

1-1-2007

# Refocusing Inheritance Law in Michigan: A Proposal to Realign Michigan Inheritance Law with its Purpose

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## Recommended Citation

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REFOCUSING INHERITANCE LAW IN MICHIGAN:  
A PROPOSAL TO REALIGN MICHIGAN INHERITANCE LAW WITH ITS PURPOSE  
by  
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Submitted in partial fulfillment of the requirements of the  
King Scholar Program  
Michigan State University College of Law  
under the direction of  
Professor Melanie Jacobs  
Fall, 2006

## INTRODUCTION

Family structures in the United States continue to change. In fact, from 2000 to 2005, the percentage of households in the United States headed by married couples dropped below 50 percent.<sup>1</sup> Increasingly, people live in unmarried partner households, headed by same-sex or opposite-sex partners.<sup>2</sup>

As one might expect, people who live in unmarried partner households form emotional and financial family bonds, similar to those of married couple households.<sup>3</sup> Families provide invaluable support for their members. People take care of family members during sickness and provide financial security through cooperation. Family members structure their lives in ways that cause them to depend on the efficiencies created by these support systems. For example, a two-parent family may make a lifestyle and parenting choice that one parent will work outside of the home to earn money for the family while the other parent stays home to take care of the child and the house. The ability of both parents to rely on this arrangement flows from each person's reliance on the security of the family relationship. State laws generally recognize the financial reliance that married people place on their spouses and protect the welfare of married couples through inheritance laws.<sup>4</sup>

Inheritance laws govern how a person's property is distributed after the person dies and in doing so, provide important protections for married couples. Specifically, a spouse generally

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<sup>1</sup> See SIMMONS, TAVIA & MARTIN O'CONNELL, U.S. CENSUS BUREAU, MARRIED-COUPLE AND UNMARRIED-PARTNER HOUSEHOLDS: 2000 1 (2003). Married couple households accounted for 51.6% of all households in the US in 2000; U.S. CENSUS BUREAU, 2005 AMERICAN COMMUNITY SURVEY, at [http://factfinder.census.gov/servlet/ADPTable?\\_bm=y&-geo\\_id=01000US&-qr\\_name=ACS\\_2005\\_EST\\_G00\\_DP1&-ds\\_name=&-redoLog=false](http://factfinder.census.gov/servlet/ADPTable?_bm=y&-geo_id=01000US&-qr_name=ACS_2005_EST_G00_DP1&-ds_name=&-redoLog=false). Married couple households accounted for 49.7% of all US households in 2005.

<sup>2</sup> See SIMMONS & O'CONNELL, *supra* note 1, at 1. (noting the increase in unmarried partner households from the 1990 census to the 2000 census).

<sup>3</sup> See *id.* Data compiled for households headed by unmarried couples excludes those census respondents who indicated living with a "housemate, roommate", "other nonrelative", or "roomer, boarder", suggesting a closer, family relationship.

<sup>4</sup> See *infra* Part I.B..

receives a large share of the decedent's property if the decedent dies without a will, thereby protecting the spouse from unintentional disinheritance.<sup>5</sup> A surviving spouse also has the option of taking a statutorily-defined share of the estate in lieu of taking under the decedent's will; this protects the spouse against the consequences of being omitted from the decedent's will or being included and given only a small share.<sup>6</sup> Other default inheritance law provisions provide protections for spouses omitted from a will the testator executed before the marriage.<sup>7</sup> Many states' inheritance law also automatically remove a former spouse as a taker under a will executed during the marriage.<sup>8</sup>

Inheritance law uses characteristics of the decedent's family to determine how to distribute the decedent's property.<sup>9</sup> These laws still provide primarily for the traditional family, to the exclusion of same-sex couples, because they hinge the provision of benefits on the marital relationship to the exclusion of other committed relationships.<sup>10</sup> This puts current inheritance law out of synch with the lives of millions of Americans.<sup>11</sup> Because the purposes espoused by intestacy law are so critical, this disconnect between the law and reality frustrates inheritance law's dual purposes of implementing the probable intent of the decedent and protecting surviving family members.<sup>12</sup> As the population of both same-sex and opposite-sex unmarried partners grows, inheritance laws protect an increasingly smaller portion of society.<sup>13</sup>

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<sup>5</sup> See *infra* Part I.C.1.

<sup>6</sup> See WILLS, TRUSTS, AND ESTATES 425 (Jesse Dukeminier et al. eds., 2005).

<sup>7</sup> See *id* at 462-65.

<sup>8</sup> See *id* at 269.

<sup>9</sup> See *infra* Part I.C.

