) (declaring that the 2008 revision was “intended to . . . [reflect] developing public policy and *family relationships*” (emphasis added)); Sabrina Tavernise, *New Numbers, and Geography, for Gay Couples*, N.Y. TIMES, Aug. 25, 2011, at A1 (reporting that the number of same-sex couples in America increased twofold (to 901,997) in the last decade).

85. Lee-ford Tritt, *Technical Correction or Tectonic Shift: Competing Default Rule Theories Under the New Uniform Probate Code*, 61 ALA. L. REV. 273, 276 (2010). As Professor Tritt notes, “in 2008 the UPC did not revise its notions of family across the board. For example, the drafters [were] conspicuously silent regarding the UPC’s recognition of domestic partnerships in addition to spousal relationships (even though partnerships are increasingly recognized by states for both gay couples and unmarried heterosexual couples).” *Id.* at 276 n.8.

86. UNIF. PROBATE CODE art. II, pt. 1, gen. cmt (amended 2010).

87. See *Defining Marriage: Defense of Marriage Acts and Same-Sex Marriage Laws*, NAT’L CONF. OF ST. LEGISLATURES, <http://www.ncsl.org/issues-research/human-services/same-sex-marriage-overview.aspx> (last updated May 15, 2013) (showing that twelve states and the District of Columbia currently allow same-sex marriage and fourteen states currently provide other degrees of protection in the form of civil unions and domestic partnerships).

88. See HUMAN RIGHTS CAMPAIGN, MARRIAGE EQUALITY AND OTHER RELATIONSHIP RECOGNITION LAWS 1 (2013), available at http://www.hrc.org/files/assets/resources/marriage_equality_laws_062013.pdf (detailing which states have passed marriage equality and relationship recognition laws).

89. Jennifer Seidman, *Functional Families and Dysfunctional Laws: Committed Partners and Intestate Succession*, 75 U. COLO. L. REV. 211, 224 (2004).

90. *Irving Trust Co. v. Day*, 314 U.S. 556, 562 (1942).

91. *United States v. Fox*, 94 U.S. 315, 320–21 (1876).

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

wishes with respect to the distribution of her estate upon death.⁹³ Of course, predicting the intent of every individual who dies intestate is an impossible challenge for state legislatures, and oftentimes fails to carry out the average decedent's wishes. For instance, in states where same-sex committed couples are not eligible to legally marry or obtain spousal-like relationship recognition, the default inheritance rules will generally provide for the decedent's next of kin over her committed partner.⁹⁴

1. Spousal Primacy

The typical intestacy statute, or probate code, protects the surviving spouse above all other heirs.⁹⁵ Over time, the spousal share in most states' intestacy statutes has increased to at least one-half of the decedent's estate⁹⁶ and in many states the surviving spouse inherits the entire intestate estate.⁹⁷ The UPC takes the same approach by permitting only *legal* spouses to inherit from a decedent's estate.⁹⁸ Unfortunately, for many individuals in a same-sex relationship who are unable to marry or enter into a civil union or domestic partnership, intestacy law has the effect of denying a surviving partner any share of the decedent's estate.⁹⁹ Because most same-sex committed partners would prefer to leave the bulk of their estates to their "surviving partners,"¹⁰⁰ this scheme violates the cardinal rule of intestate succession law, which is to "giv[e] effect to the probable intent of the decedent and protect[] those whom the decedent treated as family."¹⁰¹ At least one major survey supports this viewpoint, finding that a

93. See RALPH C. BRASHIER, *INHERITANCE LAW AND THE EVOLVING FAMILY* 4 (2004) (noting that the primary goal of any intestacy statute is to "determine how the *typical* person domiciled in the state would want his estate to be divided").

94. See Ronald J. Scalise, Jr., *New Developments in United States Succession Law*, 54 AM. J. COMP. L. 103, 104 (2006) ("[H]omosexual couples, even those in long-term committed relationships, have been denied characterization as surviving spouses under state succession laws.").

95. See, e.g., 20 PA. STAT. ANN. § 2102(1) (West 2013) (finding that if there are no surviving children or parents, the decedent's entire intestate estate passes to the surviving spouse).

96. JESSE DUKEMINIER ET AL., *WILLS, TRUSTS, AND ESTATES* 76 (8th ed. 2009).

97. See, e.g., ALASKA STAT. ANN. § 13.12.102(a)(1) (West 2013) (noting that the surviving spouse inherits the entire intestate estate if "(A) no descendant or parent of the decedent survives the decedent; or (B) 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") TEX. PROB. CODE ANN. § 38(b)(2) (West 2013) (providing that a surviving spouse inherits the entire estate if "the deceased has neither surviving father nor mother nor surviving brothers or sisters, or their descendants"); see also Lawrence W. Waggoner, *Marital Property Rights in Transition*, 59 MO. L. REV. 21, 38 (1994) ("The 1990 Code continues the pattern of giving the surviving spouse the entire estate when the decedent is not survived by descendants or parents. It goes further, however, and provides that the surviving spouse also receives the entire estate when the decedent is survived by descendants, as long as those descendants are also the descendants of the surviving spouse and the surviving spouse has no descendants who are not the decedent's.").

98. UNIF. PROBATE CODE art. II, pt. 1, gen. cmt. (amended 2010).

99. See Frances H. Foster, *The Family Paradigm of Inheritance Law*, 80 N.C. L. REV. 199, 207 (2001) ("[T]he law ignores those in intimate, dependent relationships with the decedent to confer windfalls on distant relatives who may not even have known the decedent.").

100. See Mary Louise Fellows et al., *Committed Partners and Inheritance: An Empirical Study*, 16 LAW & INEQ. 1, 38–39 (1998) (finding that 64.7% of respondents surveyed would give their entire estate to their partner).

101. DUKEMINIER, *supra* note 96, at 77.

“decendent formerly in a long-term committed homosexual relationship would likely favor his same-sex partner as the recipient of the bulk of his estate, as would occur within a [legally recognized] marriage.”¹⁰² At least one scholar sees the UPC’s omission of an intestate share for a surviving same-sex partner as a “glaring inconsistency” with the UPC’s “primary value of promoting donative freedom.”¹⁰³

2. DOMA’s Limits on Same-Sex Spousal Rights

Congress enacted the Defense of Marriage Act (DOMA) on September 21, 1996, effectively “allow[ing] states to refuse to recognize same-sex marriage or its equivalent notwithstanding the requirements of the Full Faith and Credit Clause” of the U.S. Constitution.¹⁰⁴ Forty-four states followed the federal government’s lead and enacted so-called “mini-DOMAs,” which are state-based analogues to the federal DOMA statute.¹⁰⁵ Many of the state DOMAs do not stop at marriage, but prohibit civil unions, domestic partnerships, or any other “incidents of marriage” that apply to same-sex couples.¹⁰⁶ Due to “widespread state and federal public policy disfavoring same-sex marriages and civil unions,”¹⁰⁷ many gay couples are denied important inheritance benefits by virtue of DOMA and its progeny.

3. Current Intestacy Law Fails to Effectuate Intent for Same-Sex Couples

Much has been written about intestacy law’s failure to account for the changing definition of “family” in American society.¹⁰⁸ Intestacy statutes serve multiple purposes including, (1) furthering donative freedom, (2) promoting fairness, and (3) protecting the family.¹⁰⁹ They are also intended to “shape [societal] norms and values by recognizing and legitimating relationships.”¹¹⁰ Despite the prevalence of unmarried

102. *E.g.*, Scalise, *supra* note 94, at 105; *see also* Fellows et al., *supra* note 100, at 89 (“A substantial majority [of same-sex couples] . . . preferred [their] partner to take a share of the decedent’s estate.”).

103. Spitko, *supra* note 75, at 1075–76; *see also* X. Brian Edwards, Note, *True Donative Freedom: Using Mediation to Resolve the Disparate Impact Current Succession Law Has on Committed Same-Gender Loving Couples*, 23 OHIO ST. J. ON DISP. RESOL. 715, 719 (2008) (noting that the UPC’s omission of “same-gender loving couples” fails to afford them “the same level of protection as their heterosexual counterparts”).

104. Christine A. Hammerle, Note, *Free Will to Will? A Case for the Recognition of Intestacy Rights for Survivors to a Same-Sex Marriage or Civil Union*, 104 MICH. L. REV. 1763, 1772 (2006).

