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Free Will to Will? A Case for the Recognition of Intestacy Rights for Survivors to a Same-Sex Marriage or Civil Union?

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NOTE

FREE WILL TO WILL? A CASE FOR THE RECOGNITION OF INTESTACY RIGHTS FOR SURVIVORS TO A SAME-SEX MARRIAGE OR CIVIL UNION

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TABLE OF CONTENTS

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INTRODUCTION

Intestacy is an area in which same-sex couples receive little legal protection of their relationships. For a surviving same-sex spouse, this can result in complete disinheritance and defeat the intentions of the couple.

Intestacy occurs when an individual dies without a valid will. In the absence of a valid will, certain default rules apply to the distribution of the decedent's property.[1] Intestacy statutes in most jurisdictions provide that the surviving spouse takes all or most of the decedent's estate.[2] But intestacy laws protect only the rights of lawfully married survivors,[3] and in states that do not recognize same-sex marriages or civil unions, the estate will be distributed to distant relatives, or even escheat to the state, rather than benefit the surviving partner to the marriage or union.[4]

Establishing domicile in the jurisdiction where the same-sex marriage or civil union occurred protects surviving same-sex partners because a state's recognition of same-sex marriage means that its intestacy laws likely recognize same-sex marriage as well.[5] If the decedent later dies in another jurisdiction, however, many states will not consider the surviving partner a "spouse" for the purposes of intestacy, and as a result, the survivor of the same-sex union is disinherited of the wealth that was likely jointly gener-

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1. RESTATEMENT (THIRD) OF PROP.: WILLS AND OTHER DONATIVE TRANSFERS ch. 2 (1999) (discussing common patterns of intestacy statutes in the United States).

2. *See* UNIF. PROBATE CODE § 2-102(1) (1990). The surviving spouse takes the entire estate if no parent or descendant also survives the decedent, or if all of the surviving descendants are also the descendants of the surviving spouse and there is no other descendant of the surviving spouse who survives the decedent. Uniform Probate Code section 2-102(2)-(4) provides for a flat amount plus a percentage of the remaining estate in cases where there are other eligible takers who survive the decedent. In most small to moderately sized estates, the spouse's share still consumes the entire estate. Professor Waggoner notes that "the grant to the spouse of the entire intestate estate is aligned with trends in intestate-succession law throughout the United States and Europe." Lawrence Waggoner, *The Multiple-Marriage Society and Spousal Rights under the Revised Uniform Probate Code*, 76 IOWA L. REV. 223, 230–31 (1991).

3. A narrow exception exists in some states for "putative spouses" who believed in good faith that they were parties to a valid marriage. RESTATEMENT (THIRD) OF PROP.: WILLS AND OTHER DONATIVE TRANSFERS § 2.2 cmt. e. The Uniform Probate Code does not address the rights of putative spouses.

4. "The devolution of interests in movables upon intestacy is determined by the law that would be applied by the courts of the state where the decedent was domiciled at the time of his death." RESTATEMENT (SECOND) OF CONFLICTS OF LAW § 260 (1969); *accord* UNIF. PROBATE CODE § 1-301(1); *see also* RESTATEMENT (SECOND) OF CONFLICTS OF LAW § 236(1) (The "devolution of interests in land upon the death of the owner intestate is determined by the law that would be applied by the courts of the situs."). The Uniform Probate Code § 2-105 provides that the intestate estate passes to the state if there is no taker under the provisions of the Article. UNIF. PROBATE CODE § 2-105.

5. If a state allows same-sex couples to marry, they become entitled upon marriage to all of the attendant benefits, including the right to automatically "inherit the property of a deceased spouse who does not leave a will." Goodridge v. Dep't of Pub. Health, 798 N.E.2d 941, 955 (Mass. 2003); *see also* About.com, Benefits of Gay Civil Unions, http://gaylife.about.com/cs/gaymarriage/a/cdm.htm (last visited Feb. 24, 2006) (stating that the benefits to civil unions include benefits under the laws of intestate succession).

ated.[6] Courts in these states cite the public policy exception to the Full Faith and Credit Clause of the Constitution as the rationale for refusing to honor the marriage for the purposes of intestacy.[7] The Defense of Marriage Act (DOMA) interpreted the Full Faith and Credit Clause as containing an exception to the requirement of recognition for marriages that contravene the public policy of the state.[8] Because several states have recently provided benefits to same-sex couples, this is only the beginning of debate over same-sex relationships.[9]

This Note argues that courts should recognize intestacy rights for same-sex couples that were validly married or civilly united in a state other than the one in which one of the partners died. Courts may validly recognize the marriage for intestacy purposes, even while refusing to recognize the marriage as against public policy. Part I details the recent provision of benefits in various states to same-sex couples. Part II argues that same-sex couples cannot necessarily rely on wills to effectuate their intent to leave their property to their spouses. Part III argues that when states refuse to recognize the marriages or civil unions of same-sex couples as being against the public policy of the state, they erroneously reject same-sex intestacy rights, creating a gap in the protection afforded to same-sex couples and defeating their likely intent. Part IV provides examples from case law permitting states to recognize intestacy rights—despite a general refusal to recognize the marriage—for surviving spouses of couples whose marriage violated the state's public policy. Part V concludes that courts should limit this recognition of intestacy rights to same-sex couples who are validly married, or participated in a civil union or commitment ceremony, in order to avoid fraud and unnecessary litigation.

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6. *See supra* note 4 and accompanying text; *see also In re* Cooper, 592 N.Y.S.2d 797, 801 (App. Div. 1993) ("[W]e agree with [the acting surrogate's] conclusion that 'purported [homosexual] marriages do not give rise to any rights'" pursuant to the state's intestacy statute.).

7. The Full Faith and Credit Clause provides that "Full Faith and Credit shall be given in each State to the public Acts, Records, and judicial Proceedings of every other State. And the Congress may by general Laws prescribe the Manner in which such Acts, Records and Proceedings shall be proved, and the Effect thereof." U.S. CONST. art. IV, § 1.

8. DOMA provides, "No State, territory, or possession of the United States, or Indian tribe, shall be required to give effect to any public act, record, or judicial proceeding of any other State, territory, possession, or tribe respecting a relationship between persons of the same sex that is treated as a marriage under the laws of such other State, territory, possession, or tribe, or a right or claim arising from such relationship." 28 U.S.C. § 1738C (2006). Opposite-sex marriages from other states are nearly always recognized through Full Faith and Credit. "[T]he general rule is that the validity of a marriage is governed by the law of the place where it is contracted, or celebrated." 52 AM. JUR. 2D *Marriage* § 63 (2005). Same-sex marriages, on the other hand, are often given no effect as a result of the public policy exception to Full Faith and Credit. Lynn Wardle notes that "forty states . . . have enacted state Defense of Marriage Acts (DOMAs) establishing that same-sex marriage will not be recognized in those jurisdictions." Lynn D. Wardle, *Non-Recognition of Same-Sex Marriage Judgments Under DOMA and the Constitution*, 38 CREIGHTON L. REV 365, 370 (2005). Professor Wardle continues, "[t]here appears to be little room for doubt that Congress intended to allow each state, in appropriate circumstances, to decline to recognize or enforce sister state judgments treating same-sex relationships as marriages." *Id.* at 371.