<sup>10</sup> See Sol Lovas, *When Is a Family Not a Family? Inheritance and the Taxation of Inheritance Within the Non-Traditional Family*, 24 IDAHO L. REV. 353, 353 (1988). The traditional family model provides the basis for most current inheritance statutes, even though the traditional family is no longer a majority.

<sup>11</sup> See SIMMONS & O'CONNELL, *supra* note 1, at 2. Nearly 11 million adults live in unmarried partner households.

<sup>12</sup> MICH. COMP. LAWS §700.1101 – .8102 (2006)

<sup>13</sup> Marissa J. Holob, *Respecting Commitment: A Proposal to Prevent Legal Barriers from Obstructing The Effectuation of Intestate Goals*, 85 CORNELL L. REV. 1492, 1495 (2000).

At the outset of this discussion, one must remember that marriage is used by inheritance law simply as a vehicle for implementing its purposes of effectuating the probable intent of the decedent and protecting surviving family members. The law has found in marriage an easily ascertainable and, at least historically, a fairly reliable indicator of how an intestate decedent would have wanted to divide his or her estate and which of the decedent's survivors would benefit from legal protections. Current inheritance law largely fails to recognize same-sex relationships, despite the fact that they are easily ascertainable and serve as valuable indicia of the decedent's desires and survivors' needs.

Michigan inheritance law, like that of most other jurisdictions, recognizes only traditional family relationships in distributing property and protecting surviving family members.<sup>14</sup> It makes no provisions for same-sex couples specifically, and since marriage in Michigan is restricted to opposite-sex couples only,<sup>15</sup> the growing number of same-sex partner households is left without the protections provided by inheritance law. In other words, many Michigan citizens who depend upon family relationships for financial survival are left unprotected in the event their partner dies.

Reforms implemented by a handful of jurisdictions have brought same-sex couples within the umbrella of rights and protections afforded by their respective inheritance laws. Some of these approaches focus solely on same-sex couples while others implement reforms that include other forms of unmarried partner families. Because same-sex couples in nearly all jurisdictions do not have the right to marry and thereby gain the benefits of state inheritance law, this paper focuses the issue of inheritance rights for same-sex couples. Unmarried opposite-sex couples are discussed when they are included by a particular jurisdiction's statutory scheme and

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<sup>14</sup> MICH. COMP. LAWS §700.1101 – .8102 (2006).

<sup>15</sup> MI Const. of 1963, art. I, §25 (2004); MICH. COMP. LAWS §551.1 (2006); MICH. COMP. LAWS §551.272 (2006).

when their inclusion in or exclusion from the proposal for reform bears on the likelihood of the proposal passing state constitutional muster.

This paper highlights how inheritance law in most United States jurisdictions fails to fulfill its purposes because it neglects same-sex couples and their families. Reforms implemented by some jurisdictions that bring same-sex couples and their families within the scope of the inheritance laws are reviewed. The paper gives specific attention to Michigan inheritance law and proposes a direction for reform that brings inheritance law in line with its purpose by including same-sex couples in the statutory framework.

## **I. BACKGROUND**

### **A. Same-sex Partner Households**

The 2000 Census reflected 594,000 same-sex partner households in the United States.<sup>16</sup> By most accounts, these numbers do not fully reflect the actual numbers of people in the United States living in same-sex partner households.<sup>17</sup> The reluctance of same-sex partners to identify themselves on a government survey and the survey's lack of a particular category that fit the respondent's living situation have likely caused an under-count of the number of same-sex partners living in the United States.<sup>18</sup> The Human Rights Campaign report on the subject estimates the undercount at sixty-two percent,<sup>19</sup> while another report suggests an undercount of 16%.<sup>20</sup> The census also illuminated that, in Michigan, over 30,000 people live in same-sex

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<sup>16</sup> See SIMMONS & O'CONNELL, *supra* note 1, at 2. (reporting 594,391 same-sex partner households in the 2000 census).

<sup>17</sup> See *infra* notes 20-21.

<sup>18</sup> SMITH, DAVID M. & GARY J. GATES, GAY AND LESBIAN FAMILIES IN THE UNITED STATES: SAME-SEX UNMARRIED PARTNER HOUSEHOLDS 1-2 (Human Rights Campaign 2001).

<sup>19</sup> *Id.* at 2.