105. Nancy J. Knauer, *Same-Sex Marriage and Federalism*, 17 TEMP. POL. & CIV. RTS. L. REV. 421, 432–33 (2008).

106. *Id.* at 433. These so-called “DOMAs with teeth” are in place in nineteen states which include Alabama, Arkansas, Florida, Georgia, Kentucky, Idaho, Louisiana, Michigan, Nebraska, North Carolina, North Dakota, Ohio, Oklahoma, South Carolina, South Dakota, Texas, Utah, Virginia, and Wisconsin. *Id.* at 434 n.106; *see also* HUMAN RIGHTS CAMPAIGN, STATEWIDE MARRIAGE PROHIBITIONS (2013), available at http://www.hrc.org/files/assets/resources/marriage_prohibition_laws_052013.pdf (explaining that as of June 2013, thirty states have adopted state constitutional amendments restricting marriage to one man and one woman, with an additional six states having passed a state law with the same restriction).

107. Hammerle, *supra* note 104, at 1772.

108. *See, e.g.*, BRASHIER, *supra* note 93, at 2 (noting that “many default inheritance rules in the United States still address only the traditional family”); Fellows et al., *supra* note 100, at 5–6 (“The increasing prevalence of committed relationships is reason enough to ask whether state intestate statutes need reform.”).

109. Fellows et al., *supra* note 100, at 8.

110. *Id.*

cohabitants, same-sex couples, and multiple-marriage relationships in American society, state intestacy laws still reflect a retrograde family scheme, where U.S. households are naturally presumed to comprise a father, a mother, and 2.5 children.¹¹¹ Statutes that operate under this type of “nuclear family” paradigm compromise the central purpose of modern intestacy law, which is to effectuate the presumed donative intent of the decedent.¹¹² As one commentator argues:

In view of the diversity and complexities of contemporary family relations created by adoptions, multiple marriages, and single parenthood, plus the increasing prevalence of unmarried domestic partners and new reproductive technologies, it is not easy to discern what the average person (the hypothetical intestate decedent) would want in many of these situations.¹¹³

If reflection of donative intent is the driving principle behind modern intestacy statutes, then the denial of inheritance rights to same-sex couples would appear to significantly frustrate that purpose.¹¹⁴ On average, the percentage of individuals with same-sex partners who would prefer to leave their partner their entire estate (64.7%) is nearly equivalent to the proportion of opposite-sex spouses who would do the same (70.8%).¹¹⁵ Yet if a same-sex partner is one of the fifty-five percent of American adults who die without a will,¹¹⁶ her surviving partner would have no legal claim to the decedent’s property under most state probate schemes under the UPC.¹¹⁷ As one commentator contended, this type of intestacy scheme perpetuates “an antiquated view of family and completely ignores the ever-growing population of [gay and lesbian couples] in this country.”¹¹⁸

4. *In re Estate of Cooper*

While the future of spousal recognition for gay couples continues to improve, the current reality is undeniably mixed, particularly in the area of same-sex intestacy rights. Because the rights of intestate succession hinge on the legal definition of “spouse,” gays and lesbians who live in the majority of states that preclude spousal recognition of

111. See BRASHIER, *supra* note 93, at 3 (noting that traditional families refer to a “family headed by a husband and wife (a) whose only children are their combined genetic offspring and (b) who have not used any form of reproductive technology to procreate” and how that “often conflicts with modern societal attitudes about the family structure”).

112. See DUKEMINIER, *supra* note 96, at 75 (noting that the “primary policy of [an intestacy statute] is to carry out the probable intent of the average intestate decedent”).

113. *Id.* at 101.

114. See Fellows et al., *supra* note 100, at 38 (finding that when asked whether they would leave a portion of their estate to their surviving partner if they were to die intestate, 64.7% said they would “give the partner [their] entire estate”).

115. *Id.* at 40.

116. See Press Release, LexisNexis, Majority of American Adults Remain Without Wills, New Lawyers.com SM Survey Finds (Apr. 3, 2007), available at <http://www.lexisnexis.com/about/releases/0966.asp> (finding that over fifty-five percent of “all adult Americans do not have a will . . . a percent that has remained virtually unchanged over the past three years”).

117. See UNIF. PROBATE CODE § 2-102 (amended 2010) (providing for the surviving spouse in a lawfully-recognized marriage, but failing to provide for a surviving same-sex partner).

118. Peter J. Harrington, Comment, *Untying the Knot: Extending Intestacy Benefits to Non-Traditional Families by Severing the Link to Marriage*, 25 J. CIV. RTS. & ECON. DEV. 323, 345–46 (2011).

same-sex couples are categorically denied those rights. *In re Estate of Cooper*¹¹⁹ is the leading case addressing this issue. There, Mr. Chin, the surviving same-sex partner of the decedent who died intestate, claimed an elective share against his partner's estate.¹²⁰ Chin argued that he should be allowed to claim the spousal right of election because "except for the fact that we were of the same sex, our lives were identical to that of husband and wife."¹²¹ The court, however, found that the plaintiff lacked standing to elect against Cooper's estate because "the survivor of a same-sex, spousal-type relationship cannot assert [statutory] spousal rights."¹²²

Although the New York state legislature granted an elective share to a surviving spouse "without definition," the term "surviving spouse" is elsewhere defined as "being a *husband* or a *wife*," which does not apply to gay couples.¹²³ Citing the compelling state interest in "fostering the traditional institution of marriage," the court concluded that granting spousal rights to same-sex partners would constitute "impermissible judicial legislating" and violate "the public policy expressed by [the] Legislature."¹²⁴ *Cooper* was later affirmed by the Supreme Court, Appellate Division, again finding that the term "surviving spouse" could not be "interpreted to include homosexual life partners."¹²⁵

Although New York State has legalized gay marriage since *Cooper*,¹²⁶ the court's holding continues to symbolize the significant challenges gay couples face when attempting to assert spousal rights in states that do not formally recognize same-sex relationships. In the area of intestacy, unless gay partners prospectively create valid wills or establish some other "voluntary protection[, . . . the survivor of . . . an unmarried [homosexual] couple . . . stands completely without inheritance rights."¹²⁷ The effect of antirecognition laws existent in most states is that same-sex partners remain "mere legal stranger[s]" to one another for purposes of intestate succession.¹²⁸

119. 564 N.Y.S.2d 684 (N.Y. Sur. Ct. 1990).

120. *Cooper*, 564 N.Y.S.2d at 687–88.

121. *See id.* at 685 (explaining Chin's perspective that "[w]e kept a common home; we shared expenses; our friends recognized us as spouses; we had a physical relationship").

122. *Id.* at 688.

123. *Id.* (citing N.Y. EST. POWERS & TRUSTS LAW § 5-1.2(a) (McKinney 2013)).

124. *Id.*

125. *In re Cooper*, 592 N.Y.S.2d 797, 799 (N.Y. App. Div. 1993).

126. *See* N.Y. DOM. REL. LAW § 10-a(1) (McKinney 2013) ("A marriage that is otherwise valid shall be valid regardless of whether the parties to the marriage are of the same or different sex."); Nicholas Confessore, *Beyond New York, Gay Marriage Faces Hurdles*, N.Y. TIMES, June 26, 2011, at A1 (reporting the legalization of same-sex marriage in New York "carries enormous symbolic importance for the same-sex-marriage movement").

127. Sol Lovas, *When Is a Family Not a Family? Inheritance and the Taxation of Inheritance Within the Non-Traditional Family*, 24 IDAHO L. REV. 353, 363 (1988).

128. *See* NANCY J. KNAUER, GAY AND LESBIAN ELDERS: HISTORY, LAW, AND IDENTITY POLITICS IN THE UNITED STATES 98–99 (2011) (noting that "[i]f a same-sex partner dies without a will, the rules of intestate succession will generally distribute the partner's property to the partner's closest relatives," leaving the surviving spouse with nothing).

D. *Proposals for Expanding Intestacy Rights for Same-Sex Couples*

Given society's trend towards "nontraditional" family relationships, many in the gay and lesbian community were surprised by the omission of defined rights for domestic partners and same-sex couples in the 1990 UPC.¹²⁹ To some, the exclusion was viewed as a "message that gay and lesbian relationships are insignificant or unsuitable for recognition."¹³⁰ One common argument for the omission was that "[a]t the time of the 1990 revisions, . . . the drafters [did not] have enough experience or empirical data to support what would then have been considered a revolutionary idea."¹³¹ As gay relationships began to occupy a more prominent place in the American landscape, however, the notion of intestacy rights for gay couples became less "revolutionary," prompting scholars to propose reforms to the UPC that would make it less discriminatory towards nontraditional family relationships.