9. *See infra* Part I.

I. BACKGROUND: THE RISE OF BENEFITS TO SAME-SEX COUPLES

The provision of benefits to same-sex couples is incredibly disparate across different states. The few states and municipalities that extend rights to same-sex couples are in stark contrast to the lack of protections afforded at the federal level, where the government has sought to deny the protections of opposite-sex marriage to same-sex couples through DOMA.[10] This Part briefly describes of some of the rights recently gained by same-sex couples in the United States.

In *Baehr v. Lewin*, the Hawaii Supreme Court held that restriction of marriage to opposite-sex couples violated the Hawaii Constitution's Equal Protection Clause.[11] The court remanded to the trial court for a determination of whether a compelling state interest justified the restriction.[12] The trial court in *Baehr v. Miike* determined that the state did not meet this burden.[13] In response to these judicial rulings that gave same-sex and opposite-sex Hawaiian couples some of the benefits of marriage upon registration of their relationship, the Hawaii state legislature passed the Reciprocal Beneficiaries Act.[14] Subsequently, however, Hawaii amended the state constitution to allow the legislature to define marriage as a union between a man and a woman.[15]

Similar to the court in Hawaii, the Vermont Supreme Court determined that denial of marital rights to same-sex couples violated the Vermont State Constitution.[16] In response to the decision, the legislature created a union that parallels marriage for same-sex couples.[17] The Civil Union Law gives all of the benefits of marriage to same-sex participants.[18]

California has had a mixed history with respect to rights for same-sex couples. On the one hand, California has created a registry with the Secretary of State through which certain same-sex couples may register their partnership for the purpose of receiving benefits similar to those accorded by marriage, including death and survivorship benefits.[19] Additionally, on February 12, 2004, San Francisco Mayor Gavin Newsom ordered city clerks

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10. Theresa Glennon, *An American Perspective on the Debate Over the Harmonisation or Unification of Family Law in Europe*, 38 FAM. L.Q. 185 (2004) (book review).

11. Baehr v. Lewin, 852 P.2d 44 (Haw. 1993).

12. *Id.* at 68.

13. Baehr v. Miike, No. 91-1394, 1996 WL 694235 (Haw. Cir. Ct. Dec. 3, 1996).

14. HAW. REV. STAT. ANN. § 572C-3 to -5 (1994).

15. HAW. CONST. art. I, § 23.

16. Baker v. Vermont, 744 A.2d 864 (Vt. 1999).

17. VT. STAT. ANN. tit. 15, §§ 1201-07 (2002).

18. *See id.* The couple is not considered married, however. The law creates a separate category to define the union of same-sex individuals.

19. For more information on this interesting concept and some of its limitations—including the fact that it is currently limited to same-sex couples with one partner sixty-two years of age or older—see the California Secretary of State's Domestic Partner's Registry, http://www.ss.ca.gov/dpregistry/ (last visited Mar. 28, 2006).

to begin issuing marriage licenses to same-sex couples.[20] The California Supreme Court, however, eventually voided all of the marriages performed in 2004 in San Francisco and elsewhere, leaving in their wake lawsuits challenging restrictions on same-sex marriage.[21] On September 6, 2005, California lawmakers became the first in the country that voted to legalize same-sex marriage, with the State Assembly narrowly approving a bill that defines marriage as between "two persons" instead of between a man and a woman.[22] In another setback to same-sex couples, though, and consistent with his public pronouncements on the subject, Governor Schwarzenegger vetoed the bill.[23] The ultimate outcome of these movements, and therefore the status of same-sex relationships, is likely far from over. As a result, it is unclear how a California court would respond to a claim by a surviving same-sex partner for intestacy rights.

Same-sex couples in Massachusetts were given the right to marry[24] in *Goodridge v. Department of Public Health.*[25] The Massachusetts Supreme Judicial Court determined that the exclusion of same-sex couples from marriage violates the Massachusetts Constitution, and the court redefined the common law meaning of marriage to include "the voluntary union of two persons as spouses, to the exclusion of all others."[26]

New York provides an impressive example of inclusivity for same-sex couples through statutory interpretation and policy-making. The New York Court of Appeals recognized the rights of a same-sex couple in the landmark case of *Braschi v. Stahl Associates Co.* by defining *family* to include same-sex partners.[27] The landlord in *Braschi* sought to evict the same-sex partner of a tenant who died in a rent-controlled apartment building.[28] The court extended the non-eviction protection of New York City's rent-control regulation to the surviving partner by defining *family* to include same-sex partners, thereby preventing his eviction.[29] Additionally, in 1998, the city extended its protection of the rights of same-sex couples by passing its Domestic

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20. NOLO, Same-Sex Marriage: Developments in the Law, http://www.keepmedia.com/ (enter a search for "Same-Sex Marriage: Developments in the Law"; then click on "Same-Sex Marriage: Developments in the Law") (last visited Apr. 19, 2006).

21. *Id.*

22. Dean E. Murphy, *Same Sex Marriage Wins Vote in California*, N.Y. TIMES, Sept. 7, 2005, at A14. This is in contrast to Massachusetts, where same-sex marriage was legalized at the behest of courts after a determination that it was unconstitutional to restrict marriage to one man and one woman. *See infra* notes 24–26 and accompanying text.

23. Associated Press, *Same-Sex Marriage Bill Vetoed*, Sept. 9, 2005, http:// www.cbsnews.com/stories/2005/09/29/politics/main891622. shtml.

24. They were also given the right to have their relationship called a *marriage* rather than a *civil union.*

25. 798 N.E.2d 941 (Mass. 2003).

26. *Id.* at 969.

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

28. *Id.* at 50–51.

29. *Id.* at 53–54.

Partnership Law.[30] The New York City Council further extended its protections by automatically recognizing couples as domestic partners if they were parties to civil unions or same-sex marriages, or they had registered as domestic partners in other jurisdictions.[31]

In addition to recognition of rights at the state level, certain employers and municipalities have granted rights and benefits to same-sex couples.[32] Many private employers have extended benefits to same-sex partners of employees that were previously available only to spouses.[33]

With the exception of these limited protections, same-sex couples face severe disadvantages compared to the rights afforded heterosexual married couples. In particular, parties to a civil union or same-sex marriage are denied an intestate share if they are domiciled in a state that refuses to recognize their relationship and applies its intestacy laws to the decedent's estate.[34] As shown in the next Part, same-sex couples cannot necessarily rely on wills to achieve the desired distribution of their estates.