<sup>20</sup> BADGETT, M.V. LEE & ROGERS, MARC A, LEFT OUT OF THE COUNT: MISSING SAME-SEX COUPLES IN CENSUS 2000 1, (Institute for Gay and Lesbian Strategic Studies 2003).

partnerships.<sup>21</sup> When adjusting for the likely undercount in the census data, the estimate of the actual number of adults living in same-sex partner households in Michigan ranges from 35,000 to 50,000 people.<sup>22</sup>

Same-sex couples in committed relationships, like married heterosexual couples, form deep emotional attachments and commitments and face parallel challenges in love, intimacy, and loyalty as those faced by married heterosexual couples.<sup>23</sup> Though same-sex couple households experience family life in much in the same way married couple households do, the current legal schemes of most jurisdictions make financial survival more difficult for same-sex couples. Therefore, the financial situations of same-sex couples are likely to be less stable than those of married couples because same-sex couples do not enjoy legal economic protections similar to those of married heterosexual couples.<sup>24</sup> Greater legal protections for families in the event of the death of a family member provide a stronger safety net and more stability for the family in general. These legal protections flow from one of the dual purposes of inheritance law: to protect the surviving family members when someone dies.

## B. The Purposes of Inheritance Law

Two main purposes exist for the current structure of inheritance law in the United States: implementing the probable intent of the decedent<sup>25</sup> and protecting the decedent's survivors.<sup>26</sup> Different statutory provisions carry out one or both of these purposes using various characteristics of the decedent and the decedent's family to determine to whom the decedent's

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<sup>21</sup> See SIMMONS & O'CONNELL, *supra* note 1, at 4. (reporting 15,368 same-sex partner households in Michigan).

<sup>22</sup> Multiplying the two cited undercount estimates by the total reported by the 2000 census yields this range.

<sup>23</sup> Gregory M. Herek. *Legal Recognition of Same-Sex Relationships in the United States: A Social Science Perspective*, 61 AM. PSYCHOLOGIST 607, 610 (2006).

<sup>24</sup> *Id.* at 615.

<sup>25</sup> See UNIF. PROBATE CODE § 1-102(b)(2) (amended 2006). (describing one of the underlying purposes and policies of the code as "to discover and make effective the intent of a decedent in distribution of his property").

<sup>26</sup> WILLS, TRUSTS, AND ESTATES, *supra* note 6 at 62-63.

assets will be transferred. Many states have adopted Uniform Probate Code provisions or at least used the UPC as a framework in constructing the state's inheritance law.<sup>27</sup> The UPC contains several key provisions that are important to furthering the purposes of inheritance law.

### C. Inheritance Law Provisions Focusing on Family Protection and Decedent Intent

#### 1. Intestacy and the Spousal Share

When someone dies without a will or with a will that does not effectively dispose of all of the decedent's assets, the law falls back on a scheme of default rules called intestate succession. Intestate succession statutes typically base the division of a decedent's assets on a traditional family model by hinging distribution of estates on the marital relationship;<sup>28</sup> they provide for a surviving spouse and surviving children to inherit large portions of the decedent's estate.

By providing a large share of the estate for the surviving spouse, the statute supposedly implements the probable intent of the decedent and provides support for someone who is reasonably likely to have had strong financial ties to the decedent. Both of the main purposes of inheritance law are served when the family fits into the UPC criteria. Unfortunately, the UPC criteria as adopted by most states exclude same-sex partner families.

For example, consider the scenario of a woman who dies intestate with only one child, and with that child's father also being her surviving spouse. The surviving spouse will receive all of the decedent's assets under the Uniform Probate Code.<sup>29</sup> The result in this example varies by state; in Michigan, for example, the surviving spouse would receive the first \$150,000 plus

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<sup>27</sup> *Id.* at 60.

<sup>28</sup> Thomas M. Hansom. *Intestate Succession for Stepchildren: California Leads the Way, but Has it Gone Far Enough?*, 47 HASTINGS L. J. 257, 260 (1995).

<sup>29</sup> UNIF. PROBATE CODE § 2-102 (amended 2006).

half the balance of the remaining estate.<sup>30</sup> The other half of the remaining estate would pass to the decedent's child.<sup>31</sup> If, however, the woman was not married but instead in a same-sex relationship with her partner of 25 years (and her child was from a previous relationship), the child would receive the entire estate under the UPC<sup>32</sup> and under Michigan law, with the surviving partner receiving nothing.<sup>33</sup>

## 2. Protection Against Intentional Disinheritance: The Elective Share

The UPC provides another protection for the surviving spouse: the right to elect a statutory share of the decedent's estate rather than taking according to the provisions of the decedent's will. The elective share protects the decedent's spouse against disinheritance by creating a statutory minimum amount the surviving spouse can elect to receive. Under the UPC, a surviving spouse may choose to take the portion designated for him or her under the decedent's will or to take a portion of the decedent's assets as determined by statute.<sup>34</sup> The amount of the share the surviving spouse may elect varies by state, but its purposes are related: to recognize the contribution that the spouse has likely made in the decedent's acquisition of wealth and to provide the spouse with adequate support.<sup>35</sup> The elective share under the most recent version of the Uniform Probate Code varies depending on the length of the marriage, ranging from a 3% share of the estate for couples married for one year to 50% of the estate for couples married for 15 years or more.<sup>36</sup> This provision strikes a balance between implementing the probable intent of the testator, whose intent can be inferred from the provisions of the will, and providing

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<sup>30</sup> MICH. COMP. LAWS §700.2102 (2006).