1. The Waggoner Proposal

The first major attempt at a more inclusive UPC came from Lawrence Waggoner's landmark article, *Marital Property Rights in Transition*, which featured a model statute addressing intestacy rights of gay and lesbian committed partners.¹³² Recognizing the UPC's lack of protections for surviving committed partners (i.e., individuals who were not "spouses" under the law but lived their lives as such), Professor Waggoner drafted his statutory proposal to incorporate an intestate share for "nontraditional" spouses.¹³³ In short, Waggoner's proposal was designed to protect those couples that lacked "spousal status," either because they were precluded from entering into a legal marriage or because they simply preferred unmarried cohabitation.¹³⁴

At least one commentator has argued that requiring spousal status before granting an intestate share is necessary for the maintenance of an efficient and predictable

129. See Fellows et al., *supra* note 100, at 5 (noting that, despite empirical data suggesting a significant rise in same-sex relationships, "one area in which there has been little or no legislative or political attention regarding committed couples has been that of intestacy laws"); Spitzko, *supra* note 75, at 1104 (labeling the 1990 UPC "a model of heteronormativity").

130. E. Gary Spitzko, *Judge Not: In Defense of Minority-Culture Arbitration*, 77 WASH. U. L. Q. 1065, 1073 n.45 (1999).

131. Spitzko, *supra* note 75, at 1071–72 n.39 (quoting Letter from Professor Lawrence W. Waggoner, Lewis M. Simes Professor of Law, University of Michigan Law School, to Professor Gary Spitzko, Assistant Professor of Law, Indiana University School of Law (June 7, 1999)).

132. See generally Waggoner, *supra* note 97. Professor Waggoner is undeniably the modern champion of a revised Uniform Probate Code. Among his many past titles, Waggoner was the Reporter for the *Restatement (Third) of Property: Wills & Other Donative Transfers*; the Director of Research of the Joint Editorial Board for the UPC; and the Chief Reporter of the revisions to Article II of the UPC. Waggoner is currently the Lewis M. Simes Professor of Law at the University of Michigan Law School. *Waggoner Lawrence W.*, U. MICH. L. SCH., <http://www.law.umich.edu/FacultyBio/Pages/FacultyBio.aspx?FacID=waggoner> (last visited June 18, 2013).

133. Waggoner, *supra* note 97, app. A at 88–91. Nontraditional spouses included gay and lesbian couples, who at that time of publication, were barred from marrying in any state.

134. See BRASHIER, *supra* note 93, at 41 (noting that "the absence of a legally recognized marriage typically means that a surviving partner . . . receives no intestate share or protection from disinheritance").

probate system.¹³⁵ Even Professor Waggoner's comments have lent support to this argument.¹³⁶ While predictability and efficiency have always been important criteria in determining a successful probate scheme, the UPC, as currently written, has the effect of denying millions of committed couples essential inheritance rights that often "mark the difference between economic security and poverty."¹³⁷ This "equality gap" is what likely encouraged Waggoner and others to push for greater intestacy protection for nontraditional committed couples.

2. Model Intestacy Statute

Waggoner's intestacy proposal is divided into two main sections: (1) determining the intestate share of the de facto partner, and (2) defining what constitutes a "marriage-like" relationship by way of a multifactor test.¹³⁸ Under his proposal, if an unmarried decedent dies intestate, her surviving partner receives the first \$50,000 of the estate plus one-half of any balance of the intestate estate, provided she leaves no surviving descendants or parents.¹³⁹ In cases where the decedent *is* survived by a parent or a child from a separate relationship, the surviving spouse receives one-half of the intestate estate.¹⁴⁰ Simply, "for intestate decedents with relatively modest estates, their committed partners receive all or nearly all of their estates."¹⁴¹

Interestingly, the model intestate shares are smaller for "de facto partners" than what the 1990 UPC provides for legal surviving spouses.¹⁴² Waggoner, who thought more diminutive shares would encourage nontraditional couples to seek out "formal" marriage arrangements, recognized the unfair burden this placed on gays and lesbians and suggested that "perhaps the same share [should go] to a surviving de facto partner who, because of gender, was prohibited by law from marrying the decedent."¹⁴³

The second part of Waggoner's proposal delineates a series of factors that could be used to determine "whether a relationship is marriage-like."¹⁴⁴ The factors mirror features of "traditional" spousal relationships, and include, inter alia, the pooling of financial resources, the procreation of children, and whether the couple holds themselves out as committed to one another.¹⁴⁵ The statute also includes a presumption

135. See, e.g., *id.* ("Relying on widely recognized, objective evidence of family structure simplifies administration and renders predictable results—two goals prized in American probate law.")

136. See Waggoner, *supra* note 97, at 62 ("Basing [intestacy] rights on status is not only beneficial to the spouse, but also efficient for society. . . . The marriage certificate itself qualifies the person for what the law allows.")

137. *Id.* at 23.

138. *Id.* at 79.

139. *Id.* The same would result if "all of the decedent's surviving descendants are also descendants of the surviving de facto partner and there is no other descendant of the surviving de facto partner who survives the decedent." *Id.*

140. UNIF. PROBATE CODE § 2-102A (amended 2010).

141. Fellows et al., *supra* note 100, at 24–25.

142. *Id.* at 26 (providing a table that compares "intestate estate to spouse under UPC and intestate estate to partner under Waggoner Working Draft").

143. Waggoner, *supra* note 97, at 80, 81 n.143.

144. *Id.* at 79–80.

145. *Id.*

in favor of a “marriage-like” relationship if any of the following three conditions are met: (1) the couple lived together for at least five years in the six-year period prior to the decedent’s death, (2) the couple registered their status as a domestic partnership, or (3) “[one] individual is the parent of a child of the decedent who, at the decedent’s death, was regularly living in the same household with the decedent and was younger than 18 years of age.”¹⁴⁶

In addition, the statute requires the couple to satisfy four elements before a de facto partner relationship is recognized: (1) the couple must have been unmarried, (2) the couple must have been living together in the same household on a regular basis, (3) the couple must have been in a “marriage-like” relationship, and (4) the relationship must not have violated state consanguinity statutes.¹⁴⁷

Notably, the third element has engendered some criticism. For one, one group of commentators have expressed concern that it “increases the potential of reinforcing heterosexual norms.”¹⁴⁸ Others simply argue that marriage is an “inherently oppressive institution,” and therefore same-sex couples should have the right to reject efforts to emulate it.¹⁴⁹ A third argument might be that the element, standing alone, suffers from inherent vagueness.¹⁵⁰ Despite these critiques, Waggoner’s proposal maintained the perception that it was the “best chance” for gays and lesbians to obtain long-denied inheritance rights.¹⁵¹ Ultimately, however, the ULC declined to adopt Waggoner’s proposal as a UPC amendment, perhaps because its notion of gay and lesbian equality was far ahead of its time. Indeed, it was only a year after Professor Waggoner published his proposal that the Defense of Marriage Act was signed into law.¹⁵²

3. The Gallanis Report

A revived interest in probate reform came in December 2002, when the Joint Editorial Board for Uniform Trust and Estate Acts (JEB) named Thomas P. Gallanis as a “special reporter” to prepare a model statute of the UPC in order to expand inheritance rights for domestic partners.¹⁵³ Highlighting the underlying purpose of his report, Professor Gallanis cited statistics that revealed same-sex couples’ increased

146. *Id.* at 80.

147. *Id.* at 81. Black’s Law Dictionary defines consanguinity as “[t]he relationship of persons of the same blood or origin.” BLACK’S LAW DICTIONARY 322 (9th ed. 2009).

148. *See, e.g.*, Fellows et al., *supra* note 100, at 27 (noting that “a statutory requirement that insists on committed couples ‘mimicking’ marriage may be politically unappealing to LGBT communities”).

149. *E.g.*, BRASHIER, *supra* note 93, at 42–43.

150. *See* GORAN LIND, COMMON LAW MARRIAGE: A LEGAL INSTITUTION FOR COHABITATION 942 (2008) (arguing that these “forms of common law marriage . . . do not serve the interest of clarity”).

151. *See* Fellows et al., *supra* note 100, at 28–29 (commenting that the Waggoner proposal “allows courts to look at the totality of circumstances to determine whether a decedent and an individual claimant had been in a committed relationship”).

152. Defense of Marriage Act, Pub. L. No. 104-199, 110 Stat. 2419 (1996) (codified at 28 U.S.C. § 1738C) (defining marriage as between one man and one woman for purposes of federal law).