II. Problems with Relying on Wills to Reflect Actual Donative Intent

Testamentary planning is at best an incomplete substitute for the broader legal recognition of intestacy rights for same-sex relationships. Although effective testamentary planning would obviate the need for recognition of same-sex intestacy rights, it has some possible shortcomings. Relying on wills to accurately reflect a decedent's intent is problematic for three reasons: relatives of the decedent may successfully challenge a will leaving most or all of the estate to a same-sex partner, a home-drawn will may fail for defects in execution,[35] or couples in a civil union or same-sex marriage may neglect to make wills at all, assuming that their union or marital status will protect them in the event one dies. The next three Sections will discuss these challenges in turn.

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30. N.Y.C. Admin. Code tit. 3, §§ 240–245 (2005).

31. *Id.* at §§ 240(a), 245.

32. An extensive and detailed list of the U.S. registration locations for domestic partnerships, which number nearly eighty-five, is available online. The site also provides the cost, applicable procedures, and a list of registration locations in places outside of the United States. Registration for Domestic Partnership for the U.S. and Other Countries, http://www.buddybuddy.com/d-p-reg.html (last visited Jan. 10, 2006).

33. According to the National Lesbian & Gay Journalists Association, an estimated 4,300 public and private employers in the U.S. now provide domestic partner benefits to gay and lesbian employees. Domestic Partner Benefits Overview, http://www.nlgja.org/pubs/DP/DPovrvw.html (last visited Apr. 1, 2006).

34. *See supra* note 4 and accompanying text.

35. If a home-drawn will fails to meet the formality requirements for execution of a will, the decedent's estate passes by intestacy.

A. *Challenge of a Validly Executed Will*

Same-sex couples face an additional hurdle compared to opposite-sex married couples because their relatives may be able to more easily challenge their wills on the grounds of undue influence. If an individual in a same-sex marriage or civil union leaves his or her estate to the partner, the will is subject to contest by the heirs who would otherwise take possession through intestate succession.[36] If a court were to set aside the will, these "natural" heirs would receive the share of the surviving same-sex partner, giving them standing to challenge the will as written.[37]

Contestants may challenge a will based on fraud, duress, or most likely, undue influence.[38] While courts seldom find undue influence in gifts left to one's spouse, courts are divided on whether this principle is extended to unmarried partners—or partners whom the jurisdiction will not recognize. Undue influence may serve as a basis for invalidating a will devising property to a same-sex partner.[39] In *Lamborn v. Kirkpatrick*, the court invalidated for undue influence a will that devised one-half of the estate to the decedent's mistress.[40] The court used the couple's illicit cohabitation as a basis for finding undue influence.[41] Similarly, the court in *Will of Kaufmann* cited undue influence in invalidating the will of a testator who left his entire estate to his domestic partner with whom he had a homosexual relationship.[42] If a court treated partners to a same-sex marriage or civil union as illicitly cohabitating, it could be enough to raise the presumption of undue influence, opening the door for challenge by the intestate heirs.[43]

The court in *In re Baird's Estate* announced the rule as placing the burden of proof on the beneficiary to disprove undue influence if the beneficiary and the testator share a "confidential relationship" and the beneficiary assisted in preparation or execution of the will.[44] Additionally,

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36. Nancy J. Knauer, *The September 11 Attacks and Surviving Same-Sex Partners: Defining Family Through Tragedy*, 75 TEMP. L. REV. 31, 39 (2002).

37. *See* UNIF. PROBATE CODE § 2-102 (1990).

38. *See* Lamborn v. Kirkpatrick, 50 P.2d 542 (Colo. 1935).

39. *See, e.g.*, Will of Kaufman, 205 N.E.2d 864 (N.Y. 1965).

40. *Lamborn*, 50 P.2d at 544.

41. Other courts have found that illicit relationships raise the presumption of undue influence. *See, e.g.*, Glider v. Melinski, 25 N.W.2d 379, 388 (Iowa 1947) (announcing that influence obtained by immoral conduct—specifically in the context of adulterous relationships—raises the presumption of undue influence).

42. *Kaufman*, 205 N.E.2d at 864.

43. *See Lamborn*, 50 P.2d at 544 ("We deem it proper to attach to illicit cohabitation . . . [a] moral basis for requiring an affirmative showing against the existence of undue influence from one who is shown to be guilty of illicit cohabitation. . . ."); *accord Kaufman*, 205 N.E.2d at 864. *But see* Estate of Sarabia, 270 Cal. Rptr. 560 (Ct. App. 1990) (not treating a will as "unnatural" merely because it named the decedent's partner); Evans v. May, 923 S.W.2d 712, 714–15 (Tex. Ct. App. 1990) (stating that the "elements of undue influence must exist in order to prevail" on such a claim and that a thirty year relationship as a "lifemate" did not constitute undue influence as a matter of law, regardless of the type of relationship).

44. *In re* Baird's Estate, 168 P. 561 (Cal. 1917).

because married couples—presumably same-sex married couples as well—often prepare their wills jointly, if the court follows the rule of *In re Baird's Estate*, the surviving partner in a same-sex relationship may face a will contest based on the "confidential relationship" and assistance in will preparation or execution.[45]

Allowing inheritance through intestacy would also reduce the incentive to challenge a will leaving the estate to a same-sex partner. If same-sex partners are seen as the "natural objects of the testator's bounty,"[46] invalidation on the grounds of undue influence would require "strong evidence that the will was not the result of the testator's free and independent judgment."[47]

B. *Home-Drawn Wills and Defects in Execution Leading to Invalidity*

Testators may prefer to write their own wills at home for a variety of reasons, such as reduced expense, belief that this method is valid and that the probate court will follow their testamentary plans, or for privacy concerns. Gay and lesbian couples may favor home-drawn wills because the partners are closeted or prefer not to publicly consult with an attorney about sensitive relationship matters.[48] Although validly-executed home-drawn wills generally work perfectly well, testators who fail to comply with required formalities for the execution of a valid will may have their estates pass through intestacy.

All wills—whether home-drawn or drafted by an attorney—must meet certain requirements; failure to comply with a formality is likely to result in the invalidation of the will. The required formalities vary from jurisdiction to jurisdiction, but generally require the will to be 1) in writing, 2) signed by the testator, and 3) attested by credible witnesses.[49] When attorneys are in-

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45. *Id.* at 561.