<sup>31</sup> MICH. COMP. LAWS §700.2103 (2006).

<sup>32</sup> UNIF. PROBATE CODE § 2-103 (amended 2006).

<sup>33</sup> *Id.*

<sup>34</sup> See UNIF. PROBATE CODE § 2-202(a) (amended 2006).

<sup>35</sup> See WILLS, TRUSTS, AND ESTATES, *supra* note 6 at 425.

<sup>36</sup> See UNIF. PROBATE CODE § 2-202(a) (amended 2006).

financial protection for the surviving spouse.<sup>37</sup> Only spousal relationships qualify for the right of election in most jurisdictions; therefore, the right of election is not extended to survivors of same-sex relationships in most jurisdictions because most jurisdictions restrict marriage to opposite-sex couples.

### 3. Protection Against Unintentional Disinheritance: The Pretermitted Spouse

Provisions in inheritance law for pretermitted spouses protect the probable intent of the testator and, indirectly, the surviving members of the testator's family. A pretermitted spouse situation occurs when a testator executes a will and later marries without changing the will to provide for the testator's spouse.<sup>38</sup> The UPC calls for a surviving spouse to receive a share of the decedent's estate if a will executed before the marriage did not provide for the spouse.<sup>39</sup> This provision supposes that, in most cases, the decedent would have provided more for his or her surviving spouse had he or she updated the will during the marriage. This provision, serves the purpose of effecting the probable intent of the testator and providing protection for the testator's spouse by creating another safety net to protect against the decedent's failure to keep his or her will current. Inheritance law of most jurisdictions neglects the formation of same-sex relationships in all cases, thereby ignoring this valuable indicator of decedent intent.

### 4. Other Protections

For the purpose of effectuating the probable intent of the testator, inheritance law steps in to adjust a testator's will in certain circumstances subsequent to a divorce. The UPC revokes any

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<sup>37</sup> The percentage a surviving spouse takes under UPC 2-202(a) is a portion of the "augmented estate", which includes assets of the surviving spouse as well as assets of the decedent, thereby adjusting the portion to "lean" toward implementing the probable intent of the donor in cases where the protective function is not as critical and the wealth is less likely to be attributable to a partnership between these spouses.

<sup>38</sup> See WILLS, TRUSTS, AND ESTATES 462-65 (Jesse Dukeminier et al. eds., 2005).

<sup>39</sup> See UNIF. PROBATE CODE § 2-301(a) (amended 2006). Under the UPC, the share is the value that the surviving spouse would have received had the testator died intestate as to the portion of the estate, if any, that is not devised to a child of the testator (and not of the surviving spouse) born before the marriage, or to such child's issue. Certain exceptions apply if there exist indicia of testator's intentional omission of the surviving spouse or if the testator provided for the spouse by a transfer outside of the will.

transfer in the will from the testator to his or her former spouse if the will was executed during the marriage.<sup>40</sup> This provision addresses the situation where a decedent executed a will during marriage, the couple subsequently divorced, and the decedent died before revising his or her will. In all likelihood, the decedent would not want his or her former spouse to inherit as if the couple was still married; therefore, this provision focuses on the goal of effecting the probable intent of the donor. Inheritance law in most jurisdictions ignores the termination of same-sex relationships in all cases, just like it ignores their formation.

D. Failure of Inheritance Law to Fulfill its Purposes for Same-sex Couples

Unfortunately, inheritance law in most states completely fails to recognize same-sex family relationships and, therefore, produces results that conflict sharply with the purposes of the laws. By ignoring same-sex families, current inheritance law distributes property contrary to the probable desires of most decedents by failing to recognize relationships to which the decedent committed significant emotional and financial investment during life.