153. T.P. Gallanis, *Inheritance Rights for Domestic Partners*, 79 TUL. L. REV. 55, 56 (2004). The model statute was originally written in 1992 in Lawrence W. Waggoner, *Spousal Rights In Our Multiple-Marriage Society: The Revised Uniform Probate Code*, 26 REAL PROP. PROB. & TR. J. 683, 726–28 (1992).

presence and acceptance in American society.¹⁵⁴ Further, his report emphasized that, despite society's improved attitude towards gays and lesbians, inheritance rights continued, anachronistically, to be conferred "on the basis of marriage."¹⁵⁵

The statute and its underlying study were discussed at the February 2004 meetings of the JEB but were not recommended to the ULC for further review.¹⁵⁶ Gallanis's proposal not only borrowed from Lawrence Waggoner's 2002 report but also drew on several other sources.¹⁵⁷ Although the JEB ultimately decided that approving statutory language was beyond its authority, the JEB encouraged Gallanis to complete the report in hopes that it would further illuminate the issue for state legislatures and other stakeholders.¹⁵⁸

The report's overarching thesis was on how the law should define "domestic partner" for inheritance purposes.¹⁵⁹ To answer this question, Gallanis proposed two options: (1) state-based registration, or (2) a multifactor test similar to the Waggoner proposal.¹⁶⁰ Gallanis' report also addressed the definition of the "domestic partnership period."¹⁶¹ This is significant because "[d]etermining the length of this period will be important in connection with the elective share, if, as in the Uniform Probate Code, the survivor's rights are based on the length of the marriage."¹⁶² Although uncertain whether his report would ultimately become part of the UPC, Gallanis concluded his proposal with a plea to state legislatures, and presumably to the ULC itself: "State law should extend the protections of inheritance to domestic partners for the same reasons those protections exist for spouses: effectuating the decedent's presumed intent, supporting the surviving family, and continuing after death the economic partnership between two people committed to each other."¹⁶³ The issue of same-sex inheritance rights remained moribund until the most recent round of revisions to the UPC took shape in 2008.

154. Gallanis, *supra* note 153, at 58–59. As of 2000, there were approximately 594,000 same-sex partner households in the United States. *Id.* at 59 (citing TAVIA SIMMONS & MARTIN O'CONNELL, U.S. CENSUS BUREAU, MARRIED COUPLE AND UNMARRIED PARTNER HOUSEHOLDS: 2000 4 tbl. 1 (2003)). Today, there are over 646,000 same-sex partner households. Martin O'Connell & Sarah Feliz, *Same-Sex Couple Household Statistics from the 2010 Census* 23 (U.S. Census Bureau, Working Paper No. 2011-26, 2011).

155. Gallanis, *supra* note 153, at 60 ("These rights include the right to a share of the estate if the decedent dies intestate . . . family allowance, protection against intentional disinheritance (traditionally referred to as an 'elective share'), and protection against unintentional disinheritance by a premarital will that the decedent failed to revise after the marriage.").

156. *Id.* at 56.

157. *Id.* at 90. Interestingly, the author notes that the September 11 terrorist attacks were equally motivational in writing the article as it revealed to policymakers—who were attempting to compensate victims' "families"—what "specialists in probate had long known: state inheritance laws provide strong protection for a decedent's surviving spouse but little or none for a decedent's surviving same- or opposite-sex domestic partner." *Id.* at 56.

158. *Id.* Gallanis was quick to mention that in publishing his report in the *Tulane Law Review* he was acting "purely in [his] individual capacity, not as a special reporter to the JEB." *Id.*

159. *Id.*

160. *Id.* at 90.

161. *Id.* at 91.

162. *Id.*

163. *Id.*

III. DISCUSSION

Given the post-DOMA political climate, one may wonder how the law can best guarantee same-sex couples intestacy rights. This Comment addresses why the ULC declined to amend the UPC to provide for same-sex couples, why that was the appropriate decision towards furthering same-sex inheritance rights, and what that says generally about the purpose and function of uniform laws. It also advocates that the next best step is for states to adopt a domestic partner registration system over an ad hoc, multifactor test in order to best determine how inheritance rights are accorded to same-sex couples. To that end, this Comment highlights Hawaii's Reciprocal Beneficiary System as a model for states to adopt regardless of the status of their marriage laws.

A. *Why the ULC Declined to Amend the UPC*

During the 2008 UPC proceedings, the issue of same-sex intestacy rights emerged, somewhat surprisingly, during a discussion regarding artificial reproductive technology, which was a major focus of that year's revisions.¹⁶⁴ During the proceedings, Commissioner Peter F. Langrock (Vermont) vehemently questioned Lawrence Waggoner, the Code's Reporter, about how the UPC planned to address the issue of intestacy for members of civil unions, same-sex marriages, and domestic partnerships.¹⁶⁵ Waggoner responded by drawing attention to the addition of a "legislative note" in the revisions,¹⁶⁶ which encouraged states that lacked relationship recognition laws in place to include those types of unmarried individuals under the heading of "spouse."¹⁶⁷ Langrock argued that the addition of a legislative note did not go far enough and noted that the "time ha[d] come for the Conference to recognize what [was] happening across the country in the gay marriage field, in the civil union field, and to give it support in a positive sense" rather than to merely "duck the issue."¹⁶⁸

While sympathetic to Langrock's concerns—indeed, Waggoner himself had proposed similar reforms to the UPC in his article *Marital Property Rights in Transition* discussed above—he ultimately reasoned that unlike the *Restatement of Property*, which defines "spouse" to include nontraditional relationships, the UPC's

164. Uniform Law Commission, Amendments to Uniform Probate Code Proceedings in the Committee of the Whole (July 18–24, 2008) [hereinafter 2008 Proceedings]; see also Tritt, *supra* note 85, at 303 (noting that "[f]or the first time," the UPC addressed Artificial Reproductive Technology in order to determine parentage for inheritance purposes).

165. See 2008 Proceedings, *supra* note 164, at 77–82.

166. *Id.* A legislative note serves two functions. First, if a UPC state recognizes "unmarried partnerships," the note encourages the state to add that designation after "spouse" in its probate statutes. UNIF. PROBATE CODE, art. II, legislative note (amended 2010). Second, for states that do not recognize same-sex relationships, the note asks that they consider recognizing the relationship should a couple die domiciled in that state. *Id.*

167. UNIF. PROBATE CODE, art. II, legislative note. The note also urged states that do not recognize same-sex marriage and similar relationships to "consider whether to recognize the spousal-type rights that partners acquired under the law of another jurisdiction in which the relationship was formed but who die domiciled in this state." *Id.*

168. 2008 Proceedings, *supra* note 164, at 79.

primary goal is to obtain enactment by state legislatures.¹⁶⁹ According to Waggoner, the major worry in recognizing same-sex relationships in the 2008 UPC was that it would “create a fire storm in a lot of states where the public policy [was] very much against them.”¹⁷⁰ In response, Langrock contended that “relegat[ing] the reality of a gay marriage and a civil union to a footnote in . . . a legislative note [was] not a fair presentation” and urged the ULC to develop an alternate draft that accounted for the growing presence of same-sex relationships in American society.¹⁷¹

B. Why the UPC Is Not the Best Vehicle to Promote Same-Sex Couples' Intestacy Rights

The colloquy between Commissioners Waggoner and Langrock encapsulates the problematic nature of arguing for certain types of reform throughout the UPC rather than through other channels, such as the state legislatures themselves. Langrock, like many scholars, ignored the ULC's central mission, which is to “promote uniformity in the law among the several States on subjects as to which uniformity is desirable and practicable.”¹⁷²

In reaction to the ULC's failure to adopt a committed partners amendment to the UPC, one scholar opined that, “[b]y clinging to certain conventional beliefs that are no longer applicable in contemporary society[,] the UPC [had] compromised the main purpose of its intestacy scheme of presuming a decedent's donative intent.”¹⁷³ Even Professor Gallanis, a former reporter to the UPC, criticized the ULC for being “slow to recognize” that uniform laws “contain default rules that do little or nothing to replicate the likely intent of members of the [gay] community.”¹⁷⁴ This line of criticism, however, is perhaps overly ambitious as to what the UPC—indeed, all uniform laws—can and should accomplish.

While the exclusion of intestate rights for same-sex couples is troubling on many levels, arguing for such reform within the UPC is misplaced. Those who make such arguments perceive the UPC's exclusion of same-sex couples as an affront to the UPC's “self-proclaimed goal of honoring donative intent.”¹⁷⁵ What these critics fail to recognize, however, is that the UPC's influence depends, in large part, on the number of jurisdictions that enact it in some form or another.¹⁷⁶ This feature distinguishes the

169. *Id.* Waggoner echoed these doubts during the Proceedings of the Committee of the Whole by stating that “[b]eyond [a legislative note, the ULC] felt that [it] couldn't do much more without really running into a lot of difficulty in the enacting states.” Uniform Law Commission, Proceedings in Committee of the Whole: Amendments to Intestacy Provisions of the Uniform Probate Code 10 (July 27–Aug. 2, 2007).

170. 2008 Proceedings, *supra* note 164, at 79.

171. *Id.*

172. UNIFORM LAW COMMISSION CONST. art. I, § 1.2.

173. Harrington, *supra* note 118, at 324–25.

174. T.P. Gallanis, *Default Rules, Mandatory Rules, and the Movement for Same-Sex Equality*, 60 OHIO ST. L.J. 1513, 1523 (1999).

175. Seidman, *supra* note 89, at 212 (noting that 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”).

176. *See* Averill, *supra* note 53, at 898 (noting that “only the success in state legislatures” will determine the overall effectiveness of the UPC).