46. Courts consider spouses of decedents to be "natural objects of the testator's bounty," and therefore generally refuse to find undue influence when the spouse is the beneficiary under the decedent's will. WAGGONER ET AL., FAMILY PROPERTY LAW: CASES AND MATERIALS ON WILLS, TRUSTS, AND FUTURE INTERESTS 264 (3d ed. 2002).

47. RESTATEMENT (THIRD) OF PROP.: WILLS AND OTHER DONATIVE TRANSFERS § 8.3 cmt. f (2003).

48. Several websites provide specific estate planning information tailored to gay and lesbian couples, citing common concerns about privacy, confidentiality, and discomfort consulting lawyers about sensitive issues. *See, e.g.*, http://www.gaywill.com (last visited Feb. 7, 2006); http://www.gaylawnet.com (last visited Feb. 7, 2006); http://www.le-gal.org/site (last visited Feb. 7, 2006). Rainbowlaw.com, a website that provides various legal documents, states that "[s]ome gay men and lesbians feel intimidated by law and lawyers." http://www.rainbowlaw.com/html/estate-planning.htm (last visited Feb. 7, 2006). One of the testimonials from the website indicates that not knowing "who is 'gay friendly' or not" is a factor in choosing to draft one's will at home. Rainbowlaw.com, http://www.rainbowlaw.com/html/testimonials.htm (last visited Feb. 7, 2006).

49. The Uniform Probate Code, section 2-502 requires the will to be in writing, signed by the testator or another individual in the testator's conscious presence, and attested by two witnesses, each of whom signed "within a reasonable time after . . . witness[ing] either the signing of the will . . . or the testator's acknowledgement of that signature or acknowledgement of the will." UNIF. PROBATE CODE § 2-502(3) (2004). States that do not follow the UPC base their required formalities on either the Statute of Frauds of 1677 or the Wills Act of 1837. WAGGONER ET AL., *supra* note 46,

volved in the preparation, occasionally a will fails to meet one of the statutory formalities and is held invalid;[50] with home-drawn wills this is even more likely to happen. In *Estate of McKellar*, the court invalidated a home-drawn will simply because one of the attesting witnesses signed without having seen the testatrix write any portion of the will, sign it, or acknowledge her signature.[51] The jurisdiction required the witnesses either to witness the testatrix's signing of the document or her acknowledgement of her signature.[52] Despite having the requisite number of witnesses, and having met the other formalities of execution, the will failed. Clear evidence that it was the intent of the testatrix to create a will and dispose of her property through the will could not overcome the failure to precisely meet the formalities. A will can also fail to qualify as validly executed if the testator signs some place other than at the end of the document,[53] the witnesses sign outside of the presence of the testator,[54] the witnesses receive a gift under the will,[55] or the witnesses are otherwise not credible or competent.[56] If same-sex couples choose home-drawn wills, the chance that a mistake in execution will lead to intestacy is a matter of serious concern.

C. *Failure to Execute a Will*

Individuals who die intestate fail to execute wills prior to death for a variety of reasons. A survey has shown that "age and wealth are good predictors of will-making."[57] Some people might choose not to undertake the expense of a will if they believe that intestacy closely reflects their preferred disposition of their estates. Partners to a same-sex marriage or civil union are likely protected by the intestacy statutes where the marriage or union occurred[58] and so may forget to execute a will upon leaving the jurisdiction,

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at 167–68. The UPC provision is similar to non-UPC state statutes, but it is arguably more forgiving of mistakes in execution when read in conjunction with the "harmless error" provisions of section 2-503. That section allows the proponent of a will to establish by clear and convincing evidence that the will constitutes the testator's intent, despite a defect in a required formality. UNIF. PROBATE CODE § 2-503.

50. For examples of attorney error causing failure of proper execution of a will, see *Biankanja v. Irving*, 320 P.2d 16 (Cal. 1958) and *Ward v. Arnold*, 328 P.2d 164 (Wash. 1958).

51. Estate of McKellar, 380 So. 2d 1273, 1274–75 (Miss. 1980).

52. *Id.* at 1275.

53. *See* WAGGONER ET AL., *supra* note 46, at 179 (stating that a small minority of courts require the signature to appear at the end of the will).

54. *See id.* at 185–90 (interpreting *Stevens v. Casdorph*, 508 S.E.2d 610 (W. Va. 1998), in which the witnesses signed while standing out of the line of vision of the testator, invalidating the will).

55. *See id.* at 199 (discussing the disqualification of a witness who was a devisee under the will).

56. *Id.*

57. *Id.* at 33 (discussing an empirical study by Mary Louise Fellows et al., *Public Attitudes About Property Distribution at Death and Intestate Succession Laws in the United States*, 1978 AM. B. FOUND. RES. J. 321, 336–39). Individuals who die at younger ages or who have not amassed much wealth are less likely to have wills than older, wealthier individuals. Fellows et al., *supra*, at 336–39.

58. *See supra* note 5 and accompanying text.

or will assume that other states will recognize their spouse's or partner's intestacy rights. Many couples may not realize that their relationship, while valid where entered into, fails to protect them at all in the many jurisdictions that refuse to recognize same-sex marriage or civil unions.

III. MANY STATES REFUSE TO RECOGNIZE THE MARRIAGES AND CIVIL UNIONS OF SAME-SEX COUPLES

There is widespread state and federal public policy disfavoring same-sex marriages and civil unions. These public policies may cause very real problems for same-sex couples relying on intestacy statutes in a jurisdiction other than the one in which the marriage or union occurred.

Many states have refused to recognize same-sex marriage or civil unions entered into in other states. During the Clinton administration, Congress enacted DOMA,[59] which allowed states to refuse to recognize same-sex marriage or its equivalent notwithstanding the requirements of the Full Faith and Credit Clause. DOMA interprets the Full Faith and Credit Clause to contain an exception to the requirement of recognizing and giving effect to the "public act[s], record[s], or judicial proceeding[s] of any other State."[60] Offense to notions of the state's public policy is sufficient to disregard validly entered-into marriages by same-sex individuals.[61]

In addition to the federal legislation, the November 2004 elections resulted in eleven state constitutional amendments that prevent same-sex marriage.[62] These states joined six others that had already passed similar amendments.[63] Moreover, President Bush vowed to make a federal constitutional amendment banning same-sex marriage a priority of his second term.[64]

Case law accords with the refusal to recognize same-sex marriage and civil unions.[65] *Burns v. Burns*[66] was the first reported appellate decision ad-

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59. 28 U.S.C. § 1738C (2006).

60. *Id.*

61. *See id.* DOMA imposes no limits on bases states can rely upon to disregard same-sex marriages.

62. LAMBDA Daily Headlines, The Advocate, *A Year After Ruling, Nation Remains Divided Over Gay Marriage*, Nov. 15, 2004, http://www. advocate.com/news-detail_ektid06950.asp.