One influential study of public opinion regarding inheritance law and unmarried couples highlights the stark contrast between the result produced by current law and the result most people believe is just.<sup>41</sup> The study presented a sample of the general public with several scenarios involving a decedent who was in a committed partnership at the time of death and asked participants to divide the estate. One scenario involved a decedent in a same-sex committed relationship who had surviving parents and no surviving children. Over half of the participants favored giving the surviving partner at least half of the estate.<sup>42</sup> Michigan law and

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<sup>40</sup> See UNIF. PROBATE CODE § 2-804 (amended 2006).

<sup>41</sup> Mary L. Fellows et al., *Committed Partners and Inheritance: An Empirical Study*, 16 LAW & INEQ. 1 (1998).

<sup>42</sup> See *id.* at 41.

the UPC provide no portion of the estate to the surviving partner,<sup>43</sup> producing a result contrary to what most people think should happen.

The difference proves even greater when participants were presented with a scenario involving a decedent in a same-sex committed relationship with no surviving children, no surviving parents, and surviving brothers and sisters. Under Michigan law and the UPC, the entire estate passes to the surviving siblings.<sup>44</sup> Over two-thirds of the participants in the general public sample responded that the surviving partner should receive a share of the estate with over half favoring giving the surviving partner at least half of the estate.<sup>45</sup> Even more striking is the finding that none of the respondents who themselves were same-sex committed relationships indicated a preference for providing none of the estate to the surviving partner.<sup>46</sup> In other words, not a single respondent in the same type of relationship as the hypothetical decedent preferred the result produced by current laws meant to effect the intent of such a decedent.

In short, inheritance laws that fail to provide inheritance rights for same-sex couples also fail in their primary purposes. Because the protections provided by inheritance law do not operate for same-sex couples in most US jurisdictions, over eleven million people fall outside of the umbrella of protections that these laws purport to provide.<sup>47</sup>

## **II. APPROACHES TO PROVIDING INHERITANCE RIGHTS TO SAME-SEX COUPLES**

Certain jurisdictions have adopted laws that provide some inheritance rights for same-sex couples. Though the details vary, each jurisdiction uses one of four basic approaches. These

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<sup>43</sup> MICH. COMP. LAWS §700.2103 (2006); UNIF. PROBATE CODE § 2-203 (amended 2006).

<sup>44</sup> MICH. COMP. LAWS §700.2102 (2006); UNIF. PROBATE CODE § 2-202 (amended 2006).

<sup>45</sup> See Fellows, *supra* note 41 at 43.

<sup>46</sup> *Id.*

<sup>47</sup> See SIMMONS & O'CONNELL, *supra* note 1 at 2.

approaches differ based on how they define eligible relationships and the extent to which state inheritance law applies to the relationship defined by the statute. The approaches differ from each other in two significant ways: how they define eligible relationships and which rights are granted to those who qualify. They range from simply granting marriage rights to same-sex couples, to creating a new type of relationship designation, such as “civil union,” “domestic partnership” or “reciprocal beneficiary relationship,” that allows a range of people to “opt in” to inheritance rights by registering with the state. Following is a brief description of the approaches currently in use.

A. Reciprocal Beneficiaries: Hawaii

Used only by Hawaii, the reciprocal beneficiary designation provides an avenue for inheritance rights for any two adults who are otherwise prohibited from marrying under Hawaii law.<sup>48</sup> The Hawaii Reciprocal Beneficiary Act recognizes that “there are many individuals who have significant personal, emotional, and economic relationships with another individual yet are prohibited by such legal restrictions from marrying”<sup>49</sup> and to whom certain benefits formerly provided exclusively to married couples should be extended.

Two people in a relationship in Hawaii must meet certain statutory requirements in order to be considered reciprocal beneficiaries under state law. Each person must be at least eighteen years old, neither person may be married or party to another reciprocal beneficiary relationship, both parties must enter into the relationship voluntarily, and the parties must be otherwise prohibited from marrying by Hawaii law.<sup>50</sup> Parties seeking to receive benefits as reciprocal

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<sup>48</sup> HAW. REV. STAT. §572C-4 (2005).

<sup>49</sup> HAW. REV. STAT. §572C-2 (2005).

<sup>50</sup> HAW. REV. STAT. §572C-4 (2005).

beneficiaries under Hawaii law must register the relationship with the state and pay a small fee.<sup>51</sup> Registration entitles reciprocal beneficiaries to legal rights as provided in Hawaii law.<sup>52</sup>

The broad scope of the relationship combined with a broad grant of rights sets the reciprocal beneficiary designation apart from the other approaches to providing inheritance rights to same-sex couples. Unlike civil unions, most domestic partnerships,<sup>53</sup> or marriage, the reciprocal beneficiary designation carries no requirement that the parties be unrelated.<sup>54</sup> For example, a brother and a sister would be prohibited from marrying under Hawaii law,<sup>55</sup> making them eligible to register as reciprocal beneficiaries if they meet the other requirements of the statute. By allowing related individuals to register as domestic partners and granting those partners a broad array of rights, the provides an avenue to inheritance rights for any couple ineligible to marry who desires them; this includes unrelated same-sex couples.