UPC from other nongovernmental law projects, such as restatements, which do not require, or ever anticipate, adoption by state legislatures.¹⁷⁷ Indeed, the *Restatement (Third) of Property* comfortably defines domestic partners as “spouses” for intestacy purposes without threatening the credibility of its publisher, the American Law Institute.¹⁷⁸ In contrast, uniform laws, by definition, are much less aspirational. Unlike restatements, uniform acts “remain ineffective unless enacted into law.”¹⁷⁹ Thus, the current political realities of the states are an essential factor in determining which laws the ULC should ultimately promulgate.

1. States Presently Lack a Framework for Administering Same-Sex Intestacy Rights

When the UPC introduced stepchildren into its intestacy hierarchy in 2008,¹⁸⁰ stepparent adoptions were universally accepted, and therefore there was no real threat of political backlash from the states. Conversely, the majority of states today prohibit same-sex marriage either by statute or constitutional amendment, which suggests a strong public policy against the recognition of such relationships.¹⁸¹ Thus, proposing uniform intestacy rights for same-sex couples before anti-gay marriage laws and their progeny are repealed by the states themselves, undermines the ULC’s own constitutional prerogative of “promot[ing] uniformity in the law among the several States on subjects as to which uniformity is desirable and practicable.”¹⁸² When the ULC takes this kind of aspirational approach to uniform lawmaking by proposing so-called “good law” rather than “endeavor[ing] to secure enactment of the approved Acts in the various States,”¹⁸³ it compromises one of the main goals it sets out to accomplish.

Despite the longstanding role that the ULC has played in informing American jurisprudence, it has never held itself out as a “superlegislature” whose aim is to supplant state law. The ULC’s central objective is simply to offer legislative proposals

177. See Razook, *supra* note 22, at 52 n.49 (“[R]estatements are, after all, syntheses rather than codifications of the common law and are not binding upon the states. They certainly do not substitute for uniform statutes.”).

178. RESTATEMENT (THIRD) OF PROP.: WILLS & OTHER DONATIVE TRANSFERS § 2.2 cmt. g (1999) (“[T]he domestic partner who remains in [a committed] relationship with the decedent until the decedent’s death should be treated as a legal spouse for purposes of intestacy.”).

179. ARMSTRONG, *supra* note 21, at 129.

180. DUKEMINIER, *supra* note 96, at 95; see also Susan N. Gary, *We are Family: The Definition of Parent and Child for Succession Purposes*, 34 ACTEC J. 171, 176 (2008) (“[T]he genetic parent who is no longer a legal parent will not inherit from the child, but a child will still inherit from or through that genetic parent, even if the parent permitted the adoption of the child by the child’s stepparent, had no further contact with the child, and has a new family with another spouse. Of course the genetic parent can overcome the intestacy rule by executing a will.” (footnote omitted)).

181. See, e.g., FLA. STAT. ANN. § 741.212 (West 2013) (“[T]he term ‘marriage’ means only a legal union between one man and one woman as husband and wife”); HAW. REV. STAT. § 572-1 (West 2013) (A valid marriage contract “shall be only between a man and a woman”); WYO. STAT. ANN. § 20-1-101 (West 2013) (“Marriage is a civil contract between a man and a female person”). For further discussion of constitutional amendments banning recognition of same-sex marriage, see note 111 and accompanying text.

182. UNIFORM LAW COMMISSION CONST. art. I, § 1.2.

183. 2010 HANDBOOK, *supra* note 8, at 775.

that have a viable chance of adoption by the state legislatures. Indeed, as one commentator suggests, “the strength of the Code is the extent to which . . . states . . . have used it as a model for their own statutes.”¹⁸⁴ Applying that logic, uniform laws that fail to attract adoption by the states results in a weakened and less influential uniform law system. Indeed, some scholars have attributed the relatively low rates of uniform law adoptions by the states to the “barrage of uniform statutes that they find unnecessary or impracticable.”¹⁸⁵

It has been argued that because the ULC lacks true legislative authority, it should only promulgate Acts that it believes have a worthy chance of adoption by the states.¹⁸⁶ This presents the formidable challenge of predicting which laws will be affirmatively received by all fifty state legislatures.¹⁸⁷ As one commentator noted, somewhat self-evidently, “[t]he [ULC] produce[s] uniformity only by passage of law in fifty state legislatures.”¹⁸⁸ In other words, if the ULC has reason to believe that a proposed act would result in nonuniformity among the states, it should decline to promulgate it. Surely guiding this inquiry is the fact that “the [ULC] has been least successful when it proposes uniform legislation dealing with issues which are the subject of intense public debate and disagreement.”¹⁸⁹

Same-sex marriage remains one of the most hotly contested issues facing our country today.¹⁹⁰ Because the issue is still very much in flux, the ULC appropriately declined to address it in the 1990 and 2008 revisions of the UPC. The ULC’s decision, although unpopular, was nonetheless consistent with its central purpose of promoting uniformity among the states. It was based on the “probable response of the state legislatures,”¹⁹¹ many of which are still decidedly against all forms of relationship

184. Andersen, *supra* note 49, at 601 (referring to states that have adopted parts of the UPC, while omitting other parts but using the unadopted UPC provisions as a model for parallel state statutes); *see also* ARMSTRONG, *supra* note 21, at 86 (“The work of the Conference is [purely] academic unless its product is sold.”).

185. Brudney, *supra* note 18, at 811 (citing ARMSTRONG, *supra* note 21, at 113).

186. *See* White, *supra* note 1, at 220–21 (“If you tell the Commissioners that a law is not going to go through fifteen of the state legislatures, or, for example, through New York or Illinois or Texas, they will say to you, ‘We don’t want to propose that law because we don’t want to produce nonuniformity.’”).

187. *Id.* at 221.

188. *Id.* at 220–21.

189. Marion W. Benfield, Jr., *Wasted Days and Wasted Nights: Why the Land Acts Failed*, 20 NOVA L. REV. 1037, 1040–41 (1996); *see also* Anderson, *supra* note 49, at 602 (noting that the “UPC’s more controversial proposals have largely fallen flat in swing states”).

190. *See* Tiffany C. Graham, *Exploring the Impact of the Marriage Amendments: Can Public Employers Offer Domestic Partner Benefits to Their Gay and Lesbian Employees?*, 17 VA. J. SOC. POL’Y & L. 83, 84 (2010) (noting that “[o]ver the course of the past decade, the question of same-sex marriage has been one of the most contentious issues affecting this country”); *see also* Jason C. Beekman, *Same-Sex Second-Parent Adoption and Intestacy Law: Applying the Sharon S. Model of “Simultaneous” Adoption to Parent-Child Provisions of the Uniform Probate Code*, 96 CORNELL L. REV. 139, 140 (2011) (“The [same-sex marriage] debate is occurring in courtrooms as much as at the polls and in state and national legislatures.”). For further discussion of the controversy surrounding same-sex marriage and state responses to issues regarding recognition of same-sex marriages, *see supra* notes 111 and 165–71 and accompanying text. For additional discussion regarding the fact that same-sex marriage is inappropriate for uniform laws due to its controversial nature, *see supra* notes 47–48 and accompanying text.

191. White, *supra* note 1, at 221.

recognition for gay couples. A proposed law that two-thirds of the states would immediately reject would violate the ULC's own constitution to "promote uniformity in the law among the several States as to which uniformity is desirable and practicable."¹⁹²

The glaring disconnect between intestacy law's central value of honoring donative intent and the denial of thousands of same-sex couples important inheritance rights is admittedly troubling. However, the UPC remains an inappropriate vehicle by which to correct such theoretical inconsistencies. Law professor Gary Spitko, for example, inveighs against the drafters of the 1990 UPC for failing to provide for same-sex surviving spouses, calling the omission "deafening in its devaluation of gay relationships."¹⁹³ Because the UPC is a "model code," Spitko argues, it has the "power to shape the law in a variety of fields and ways that gay and lesbian relationships do not merit positive attention."¹⁹⁴ Although uniform codes can serve some expressive function, they should not do so at the expense of undermining uniformity among the states.