63. *Id.*

64. *Id.*

65. *See* Smelt v. County of Orange, 374 F. Supp. 2d 861, (C.D. Cal. 2005); Wilson v. Ake, 354 F. Supp. 2d 1298 (M.D. Fla. 2005); Standhardt v. Superior Court *ex rel.* County of Maricopa, 77 P.3d 451 (Ariz. Ct. App. 2003); Lane v. Albanese, No. FA044002128S, 2005 WL 896129, at *3 (Conn. Mar 18, 2005); Rosengarten v. Downes, 802 A.2d 170 (Conn. App. 2002); Lewis v. Harris, 875 A.2d 259 (N.J. Ct. App. Div. 2005); Hennefeld v. Twp. of Montclair, 22 N.J. Tax 166 (Tax Ct. 2005); Samuels v. New York State Dep't of Health, No. 98084, 2006 WL 346465, at *6 (N.Y. App. Div. Feb. 16, 2006); Littleton v. Prange, 9 S.W.3d 223 (Tex. App. 1999). *But see* Knight v. Superior Court, 26 Cal. Rptr. 3d 687 (Ct. App. 2005) (finding that the enactment of a domestic partnership statute was not a legislative creation of same-sex marriage contrary to the state constitutional provision limiting marriage to one man and one woman).

66. Burns v. Burns, 560 S.E.2d 47 (Ga. App. 2002).

dressing the interstate recognition of a Vermont same-sex civil union.[67] In *Burns*, a heterosexual couple entered into a child custody consent decree following their divorce.[68] The parties agreed that neither of them would visit or reside with the couple's joint children "during any time where such party cohabits with or has overnight stays with any adult to which such party is not legally married or to whom party is not related within the second degree."[69] After the divorce, the former wife entered into a civil union in Vermont with her female companion, and the two began living together.[70] The former husband filed a motion for contempt of the consent decree.[71] The court found her in violation because she and her partner were not married as required by the decree for cohabitation.[72] The court noted that a civil union does not bestow the status of a civil marriage in Vermont,[73] and even if it did, the state of Georgia only recognizes the marriages of individuals of the opposite sex.[74] The court refused to recognize the civil union as equivalent to marriage for even the limited purpose of fulfilling the requirements of the consent decree. In effect, the court required the former wife to choose between shared custody of her children and living with her life partner. Similarly, a refusal to recognize a marriage for the limited purpose of inheritance could cause great hardship to individuals.

IV. States Can Recognize Same-Sex Marriage or Civil Unions for Purposes of Intestacy Despite Refusal to Recognize the Arrangement Due to Offense to Notions of Public Policy

Given the legislation, recent state constitutional amendments, and case law, can states with fervent public policy opposition to these arrangements ever recognize same-sex marriage or civil unions for intestacy purposes? Different components or "incidents" of marriage can and have been recognized by courts, even when the marriage as a whole conflicts with the state's public policy. The reasoning used by courts in the recognition of these "invalid" marriages can be extended by analogy to include same-sex marriages or civil unions for purposes of intestacy. Section IV.A argues that the purpose of intestacy is to reflect the testator's likely donative intent. Section IV.B reasons that a court may recognize the marriage for the limited purpose

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67. Barbara J. Cox, *Using an "Incidents of Marriage" Analysis When Considering Interstate Recognition of Same-Sex Couples' Marriages, Civil Unions, and Domestic Partnerships*, 13 Widener L. Symp. J. 699, 747 (2004).

68. *Burns*, 560 S.E.2d at 48. At least one purpose of the consent decree was to prevent the children from exposure to numerous sexual partners of their parents by limiting the partners in the household to spouses. *See* Cox, *supra* note 67, at 750.

69. 560 S.E.2d at 48.

70. *Id.*

71. *Id.*

72. *Id.*

73. *Id.* (discussing Vt. Stat. Ann. tit. 15, § 8 (2002)).

74. 560 S.E.2d at 49.

of avoiding intestacy, while still refusing to recognize the relationship in other contexts. Section IV.C contends that courts may balance the state's interests in refusing to recognize same-sex unions with the public policy in favor of avoiding intestacy. Section IV.D proposes that an additional solution lies in employing a contract theory to avoid the necessity of recognizing a marriage or union at all.

A. *Purposes of Intestacy: Likely Donative Intent*

Not including same-sex marriage or civil union partners in the intestacy scheme undermines the goal of intestacy statutes, which is effecting what is statistically likely to be the decedent's donative intent.[75] Additionally, financially dependent partners do not receive the protection received by heterosexual spouses. The estate may consist of jointly earned wealth, and the refusal to recognize the relationship may deprive the surviving spouse or partner of a source of support for the couple's children.[76] Surviving same-sex spouses or partners to a civil union similarly lack protection from intentional or accidental disinheritance. Protection through intestacy, therefore, may achieve important societal goals. Intestate succession functions as a default rule that attempts to approximate the manner in which testators would have disposed their estates if they had valid wills.[77] There are four major policies underlying model probate codes.[78] First and foremost, they attempt to reflect likely donative intent.[79] Secondly, intestacy attempts to fairly and equitably distribute property among family members.[80] A third objective is to "protect the financially dependent family" of the decedent.[81] Giving the estate to the surviving spouse probably reflects the likely intent of the decedent, in that the surviving spouse probably lost a source of income and would use that income to support any minor chil-

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75. *See* Martin L. Fried, *The Uniform Probate Code: Intestate Succession and Related Matters*, 55 ALB. L. REV. 927, 929 (1992) (stating that the Uniform Probate Code is based on "prevailing patterns in wills as a guide in determining what the person who fails to execute a will would probably want."). There is nothing to indicate that parties to a same-sex marriage or civil union would dispose of their estates differently by virtue of being same-sex, rather than opposite-sex, couples.

76. The Uniform Probate Code treats adopted children the same as biological children, but same-sex couples are denied the right to jointly adopt children in many places. UNIF. PROBATE CODE § 2-114 (amended 1993). If the children were the biological progeny of the surviving spouse or partner, or adopted only by the surviving spouse or partner, intestacy laws would not protect them from disinheritance.

77. *See* Fried, *supra* note 75.

78. Marissa J. Holob, *Respecting Commitment: A Proposal to Prevent Legal Barriers From Obstructing the Effectuation of Intestate Goals*, 85 CORNELL L. REV. 1492.

79. *Id.* at 1500.