Inheritance rights provided by law to reciprocal beneficiaries in Hawaii include an elective share equal to that of the spouse,<sup>56</sup> intestate succession provisions equal to those of spouses,<sup>57</sup> and protection in case of a “pretermitted spouse” situation.<sup>58</sup> Another, related benefit granted to reciprocal beneficiaries is the right to hold property in tenancy by the entirety under Hawaii law,<sup>59</sup> a right that had been previously reserved only for married couples. Hawaii statutes do not provide for automatic revocation of a testamentary gift from one reciprocal beneficiary to another in the event that the relationship has terminated.

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<sup>51</sup> *Id.*; HAW. REV. STAT. §572C-5 (2005).

<sup>52</sup> HAW. REV. STAT. §572C-6 (2005).

<sup>53</sup> The District of Columbia statute is the only domestic partnership statute without a requirement that parties to the partnership be unrelated. It does, however, require “a familial relationship between two individual characterized by mutual caring and the sharing of a mutual residence.” D.C. CODE §32-701 (2006).

<sup>54</sup> This lack of an “unrelated requirement” is the only significant factor distinguishing Hawaii’s Reciprocal Beneficiary designation from the Domestic Partnership Registry approach.

<sup>55</sup> HAW. REV. STAT. §572-1(1) (2005).

<sup>56</sup> HAW. REV. STAT. §560:2-212 (2005).

<sup>57</sup> HAW. REV. STAT. §560:2-102 (2005).

<sup>58</sup> HAW. REV. STAT. §560:2-301 (2005).

<sup>59</sup> HAW. REV. STAT. §509-2 (2005).

In short, the reciprocal beneficiary system encompasses a broader spectrum of relationships than the other approaches and offers many, but not all, of the state inheritance law rights and protections received by married couples.

#### B. Domestic Partnership

Currently used by four jurisdictions,<sup>60</sup> the domestic partnership registry approach provides an avenue for same-sex couples to bring themselves under the umbrella of some state law inheritance rights if they meet certain requirements and register their relationship with the state. More restrictive eligibility requirements and, in most cases more limited rights, distinguish this approach from reciprocal beneficiary designations, civil unions, and same-sex marriage. California, Maine, New Jersey, and the District of Columbia use domestic partnership registry systems.

Eligibility requirements among domestic partnership jurisdictions vary in almost every respect. California, Maine, and New Jersey require that domestic partner registrants may not be related in such a way that would prohibit marriage under state law;<sup>61</sup> the District of Columbia has no such “unrelated requirement.”<sup>62</sup> California and New Jersey allow same-sex couples of any age over eighteen to register as domestic partners but allow opposite-sex couples to register only if one of the partners is sixty-two years old or older.<sup>63</sup> Maine and the District of Columbia allow same-sex or opposite-sex couples of any age over eighteen to register.<sup>64</sup> All four jurisdictions require that parties maintain a common residence in order to be eligible to register as domestic

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<sup>60</sup> California, Maine, New Jersey, and the District of Columbia. CAL. FAM. CODE §297 (West 2006); ME. REV. STAT. ANN. tit. 22 §2710 (2006); N.J. STAT. ANN. §26:8A-4 (West 2006); D.C. CODE §32-702 (2006).

<sup>61</sup> CAL. FAM. CODE §297(b) (West 2006); ME. REV. STAT. ANN. tit. 22 §2710 (2006); N.J. STAT. ANN. §26:8A-4 (West 2006).

<sup>62</sup> Though the District of Columbia allows related couples to register for benefits, the common residence requirement, the more limited scope of overall rights and the use of the term “domestic partnership” in the statute call for classification of this statutory scheme as a domestic partnership approach rather than a Hawaii-style reciprocal beneficiary approach.

<sup>63</sup> CAL. FAM. CODE §297(b) (West 2006); N.J. STAT. ANN. §26:8A-4 (West 2006).