Proponents who argue that same-sex intestacy rights are best achieved through the UPC amendment process misstate the Code's influence and discount its central purpose. The ULC's Statement of Policy Establishing Criteria and Procedures for Designation and Consideration of Uniform and Model Acts provides that "there must be a reasonable probability that an act, when approved, either will be accepted and enacted by a substantial number of states, or, if not, will promote uniformity indirectly."¹⁹⁵ Indeed, "the Conference and others tend to view states' passage of uniform laws as the ultimate test of its success."¹⁹⁶ A recent report by the ULC explained that Acts that serve merely as "points of reference . . . [are] not why the ULC is organized or funded by the states [and] . . . detract from the ULC's reputation."¹⁹⁷ In other words, the "primary goal of the uniform laws process is . . . to produce legislation acceptable to those interests on which it will impact so that the uniform act will be widely enacted without significant amendment or delay."¹⁹⁸

2. Uniform Laws Are Not Restatements

A common misconception of the UPC and uniform laws in general is that they serve primarily as aids to judicial interpretation, providing guidance to courts when deciding novel questions of law.¹⁹⁹ While the UPC can certainly offer technical guidance to states in amending their probate procedures, its primary function is not to

192. UNIFORM LAW COMMISSION CONST. art. I, § 1.2.

193. Spitko, *supra* note 75, at 1103.

194. *Id.* at 1105.

195. *Criteria for New Projects*, *supra* note 47.

196. Patchel, *supra* note 25, at 92; *see also* Razook, *supra* note 22, at 77–78 (describing the "Conference's success rate based on state passage as seed fallen on barren ground" (internal quotation marks omitted)).

197. UNIFORM LAW COMMISSION, COMMITTEE TO REVIEW THE ULC DRAFTING PROCESS, FINAL REPORT 16 (2011).

198. Miller, *supra* note 11, at 508 n.1.

199. *Cf. Averill*, *supra* note 53, at 901 (explaining the UPC's influence as "secondary or persuasive authority for determining proper rules of construction for the common law").

state what would be a good law, but rather what law has the best chance of adoption by all fifty states.²⁰⁰ The argument that the omission of same-sex couples from the UPC “devalues and denies the donative intent” of these groups²⁰¹ oversells the Code’s expressive function and would be more appropriately directed at state legislatures.

Because the UPC’s foremost goal is universal adoption by the states, the risk of nonadoption of a proposed uniform law has weightier political and judicial implications than the rejection of a Restatement put forth by the American Law Institute.²⁰² For example, in *Dainton v. Watson*,²⁰³ the Wyoming Supreme Court refused to apply a UPC rule governing penalty clauses for will contests,²⁰⁴ primarily because the Wyoming state legislature failed to adopt the rule after having the opportunity to do so.²⁰⁵ While the court did not explicitly reject the UPC rule on its face, it noted that “mere nonadoption of the UPC in the face of the opportunity to adopt was read as rejection.”²⁰⁶

C. *Hawaii’s Reciprocal Beneficiaries Act: A Model for Reform*

While some states provide some form of inheritance rights to unmarried same-sex couples,²⁰⁷ the vast majority do not.²⁰⁸ This Part focuses on one state’s approach (Hawaii’s Reciprocal Beneficiaries Act) as an alternative model for extending inheritance rights to same-sex couples. Hawaii is significant because it permits same-sex couples to obtain inheritance benefits as reciprocal beneficiaries despite the state’s constitutional ban on same-sex marriage. Given the majority of states with similar constitutional proscriptions, the inheritance interests of same-sex couples would be far better served by adopting a registration scheme like Hawaii’s rather than attempting to

200. See UNIFORM LAW COMMISSION CONST., art. I, § 1.2 (“It is the purpose of the Conference to promote uniformity in the law among the several States on subjects as to which uniformity is desirable and practicable.”). But see Andrew Stimmel, Note, *Mediating Will Disputes: A Proposal to Add a Discretionary Mediation Clause to the Uniform Probate Code*, 18 OHIO ST. J. ON DISP. RESOL. 197, 215 (2002) (“The UPC, however, is a very influential academic exercise. Because of the participants and the drafting process, a uniform code carries significant persuasive weight on state legislators when contemplating reform in their own statutory codes.”).

201. E.g., Seidman, *supra* note 89, at 227; see also Marissa J. Holob, *Respecting Commitment: A Proposal to Prevent Legal Barriers from Obstructing the Effectuation of Intestate Goals*, 85 CORNELL L. REV. 1492, 1528 (2000) (“To best achieve the goal of reflecting a decedent’s likely donative intent, current probate codes must be expanded to include sufficiently committed partners.”).

202. Averill, *supra* note 53, at 895.

203. 658 P.2d 79 (Wyo. 1983).

204. *Dainton*, 658 P.2d at 82.

205. *Id.* (noting that the Wyoming “legislature [had] chosen not to incorporate §3-905 of the Uniform Probate Code into the recently enacted Wyoming Probate Code . . . [despite being] aware of the Uniform Probate Code and all of its various provisions”).

206. Andersen, *supra* note 49, at 617; see also *Estate of Liles*, 435 A.2d 379, 383 (D.C. 1981) (refusing to follow UPC § 2-508 because “[i]t was considered by the City Council but not adopted”).

207. See, e.g., HAW. REV. STAT. § 560:2-202 (West 2013) (allowing the reciprocal beneficiary of a decedent domiciled in the state to take an elective share); ME. REV. STAT. tit. 18-A, § 1-201(17) (West 2013) (including registered domestic partners as “[h]eirs”); *Lewis v. Harris*, 908 A.2d 196, 221–22 (N.J. 2006) (holding that same-sex couples are entitled to the same rights and benefits as married opposite-sex couples).

208. Presently, thirty-six states ban same-sex marriage either through state constitutional amendments or state DOMA legislation. HUMAN RIGHTS CAMPAIGN, *supra* note 106.

influence state probate law through reform of the UPC.

1. *Baehr v. Lewin*: The Backdrop to Hawaii's Reciprocal Beneficiaries Act

The Hawaii Supreme Court significantly impacted the modern gay rights movement—for better or worse—when it issued its landmark decision in *Baehr v. Lewin*.²⁰⁹ *Baehr* involved three same-sex couples who, after filing timely applications with the Hawaii Department of Health, were denied marriage licenses because the state marriage statute was interpreted to only permit marriage between one man and one woman.²¹⁰ The couples challenged the statute on equal protection and due process grounds.²¹¹ After the trial court found in favor of the State, the couples appealed to the Supreme Court of Hawaii, which reversed the lower court's decision.²¹² The Hawaii Supreme Court concluded that sex was a “suspect category” and thus subject to strict scrutiny.²¹³ Under a strict scrutiny analysis, “laws are ‘presumed to be unconstitutional unless the state shows compelling state interests which justify such classifications.’”²¹⁴ The court remanded the case to the trial court so that the government could present any “state compelling interests” that would justify the sex-based classification.²¹⁵

On remand, the trial court rejected every “compelling” interest put forward by the state, including “the need to protect traditional marriage,” “the optimal development of children,” and “protecting the public fisc.”²¹⁶ Ultimately, the court struck down the state marriage statute as unconstitutional,²¹⁷ concluding that, “under the state constitution, Hawaii's heterosexuals-only approach to marriage unlawfully discriminated against homosexuals.”²¹⁸ The trial court stayed its decision pending review by the Hawaii Supreme Court, however, which provided the legislature enough time to subsequently pass an amendment to Hawaii's constitution, defining marriage as between one man and one woman.²¹⁹

209. 852 P.2d 44 (Haw. 1993); *see also* Knauer, *supra* note 105, at 436 (“This case set off a firestorm of anti-recognition legislation in the form of DOMAs that specified that marriage could only be between one man and one woman and citizen initiatives that proposed state constitutional amendments to prohibit same-sex marriage.”).

210. *Baehr*, 852 P.2d at 49.

211. *Id.* at 50.

212. *Id.* at 48.

213. *Id.* at 67.

214. *Id.* at 64 (footnote omitted) (quoting *Holdman v. Olim*, 581 P.2d 1164, 1167 (1978)); *see, e.g.*, *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 440 (1985) (“The general rule is that legislation is presumed to be valid and will be sustained if the classification drawn by the statute is rationally related to a legitimate state interest.”).

215. *Baehr*, 852 P.2d at 48.

216. *Baehr v. Miike*, No. 91-1394, 1996 WL 694235, at *16, *17, *21 (Haw. Cir. Ct. Dec. 3, 1996), *aff'd*, 950 P.2d 1234 (Haw. 1997).

217. *Id.* at *22.

218. BRASHIER, *supra* note 93, at 60.

219. *See* HAW. CONST. art. I, § 23; Sandra Oshiro, *Hawaiian Judge Puts Same-Sex Marriage Ruling on Hold*, THE NATION, Dec. 6, 1996, at A12.

2. Hawaii Reciprocal Beneficiaries Act

Although the state constitutional amendment foreclosed same-sex marriage in Hawaii, the legislature managed to pass compromise legislation in the form of the Hawaii Reciprocal Beneficiaries Act (RBA).²²⁰ The RBA was intended to “advance, ‘as a matter of fundamental fairness,’ the ‘equal rights and possibilities for all law abiding citizens’ of Hawaii while preserving ‘the tradition of marriage as a unique social institution based upon the committed union of one man and one woman.’”²²¹ The legislation effectively balanced two competing interests: securing inheritance rights for gays and lesbians while maintaining the institution of marriage as between one man and one woman.