80. *Id.*

81. Cristy G. Lomenzo, *Note: A Goal-Based Approach to Drafting Intestacy Provisions for Heirs Other than Surviving Spouses*, 46 HASTINGS LJ. 941, 947 (1995) (quoting Fellows et al., *supra* note 57).

dren the couple might have. A fourth purpose is to "promote and encourage the nuclear family."[82]

Case law supports the idea that "laws concerning intestate succession are designed to effect the orderly distribution of property for decedents who lacked either the foresight or the diligence to make wills."[83] Spouses are favored under the laws of intestate succession because they are statistically the most likely to be the object of testators' bounty.[84] Additionally, the law protects surviving spouses from disinheritance.[85] Spouses receive legal protections under American law not afforded to other family members.

B. *Recognition of "Incidents of Marriage" without Full Recognition of Continued Validity of the Marriage*

Intestacy is a unique area in which courts have gone to great lengths to recognize relationships—despite their conflict with public policy—in order to benefit the survivor of a "marital" relationship. Ideally, same-sex couples would prefer that states recognize as valid in their entirety their marriages or unions.[86] Short of that, however, courts can and should recognize the marriage or union when the right to inherit through intestacy is the particular "incident" involved.[87] The different incidents of marriage invoke different public policies, and the right to inherit through intestacy is an area in which courts have regularly preferred to resolve doubts in favor of the validity of the marriage. In some cases, they have done so despite a general refusal to honor the marriage during the lives of the parties.

In intestacy proceedings, courts may recognize marriages that are not valid in the litigation forum by using the "incidents of marriage" approach. Three cases illustrate the strides that courts have taken in order to recognize a marriage in cases in which personal property would otherwise pass by intestacy. These cases involve individuals claiming an intestate share of their spouses' estates when the jurisdiction would not have recognized the marriages during the couples' lives.

In *Miller v. Lucks*, the court recognized intestacy rights for an interracial marriage, despite a general refusal to recognize interracial marriages.[88]

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82. Lomenzo, *supra* note 81, at 947 (quoting Fellows et al., *supra* note 57, at 324). Although the recognition of intestacy rights for same-sex couples does not further this purpose, this goal is arguably less important than the earlier-listed purposes. Perhaps the increased acceptance of same-sex relationships will lead to such relationships being included in the ambit of "nuclear family."

83. King v. Riffee, 172 W. Va. 586, 589 (1983).

84. *Id.*

85. *Id.*; *see also* UNIF. PROBATE CODE § 2-202 (amended 1993) (providing for elective share of the estate in the event the testator disinherited the surviving spouse).

86. For same-sex couples, recognition of the marriage or union in its entirety would be ideal, as the couples would receive all of the benefits attendant to marriage.

87. *See* Cox, *supra* note 67, at 718.

88. Miller v. Lucks, 36 So. 2d 140 (Miss. 1948).

In *Miller*, an African American woman died intestate in the state of Mississippi, and her surviving husband, a white man, claimed the spouse's share of the intestate estate.[89] The couple had validly married in Illinois, which did not prevent interracial marriage.[90] The court stated that Mississippi's anti-miscegenation laws prohibited the recognition of a marriage between African Americans and whites and that it served to prevent "persons of Negro and white blood from living together in this state in the relationship of husband and wife."[91] Notwithstanding a marriage that violated the state's public policy, the Mississippi court recognized the marriage for the limited purpose of allowing the surviving spouse to inherit property. The court reasoned as follows:

> [T]o permit one of the parties to such a marriage to inherit property in this state from the other does no violence to the purpose of Sections 263 of our Constitution and 459 of the Code of 1942. What we are requested to do is simply to recognize this marriage to the extent only of permitting one of the parties thereto to inherit from the other property in Mississippi, and to that extent it must and will be recognized.[92]

While the court would never have validated the marriage while the couple lived in the state, it granted the benefit of inheritance through intestacy as a single, recognizable incident of marriage.

The court in *In re Dalip Singh Bir's Estate*[93] recognized intestacy rights for an unlawful polygynous marriage. A man died intestate in California, and his two wives living in India sought to share in his estate.[94] The decedent lawfully entered into the polygynous marriage under the laws of the Punjab Province in India.[95] The trial court determined that only the first wife had a claim to his estate because public policy concerns did not allow the court to recognize both marriages as valid.[96] The appellate court, however, held that the public policy rule only applies "if decedent had attempted to cohabit with his two wives in California. Where only the question of descent of property is involved, 'public policy' is not affected."[97] Similar reasoning is available for application to other types of relationships of which the state's public policy disapproves, such as same-sex marriage or civil unions.

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89. *Id.* at 141.

90. *Id.*

91. *Id.* at 142.

92. *Id.*

93. *In re* Dalip Singh Bir's Estate, 188 P.2d 499 (Cal. Dist. Ct. App. 1948).

94. *Id.*

95. *Id.*

96. *Id.*

97. *Id.* at 502.

The court struggled with the marriage of an uncle and his niece in *In re May's Estate*, but found it sufficient for intestacy purposes.[98] The couple lived in the state of New York, traveled to Rhode Island for the marriage, and returned to New York two weeks later.[99] Rhode Island's laws did not prohibit nuptials when the "marriage solemnized is between persons of the Jewish faith within the degrees of affinity and consanguinity allowed by their religion."[100] The state of New York viewed such marriages as incestuous and impermissible.[101] The court determined that if the couple had sought recognition in the state while both individuals were alive and domiciled there, the marriage would have been void and without effect.[102] The marriage was valid where created, however, and the court recognized it insofar as it awarded the surviving spouse the intestate share of the estate.[103]

Some courts, however, have not been so generous as to recognize intestacy rights when the marriage violates the state's public policy,[104] "particularly if an attempt has been made by residents of a state to evade the law."[105] Some courts have determined that these invalid marriages constitute a nullity, and they will not recognize the marriage for any purpose, including intestacy. In *Eggers v. Olson*, the court held as follows:

> [P]ersons domiciled in this state cannot evade the inhibition of the law by going to another state, and there marrying and then returning to this state to reside and have such marriage recognized by the law of this state. Such marriage is void, and confers no rights of person or property.[106]

Where there has been no attempt to evade state laws, however, it makes little sense to deny rights of inheritance to the survivor of a good-faith same-sex marriage or civil union. If a couple legally marries in state A, with no attempt to evade the laws of state B, and later moves to state B, where one partner dies, it should not evoke the same vigorous objection as a deliberate attempt to avoid state B's laws. In striking down California's anti-miscegenation statute, the California Supreme Court in *Perez v. Lippold* stated, "In determining whether the public interest requires the prohibition of a marriage between two persons, the state may take into consideration matters of legitimate concern to the state."[107] Although the deliberate attempt to evade state laws is a valid state concern in determining of intestacy rights,

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98. *In re* May's Estate, 114 N.E.2d 4 (N.Y. 1953).

99. *Id.* at 5.

100. *Id.*

101. *Id.* at 6.

102. *Id.* at 7.