<sup>64</sup> ME. REV. STAT. ANN. tit. 22 §2710 (2006); D.C. CODE §32-701 (2006).

partners,<sup>65</sup> with Maine requiring that the couple be domiciled in the state for at least twelve months.<sup>66</sup> All four jurisdictions also require that parties to a domestic partnership not be married or party to another domestic partnership.<sup>67</sup> Maine imposes the additional requirement that each domestic partner must be “the sole domestic partner of the other and expect[s] to remain so.”<sup>68</sup> New Jersey’s domestic partnership registry contains a host of additional requirements, including requirements of joint responsibility for living expenses and verifiable joint responsibility for “each other’s common welfare.”<sup>69</sup>

As with eligibility requirements, the inheritance rights provided to domestic partners vary from jurisdiction to jurisdiction. Registered domestic partners in California are entitled to all of the same rights, protections, and benefits under California inheritance law as those provided to married couples.<sup>70</sup> In addition, the California statute specifically provides that any California laws that refer to, rely upon, or adopt federal law that would treat married couples differently than domestic partners will be treated by California law “as if federal law recognized a domestic partnership in the same manner as California law.”<sup>71</sup> Therefore, domestic partners are treated equally to spouses under California law for the purposes of all inheritance rights.

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<sup>65</sup> CAL. FAM. CODE §297(b) (West 2006); ME. REV. STAT. ANN. tit. 22 §2710 (2006); N.J. STAT. ANN. §26:8A-4 (West 2006); D.C. CODE §32-701(1) (2006).

<sup>66</sup> ME. REV. STAT. ANN. tit. 22 §2710 (2006).

<sup>67</sup> CAL. FAM. CODE §297(b) (West 2006); ME. REV. STAT. ANN. tit. 22 §2710 (2006); N.J. STAT. ANN. §26:8A-4 (West 2006); D.C. CODE §32-701 (2006).

<sup>68</sup> *Id.*

<sup>69</sup> Both persons must have a common residence; both persons must be jointly responsible for each other’s common welfare, and this joint responsibility must be evidenced by joint financial arrangements or joint ownership of real or personal property. This must be demonstrated by at least one of the following: A deed, mortgage agreement, or lease; a joint bank account; Designation of one of the persons as a primary beneficiary in the other person’s will; Designation of the other person as a primary beneficiary in the other person’s life insurance policy or retirement plan; or, Joint ownership of a motor vehicle. ME. REV. STAT. ANN. tit. 22 §2710 (2006).

<sup>70</sup> CAL. FAM. CODE §297.5 (West 2006).

<sup>71</sup> CAL. FAM. CODE §297.5(e) (West 2006).

Though it does not offer the wide range of rights provided by California, New Jersey law affords domestic partners equal treatment to that of spouses with regard to intestate succession,<sup>72</sup> pretermitted domestic partner situations<sup>73</sup>, and domestic partner elective share.<sup>74</sup>

The Maine statute gives a more limited array of rights to domestic partners, providing equal rights only with regard to intestate succession.<sup>75</sup> The statute does not allow a domestic partner to elect against his or her partner's will,<sup>76</sup> does not provide pretermitted domestic partners the same protections as pretermitted spouses, and lacks automatic revocation of testamentary gifts to a domestic partner upon termination of the partnership.

In the District of Columbia, domestic partners are treated equally to spouses with respect to intestate succession<sup>77</sup> and receive the same protections as spouses when omitted from the will.<sup>78</sup> Testamentary gifts to a former domestic partner are treated the same as those to a former spouse and automatically revoked.<sup>79</sup>

#### 1. Ongoing Developments with New Jersey's Domestic Partnerships Laws

In October 2006, the New Jersey Supreme Court decided the case of Lewis v. Harris,<sup>80</sup> which held that “denying rights and benefits to committed same-sex couples that are statutorily given to their heterosexual counterparts violates” the New Jersey Constitution.<sup>81</sup> The court specifically cited that one disparity between the current domestic partnership designation and marriage is the protection that a married couple receives by having a bequest to the spouse

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<sup>72</sup> N.J. STAT. ANN. §3B:5-3 (West 2006).

<sup>73</sup> N.J. STAT. ANN. §3B: 5-15 (West 2006).

<sup>74</sup> N.J. STAT. ANN. §3B:8-1 (West 2006).

<sup>75</sup> ME. REV. STAT. ANN. tit. 18A §2-102 (2006).

<sup>76</sup> ME. REV. STAT. ANN. tit. 18A §2-201 (2006).

<sup>77</sup> D.C. CODE §19-302 (2006).

<sup>78</sup> D.C. CODE §19-113 (2006).

<sup>79</sup> D.C. Code §18-109 (2006).

<sup>80</sup> Lewis v. Harris, 908 A.2d. 196 (N.J. 2006).