The RBA establishes the first registration system of its kind in the nation. It permits “two individuals who are legally prohibited from marrying each other to receive certain rights and benefits by filing a signed declaration of their relationship as *reciprocal beneficiaries*.”²²² What’s more, the Act provides the surviving reciprocal beneficiary an intestate share of the decedent’s estate, something that previously had only been reserved for married spouses.²²³ As one commentator noted, “[t]he most important benefit of registering is that the surviving reciprocal beneficiary is treated the same as the surviving spouse under state probate laws.”²²⁴ Moreover, because the system is limited to individuals who are legally barred from marriage, it does not pose a viable threat to the “institution of marriage,” which has been the largest proverbial thorn in the side of many anti-gay marriage groups.²²⁵

The RBA also accomplishes Professor Waggoner’s objective of identifying “de facto partners” without having to resort to a judicially cumbersome multifactor test. By requiring couples to register as “reciprocal beneficiaries,” the statute ensures that those partners who come forward are as deserving of all the inheritance rights and privileges afforded to married spouses.²²⁶ In other words, “[t]he registration indicates to the probate court that the decedent wished the survivor to be included under the state’s default inheritance rules.”²²⁷ The minimal burden that the Act places on couples to formally register is easily outweighed by the significant inheritance protections such couples would receive that were previously unavailable to them.²²⁸

220. Act of July 8, 1997, § 1, 1997 Hawaii Laws Act 1211, 1211–12 (codified at HAW. REV. STAT. §§ 572C-1 to 572C-7 (West 2013)).

221. W. Brian Burnette, Note, *Hawaii’s Reciprocal Beneficiaries Act: An Effective Step in Resolving the Controversy Surrounding Same Sex Marriage*, 37 BRANDEIS L.J. 81, 85 (1999) (footnotes omitted) (quoting HAW. REV. STAT. §§ 572C-1, 572C-4 (Supp. 1997); 1997 HAW. SENATE J. 2 (1997) (statement of Sen. Matsunaga)).

222. BRASHIER, *supra* note 93, at 80.

223. HAW. REV. STAT. § 560:2-102 (West 2013).

224. BRASHIER, *supra* note 93, at 81.

225. *Id.* at 82.

226. *Id.* at 83.

227. *Id.*

228. In fact, the registration requirement for same-sex couples parallels the acquisition of a marriage certificate for opposite-sex spouses, at least insofar as it relates to intestacy. Compare HAW. REV. STAT. § 572-5 (providing marriage license requirements), with HAW. REV. STAT. § 572C-5 (providing reciprocal beneficiary relationship registration requirements).

The requirements to register as reciprocal beneficiaries are relatively straightforward: each party must be at least eighteen years old; neither may be married or part of another reciprocal beneficiary relationship; they must be prohibited from marrying under state law; the consent of each party must not have been obtained by force, fraud, or duress; and each party must sign a “declaration” of a reciprocal beneficiary relationship.²²⁹ Once the above conditions are met, existing inheritance rights afforded to legally married spouses are fully extended to registered reciprocal beneficiaries.²³⁰ As one commentator notes, “[t]he implicit acknowledgement of gay and lesbian property owners by the Hawaii legislature in the reciprocal beneficiary statutes represents a remarkable step toward developing a probate code that reflects America’s changing family structures.”²³¹

3. State-Based Approaches vs. the UPC

State schemes like Hawaii’s, which require public declarations of partnership among same-sex couples—even in states where same-sex marriage is constitutionally prohibited—are superior to efforts to effect reform through the UPC’s formal amendment process. These state-based legislative strategies reduce the risk of political backlash, are ultimately more successful in securing inheritance rights for nontraditional families, and better preserve the purpose and spirit of the uniform law system.

D. Other Options: The Benefits of a Registration Scheme vs. Multifactor Test

Currently, there are only a handful of states that offer marriages, civil unions, or domestic partnership rights to same-sex couples.²³² What’s more, thirty-six states have enacted constitutional amendments or have passed existing laws that define marriage as between one man and one woman.²³³ Nineteen of these states go even further enacting laws that do, or may, affect civil unions and domestic partnerships.²³⁴ Despite this relatively bleak picture, the gay rights movement has nonetheless made significant progress since the ULC’s initial drafting of the Uniform Probate Code in 1969. For example, when the 1990 UPC was promulgated, no state had yet offered *any* form of relationship recognition to same-sex couples.²³⁵ At the time of the 2008 UPC’s

229. See HAW. REV. STAT. § 572C-4.

230. See *id.* § 572C-1 (“[The] purpose of this chapter is to extend certain rights and benefits which are presently available only to married couples to couples composed of two individuals who are legally prohibited from marrying under state law.”).

231. BRASHIER, *supra* note 93, at 83.

232. Currently Connecticut, Delaware, Iowa, Maine, Maryland, Massachusetts, Minnesota, New Hampshire, New York, Rhode Island, Vermont, Washington, and the District of Columbia offer same-sex marriages. HUMAN RIGHTS CAMPAIGN, *supra* note 88. States including Colorado, Hawaii, Illinois, New Jersey, and Rhode Island offer civil unions, and Hawaii, Maine, Wisconsin, Oregon, Nevada, and California offer some version of domestic partnerships. *Id.*

233. HUMAN RIGHTS CAMPAIGN, *supra* note 106.

234. *Id.*; see, e.g., TEX. FAM. CODE ANN. § 6.204(2)(b) (West 2013) (“A marriage between persons of the same sex or a civil union is contrary to the public policy of this state and is void in this state.”).

235. See M.V. LEE BADGETT & JODY L. HERMAN, PATTERNS OF RELATIONSHIP RECOGNITION BY SAME-SEX COUPLES IN THE UNITED STATES 2 (2011) (“In 1997, Hawai’i became the first state in the U.S to offer

drafting, however, three states recognized marriage for gay couples and several others offered spousal equivalent rights in the form of civil unions and domestic partnerships.²³⁶ Today, that number is even greater, and the momentum is clearly on the side of gay equality.²³⁷

1. Problems in Applying a Multifactor Test

An alternative approach for states that fail to recognize same-sex relationships by statute is for courts to apply a multifactor test to help determine the authenticity of the same-sex relationship. Several scholars have advocated for this approach, despite the striking similarities it bears to the moribund doctrine of common law marriage.²³⁸ This Part of the Comment will argue why a multifactor test is ultimately difficult to administer and unduly burdensome on state courts and should not be advocated in lieu of a more objective state-based registration scheme.

As discussed above, Lawrence Waggoner was the first to propose a multifactor test in determining “marriage-like” relationships, examining factors such as how long the couple had been living together, their pooling of financial resources, the joint raising of children, and whether the couple held themselves out as committed to each other.²³⁹ His proposal employs a unique “balancing test to determine whether the [couple’s] relationship was sufficiently marriage-like to justify attributing an intent to the intestate decedent to benefit the claimant.”²⁴⁰ Despite Waggoner’s belief that this type of inquiry would not incur substantial judicial resources,²⁴¹ it is hard to imagine how a multifactor test could be applied without obtaining that very result. The multifactor test bears a remarkable resemblance to the common law marriage doctrine, which has been abolished by the vast majority of states.²⁴² The “[t]ypical requirements” couples must prove to establish a common law marriage (in the states that still recognize the doctrine) are quite similar to the factors set out in the Waggoner proposal: (1) the couple must live together, (2) “manifest an intent to be currently married,” and (3) “hold themselves out to the community as married.”²⁴³

The reasons for common law marriage’s eventual decline in the states should give Waggoner and others pause when proposing a similar multifactor test for determining marriage-like relationships. This type of system would require courts to “engage in

legal recognition to same-sex couples.”).

236. The states that had some form of same-sex relationship protection prior to 2008 were Massachusetts (marriage), Connecticut (marriage), California (domestic partnerships), District of Columbia (domestic partnerships), New Jersey (civil unions), and Oregon (domestic partnerships). See HUMAN RIGHTS CAMPAIGN, *supra* note 88.

237. *Id.*

238. Gallanis, *supra* note 153, at 87–90; E. Gary Spitko, *An Accrual/Multi-Factor Approach to Intestate Inheritance Rights for Unmarried Committed Partners*, 81 OR. L. REV. 255, 259 (2002); Waggoner, *supra* note 97, at 79–86.

239. See *supra* notes 144–52 and accompanying text for a detailed discussion of Waggoner’s factors.

240. Waggoner, *supra* note 97, at 83.

241. *Cf.* BRASHIER, *supra* note 93, at 7 (arguing that “a discretionary system permitting individually tailored solutions would demand far more resources than does an objective system”).

242. *Id.* at 44.