103. *Id.*

104. *See In re* Shun T. Takahashi's Estate, 129 P.2d 217 (Mont. 1942); Eggers v. Olson, 231 P. 483 (Okla. 1924).

105. Perez v. Lippold, 198 P.2d 17, 38 (Cal. 1948) (Shenk, J., dissenting).

106. Eggers v. Olson, 231 P. 483 (Okla. 1924).

107. *Perez*, 198 P.2d at 21.

this does not apply to the case of couples whose marriage or civil union was entered into honestly and validly in another jurisdiction.

The courts in *Miller*, *Dalip Singh Bir's Estate*, and *May's Estate* took great strides in recognizing marriage and its importance, even in relationships contrary to the state's professed public policy. When the mere distribution of a decedent's estate is at stake, it stands to reason that courts, consistent with their strong exception to same-sex relationships, could recognize the marriage incident that provides for intestacy rights of the surviving partners to a validly entered-into same-sex marriage, civil union, or commitment ceremony.

C. *Weighing Competing Public Policies Allows States to Recognize Same-Sex Marriage or Civil Unions despite Intestacy Statutes that Fail to Provide for Same-Sex Inheritance*

Many states refuse to recognize same-sex marriage or civil unions based on public policy objections to marriage between people of the same sex.[108] There are many competing policies at stake in the recognition of intestacy rights, however, and courts may validly base recognition of the marriage on the state's intestate succession policies rather than the policies about who can marry whom.

Courts faced with a question that requires recognition of same-sex marriage or civil unions for intestacy purposes can rely upon the policies of the state that relate to intestate succession rather than those policies implicated by same-sex relationships. Even if public policy does not support same-sex marriage or civil unions, the court is not being called upon to recognize or sanction the relationship during the lives of the parties. The logical public policy to examine is that related to the purposes behind the intestate succession laws.

The ideals reflected in the intestate succession policies of a state[109] apply with equal force to same-sex couples, especially the protection of the financially dependent family.[110] If the estate of a decedent escheats to the state or is distributed to distant relatives, the state might ultimately bear the costs. If the decedent leaves behind dependent, non-biological children with no means of support, they may have to resort to welfare or other state financial assistance as a result.

A refusal to recognize intestacy rights for same-sex couples is unlikely to deter same-sex relationships. Professor David Engdahl, who supports the "incidents of marriage" approach,[111] points out that when a marriage prohibited by the forum goes undiscovered until after the death of one of the partners, punishing the survivor by denying rights is ineffective to affirm the

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108. *See supra* Part III.

109. *See supra* Introduction.

110. Lomenzo, *supra* note 81 (quoting Fellows et al., *supra* note 57).

111. *See supra* Part IV.B.; Cox, *supra* note 67.

policy behind the marriage restriction.[112] Refusing the right of inheritance is "[a]t best . . . a sterile vindication of the policy of the marriage laws, often at great human expense to a party . . . whose marital habits did not conform nicely to the law."[113]

Parties to same-sex marriages and civil unions likely have the reasonable expectation that their estate will pass to their partners upon death, particularly if that result follows under the law of the jurisdiction where the marriage or union occurred.[114] Upon leaving that jurisdiction, couples may be surprised to learn, perhaps too late, of the disparate approaches, leading to a "stunning lack of uniformity of treatment of surviving same-sex partners."[115] The couples' reasonable expectations can and should be honored where doing so does not require the state to sanction or encourage the formation of such relationships.

Although encouraging nuclear families is a purpose behind the intestacy laws,[116] the balance should tip in favor of the intentions of the decedent. At the point where an individual has already made his or her life choices and has died leaving a surviving partner, the policy of encouraging nuclear families does not apply. Nor would it serve as an example that might encourage others to form nuclear families; rather, it merely provides a warning to similarly situated individuals of the importance of having a valid will.

In short, using the state's public policy concerning marriage and family protection allows fulfillment of the couple's reasonable expectations surrounding the disposition of their estate, especially when recognition does no violence to the policies behind the prohibition.[117] Weighing the applicable advantages that come out of allowing a surviving same-sex partner to share in the estate with the policies against same-sex marriage[118] allows courts to find in favor of this limited, retrospective recognition of same-sex marriage. Like the many cases that have recognized an illicit or defective marriage,[119] even a state's fundamental disagreement with recognition during the lives of the parties can be overcome.

D. *A Solution in Contract Law*

The law of contracts also supplies courts with a solution to the problem of intestate succession rights of parties to a same-sex marriage or civil union. If a court treats the intestate share as an implied contractual right, it can

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112. David E. Engdahl, *Proposal for a Benign Revolution in Marriage Law and Marriage Conflicts Law*, 55 IOWA L. REV. 56, 105–106 (1969).

113. Cox, *supra* note 67, at 721–22 (quoting Engdahl, *supra* note 112, at 106).

114. *See supra* note 5 and accompanying text.

115. Knauer, *supra* note 36, at 78.

116. *See* Lomenzo, *supra* note 81.

117. *See supra* Part IV.

118. Arguably, these policies become moot upon the death of one partner.

119. *See supra* Section IV.B and accompanying text.

lawfully respect the decedent's likely donative intent without recognizing the marriage. Case law demonstrates the successful use of contract law to avoid the problem of public policy.

In *Marvin v. Marvin*,[120] the court used contract law to validate a relationship that was otherwise in violation of the state's public policy. The plaintiff brought suit against an opposite-sex former cohabitant for breach of contract.[121] She claimed she had an oral agreement based on their non-marital relationship to share equally their earnings and any property accumulated by them.[122] Although the court recognized its role in the promotion of the institution of marriage, it stated, "perpetuation of judicial rules which result in an inequitable distribution of property accumulated during a nonmarital relationship is neither a just nor an effective way of carrying out that policy."[123] The court seemed to recognize that it should not punish the plaintiff for her relationship and that an inequitable outcome would not deter this type of relationship. Other courts have established that even unmarried, cohabitating parties are free to enter into contracts.[124]

Courts should recognize intestate succession as an implied contractual right attendant to same-sex couples' marriage or union contract that is wholly valid where entered into. By shifting the focus from the relationship the parties had before death to their status as lawfully contracting parties, the court is free to dispose of the estate in the same way the decedent likely would have chosen had he or she had the opportunity.[125]

V. Requirement of Civil Union, Commitment Ceremony, or Same-Sex Marriage Status

Even if a court is willing in some situations to apply the intestate succession laws to benefit the surviving partner to a same-sex relationship, what qualifies as an appropriate same-sex relationship might remain unclear. Should a court automatically give the intestate estate to a surviving same-sex partner? How long must the relationship have lasted in order to qualify? Should the court have to examine the relationship, its length, and the level of commitment?

In order to treat same-sex marriage or civil union as similar as possible to heterosexual marriage, the recognition of intestacy rights should be lim-

120. Marvin v. Marvin, 557 P.2d 106 (Cal. 1976).

121. *Id.*

122. *Id.*

123. *Id.* at 122.

124. *See, e.g.*, Whorton v. Dillingham, 248 Cal. Rptr. 405, 407 (Ct. App. 1988) ("Adults who voluntarily live together and engage in sexual relations are competent to contract respecting their earnings and property rights."). An exception to this general rule prohibits an express contract "expressly and inseparably based upon an illicit consideration of sexual services." *Marvin*, 557 P.2d at 114.

125. According to Marissa J. Holob, "[m]ost partners in committed relationships leave the majority of their estate to their surviving partner." Holob, *supra* note 78, at 1512.

ited to those who have actually married, been civilly united, or participated in a commitment ceremony that the couple treats as equivalent to marriage. Requiring a formal commitment avoids fraud, makes a distinction between people who are simply "living together" for a limited duration, and reduces the need for inquiry into—and litigation about—the substance of the relationship.

In keeping with the majority of states that have abolished common law marriage, courts should recognize intestacy rights only for same-sex couples that are formally committed. States have sought to delineate rights that favor formal commitment over "shacking up" and consequently have abolished the traditional protection of unmarried heterosexual couples known as common law marriage.[126] The reasons center mainly around the fact that "informal associations were vulnerable to fraud."[127] In the states that still recognize common law marriage, the parties must intend that their relationship be a marriage, and couples who are simply living together cannot claim the benefits of common law marriage.[128]

Because heterosexual claims of intestacy rights are limited by the abolition of common law marriage, same-sex relationships should be similarly restricted. Same-sex couples living together without formal commitment should be subjected to the same standards as heterosexual couples. If a concern of the state is that heterosexual couples would not want their estates to go to a partner in a relationship of short duration or informal commitment, the same concern applies with equal force to same-sex couples. Intestacy was designed to reflect the likely donative intent of married individuals, not the intent of roommates or people living together casually.[129] The same-sex nature of the relationship by itself should not indicate that the relationship is so serious or formal as to be considered a marriage. This distinction is identical to that faced by couples in a jurisdiction that does not recognize common law marriage. Evidence of a formal commitment also avoids the possibility of fraud. Therefore, unless the couple is formally committed through marriage, civil union, or formal commitment ceremony, courts should exclude the surviving same-sex partner from intestate succession.

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126. Only a few states recognize common law marriage, and of those, some recognize only the marriages that were contracted before a certain date. The states that recognize it are as follows: Alabama, Colorado, Georgia (if created before January 1, 1997), Idaho (if created before January 1, 1996), Iowa, Kansas, Montana, New Hampshire (for inheritance purposes only), Ohio (if created before October 10, 1991), Oklahoma (possibly only if created before November 1, 1998—Oklahoma's laws and court decisions may conflict over whether common law marriages formed in that state after November 1, 1998 will be recognized), Pennsylvania (if created before September 2003), Rhode Island, South Carolina, Texas, Utah, and Washington, D.C. Alternative to Marriage Project Fact Sheet, Common Law Marriage, http://www.unmarried.org/commonlaw.pdf (last visited Feb. 24, 2006).

127. Holob, *supra* note 78, at 1516–17 (citing Ellen Kandoian, *Cohabitation, Common Law Marriage, and the Possibility of a Shared Moral Life*, 75 GEO. L.J. 1829, 1851 (1987)).

128. Sol Lovas, *When Is a Family Not a Family? Inheritance and the Taxation of Inheritance within the Non-Traditional Family*, 24 IDAHO L. REV. 353, 361 (1988).

129. *See supra* Section IV.A.

Another benefit of including only formally committed same-sex couples is that it avoids the need for litigation regarding the substance of the relationship. The court in *In re Estate of Lenherr*[130] summed it up perfectly by stating that in a time of "widespread travel and ease of mobility, it would create inordinate confusion and defy the reasonable expectations of citizens whose marriage is valid in one state to hold that marriage invalid elsewhere."[131] As long as the couple in question is validly married, civilly united, or committed in a way equivalent to marriage, courts should allow the survivor to inherit through intestate succession through his or her partner. This leads to a uniform result that does no harm to public policy that might otherwise prevent the couple from legal recognition or receipt of benefits from the state during the lives of the parties. It simply distributes the likely mutually gained wealth in the manner most likely to be what the parties would have done if given the opportunity to create a will before death. The state need not approve, encourage, or validate the relationship. The bright-line standard allows the disposition with minimum litigation, offers no special benefits to the survivor, and comports with how the majority of Americans would prefer to distribute their estate.[132] Requiring a formal commitment is consistent with treating the relationship like a marriage, even for such a narrow, limited purpose.

CONCLUSION

Intestacy rights for formally committed, same-sex couples do not offend public policy; therefore, courts can recognize such rights, even if they do not recognize the relationship during the lives of the partners. People have many varied motivations for forming intimate relationships, but it seems unlikely that allowing same-sex partners to inherit through intestacy would encourage the formation of same-sex relationships. Intestacy merely provides a safety net for those who do not execute wills, or whose wills fail for some reason. It also reflects the likely intent of the decedent to dispose of the estate in favor of his or her closest equivalent to a spouse. It does not cost the state anything, nor does it require the state to allocate scarce resources to couples whose relationships contravene public policy. It merely asks the court to recognize the right of a partner, at death, to have the benefit of support from the decedent. In this way, it protects and rewards the emotional commitment and financial interdependence between committed partners, and preserves the wealth that partners jointly generate.

Courts recognizing major changes that are contrary to public policy have been met with forceful opposition.[133] Recognition of the right to inherit by

130. *In re* Estate of Lenherr, 314 A.2d 255 (Pa. 1974).

131. *Id.* at 258.

132. *See supra* Section IV.B.

133. The decision in *Goodridge v. Department of Public Health*, 798 N.E.2d 941 (Mass. 2003), legalizing same-sex marriage, arguably led to the inclusion of eleven proposed amendments to state constitutions on the November 2004 ballots that banned gay marriage, all of which passed.

intestate succession, however, is not likely to create the same backlash as the wide-sweeping recognition of the right to marriage. As with the other cases in which courts have merely recognized a single incident of marriage, this small move of recognition of intestacy rights for same-sex couples is not likely to receive the same public or private attention as full recognition of same-sex marriage. The only people whose lives it may dramatically affect are parties in same-sex relationships who die without a valid will leaving their estate to their partner. Allowing intestacy rights will have little or no effect on the state, especially compared to the benefit it bestows on the surviving partner.

Associated Press, *Voters pass all 11 bans on gay marriage: Ballot initiatives pave the way for new court battles*, Nov. 3, 2004, http://msnbc.msn.com/id/6383353.