243. *Id.*

individualized, subjective inquiries concerning whether a surviving cohabitant is in fact a surviving spouse,” which is at odds with the “probate system’s strong preference for objectivity.”²⁴⁴ Moreover, the line of criticism that attaches to common law marriage could easily be applied in opposition to a multifactor test for identifying same-sex committed partners.²⁴⁵ Given the widespread rejection of common law marriage by the states in the last century,²⁴⁶ it seems unlikely that states would embrace a similar test in this slightly different context.

2. Benefits of a Registration System

A more feasible approach for identifying same-sex committed couples is the establishment of a registration system, similar to the system established by the RBA in Hawaii. Many states that fail to recognize same-sex marriage have instead enacted so-called “relationship recognition” laws, which allow same-sex couples to enter into civil unions or domestic partnerships.²⁴⁷ These types of “marriage-lite” relationship schemes offer many of the same rights and benefits that marriage provides while simultaneously establishing the certainty of the relationship by requiring registration with the state.²⁴⁸ A registration system ensures that the country’s probate laws will remain “simple, objective, and efficient” so that courts can “determine family membership immediately.”²⁴⁹ As Professor Gary Spitko explains,

[u]nder the registration [system], a determination of who is entitled to take an intestate share as a surviving non-marital partner requires only an examination of the state’s register for non-marital partners. This approach avoids a subjective inquiry by the fact-finder into the quality of the survivor’s relationship with the intestate so as to determine whether the survivor merits recognition under the intestacy scheme.²⁵⁰

Professor Gallanis’ model intestacy statute, discussed previously, included both a multifactor test and a registration requirement.²⁵¹ Gallanis theorized that “a combination of the two approaches will work better than either alone: partners who self-identify will avoid litigation, while those who do not will not be entirely barred.”²⁵² Citing a 1996 study that found that only one-third of all same-sex couples living in states with domestic partner registries actually registered their relationship, Gallanis reasoned that a multifactor test was a fair alternative to those who elect not to

244. *Id.* at 44–45.

245. *Cf. Waggoner, supra* note 97, at 75 n.133 (“One criticism of the concept was that the informality of common law marriages makes them highly vulnerable to fraud and perjury.”).

246. *See BRASHIER, supra* note 93, at 44 (noting that “[d]uring the twentieth century, most states rejected the concept” of common-law marriage).

247. *See HUMAN RIGHTS CAMPAIGN, supra* note 88.

248. *See, e.g., N.J. STAT. ANN. § 37:1-31* (West 2013) (“Civil union couples shall have all of the same benefits, protections and responsibilities under law . . . as are granted to spouses in a marriage.”).

249. *See BRASHIER, supra* note 93, at 6–7 (arguing that the alternative “could lead to wildly inconsistent and unpredictable outcomes, reducing public confidence in the probate process”).

250. Spitko, *supra* note 238, at 260.

251. *See Gallanis, supra* note 153, at 84.

252. *Id.*

register but still prefer to have their relationship recognized for purposes of intestacy.²⁵³

To be sure, one of the major reasons same-sex couples decline to register their relationships in states where they have the opportunity to do so, is fear of “state discrimination against them based upon the nature of their relationship or their sexual orientation.”²⁵⁴ While this may have been a legitimate concern in 1996 when gay relationships were still considered a taboo subject, today same-sex couples are an increasingly visible and protected group in American society, which arguably mitigates the “burden” that registration places on them.²⁵⁵ Thus, the argument that a registration-only approach is fatally flawed out of fear of persecution is unpersuasive in a country where the number of states offering same-sex marriage, civil unions, or domestic partnerships continues to increase.²⁵⁶

E. Where This Leaves the UPC

In 2008, the Uniform Law Commission declined to revise its intestacy provisions to account for either a multifactor test or a registration scheme. As the foregoing Part demonstrates, a multifactor test for determining same-sex relationships would require courts to engage in “detailed, individualized . . . inquiries about the relationships of the decedent with survivors claiming to be part of his family,”²⁵⁷ which would violate the probate system’s primary goal of efficiently disposing of decedents’ estates. Moreover, a major objective of any uniform law proposal is to “simplify and make more efficient the complex social relationships of our era and of that to come.”²⁵⁸ Because a multifactor test would likely lead to more complexity and less simplicity in the area of intestacy, it was rightfully rejected as an amendment to the 2008 UPC.

A registration approach, however, would enable states to identify same-sex relationships as effectively as they do opposite-sex relationships, and would result in a less costly and more efficient probate code. Many states that lack the political will to enact same-sex marriage laws have instead passed spousal-equivalent measures allowing gay couples to enter into civil unions and/or domestic partnerships. In the vast majority of states, however, legal recognition for same-sex couples is barred by either statute or state constitutional amendment.²⁵⁹ Thus, same-sex couples who are unable to marry or enter into a legally equivalent relationship are consequently denied important marital rights, including the right of intestacy. Because probate laws do not provide for a surviving same-sex partner, the denial of intestacy rights to gay couples creates an

253. *Id.* (citing Fellows et al., *supra* 100, at 55).

254. Spitzko, *supra* note 238, at 260 n.17.

255. Cf. Vauhini Vara, *Number of Self-Identified Gay Couples Surges*, WALL ST. J., Aug. 26, 2011, at A3 (reporting that “[t]he number of Americans identifying themselves as living with a same-sex partner has risen quickly in the past decade, according to the [latest] census data”).

256. See HUMAN RIGHTS CAMPAIGN, *supra* note 88 (reporting that twelve states and the District of Columbia have passed same-sex marriage laws and five states have passed “equivalent of state-level spousal rights to same-sex couples”).

257. BRASHIER, *supra* note 93, at 6.

258. ARMSTRONG, *supra* note 21, at 131.

259. See *Marriage & Relationship Recognition Laws*, MOVEMENT ADVANCEMENT PROJECT, http://www.lgbtmap.org/equality-maps/marriage_relationship_laws (last updated May 22, 2013) (noting that thirty states currently provide “[n]o legal recognition for same-sex couples”).

“inheritance pattern that the average [same-sex] decedent probably would [not] have wanted if an intention had been expressed by will.”²⁶⁰

While state legislatures can and should work on correcting this particularly harmful form of discrimination, it does not logically follow that the ULC should lead the charge for reform. As stated throughout this Comment, uniform laws are only as effective as the number of state legislatures that adopt them.²⁶¹ A uniform law addressing the intestacy rights of same-sex couples, while admirable, would likely be dead on arrival in states that, either by statute or constitutional amendment, expressly and forcefully prohibit the recognition of such relationships.²⁶² Until the states themselves are politically capable of legislatively recognizing the rights of same-sex couples, the ULC should continue to “exercise [its] wise discretion in the selection of subjects”²⁶³ that have a reasonable opportunity to “make uniform the law among the various jurisdictions.”²⁶⁴

IV. CONCLUSION

The lack of universal inheritance rights for gay and lesbian couples remains a serious concern for policymakers. The majority of state probate laws continue to frustrate the donative intent of many gays and lesbians who happen to die intestate, a concern that opposite-sex couples are rarely forced to confront.²⁶⁵ While much effort should be exercised to help correct this inequity, reforming the UPC to recognize same-sex relationships is not a viable option.²⁶⁶ Indeed, the UPC’s central purpose is to encourage legal uniformity at the state level. Until the political environment improves with respect to gay and lesbian relationships—namely, the protection of legal rights and benefits that attach to such relationships—the UPC should remain unamended.²⁶⁷ In the alternative, gay rights advocates should continue to lobby their state legislatures to pass relationship recognition laws that provide intestate succession rights for same-sex couples, using Hawaii’s Reciprocal Beneficiaries Act as a model.²⁶⁸

260. Cristy G. Lomenzo, *A Goal-Based Approach to Drafting Intestacy Provisions for Heirs Other than Surviving Spouses*, 46 HASTINGS L.J. 941, 946 (1995).

261. See *supra* notes 169–71 and accompanying text for a discussion of the conditional effectiveness of uniform laws. See *supra* Part II.A.3 for a fuller discussion of the effectiveness of uniform laws.

262. See *supra* Part III.B for a discussion of why the UPC may not be the ideal vehicle for promoting the intestacy rights of same-sex couples.

263. ARMSTRONG, *supra* note 21, at 131.

264. UNIF. PROBATE CODE §1-102(b)(5).

265. See *supra* Part II.C.3 for a discussion of how intestacy law is applied to same-sex couples.

266. See *supra* Part III.B for a discussion of why the UPC is not the appropriate vehicle through which to advance same-sex intestacy rights.

267. See *supra* Part III.A for a discussion of why the ULC properly declined to amend the UPC during its 2008 proceedings.

268. See *supra* Part III.C for a discussion of Hawaii’s Reciprocal Beneficiaries Act.