<sup>81</sup> *Id.* at 200.

automatically revoked at divorce.<sup>82</sup> A party to a New Jersey domestic partnership that has terminated receives no such protection. The court called upon the legislature to remedy this problem within 180 days of the decision either by allowing same-sex couples to marry under New Jersey law or by otherwise providing rights and benefits equal to those of marriage to same-sex couples in committed relationships.<sup>83</sup> In December 2006, both chambers of the New Jersey legislature passed a bill that would create a civil union system<sup>84</sup> similar to those of Vermont and Connecticut;<sup>85</sup> it has not yet been signed by the governor.

### C. Civil Unions

Civil unions provide same-sex couples with a parallel route to the rights and benefits traditionally associated with marriage, using a process and eligibility requirements that also parallel state marriage law. Two states, Vermont and Connecticut, provide for civil unions. These arrangements grant all of the same rights and benefits to parties to a civil union as are provided to legal spouses.

Eligibility requirements for civil unions parallel those of marriage. Both states limit civil unions to same-sex couples who are unrelated and over the age of eighteen, and not married or party to another civil union.<sup>86</sup> Each jurisdiction also requires civil union licenses similar to those required of married couples.<sup>87</sup>

While Vermont's statute was prompted by court action, Connecticut's was adopted voluntarily. The Vermont civil union statute specifies that its purpose is to comply with the

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<sup>82</sup> N.J. STAT. ANN. §3B:3-14 (West 2006).

<sup>83</sup> See *Lewis*, 908 A.2d. at 224.

<sup>84</sup> S.B. S2407, 2006 Leg., 212th Sess. (NJ 2006).

<sup>85</sup> See *infra* Part II.C.

<sup>86</sup> VT. STAT. ANN. tit. 15 §1202-1203 (2006); CONN. GEN. STAT. §46b-38bb(2) – (3), §46b-38cc (2006).

<sup>87</sup> VT. STAT. ANN. tit. 18 §5160 (2006); CONN. GEN. STAT. §46b-38hh (2006).

Vermont Supreme Court’s ruling in Baker<sup>88</sup> that the state’s failure to extend the secular benefits of marriage to same-sex partners violated Vermont’s state constitution – specifically its common benefits clause.<sup>89</sup> The Baker court noted that the legislature need not extend the right to marry to same-sex partners; however, the court held that the state must afford same-sex partners the same state law benefits as those received by married couples.

Instead of granting specific rights in the civil union statute or relying on individual parts of the state’s statutory scheme to grant rights only when they reference civil unions specifically, these statutes provide broader, more blanket-like grants of rights. For example, the Vermont statute grants a wide range of benefits, protections, and responsibilities to parties to civil unions directly.<sup>90</sup> The statute provides that the benefits, protections, and responsibilities of spouses under

laws relating to title, tenure, descent and distribution, intestate succession, waiver of will, survivorship, or other incidents of the acquisition, ownership, or transfer, inter vivos or at death, of real or personal property, including eligibility to hold real and personal property as tenants by the entirety (parties to a civil union meet the common law unity of person qualification for purposes of a tenancy by the entirety)”

shall apply “in like manner to parties to a civil union.”<sup>91</sup>

The Connecticut statute has a similarly comprehensive effect but takes an even simpler and more comprehensive approach than Vermont by providing that “wherever in the general statutes the terms ‘spouse’, ‘family’, ‘immediate family’, ‘dependent’, ‘next of kin’ or any other term that denotes the spousal relationship are used or defined, a party to a civil union shall be

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<sup>88</sup> Baker v. State, 744 A.2d 864 (Vt. 1999). (holding that extending legal rights to opposite-sex couples that are unavailable to same-sex couples violates state constitution)

<sup>89</sup> VT. CONST. CH 1. ART. 7.

<sup>90</sup> VT. STAT. ANN. tit. 15 §1204 (2006).

<sup>91</sup> VT. STAT. ANN. tit. 15 §1204(e)(1) (2006).

included in such use or definition.”<sup>92</sup> A few limited exceptions apply that are unrelated to inheritance rights.<sup>93</sup> Parties to a civil union in Vermont and in Connecticut fare the same as spouses under all provisions of the probate code.

### 1. Current Development in Vermont

A bill in the Vermont House of Representatives proposes to eliminate gender discrimination in the state’s marriage laws by allowing members of the same sex to enter into a civil marriage under Vermont law. The bill is currently in the house judiciary committee.<sup>94</sup>

#### D. Marriage for Same-sex Couples

In *Goodridge v. Department of Public Health*,<sup>95</sup> the Massachusetts Supreme Judicial Court held that the state’s denial of marriage applications from same-sex couples violated the Massachusetts constitution. Later, in an advisory opinion, the court specified to the legislature that a civil union or domestic partnership statutory scheme would not solve the constitutional problem.<sup>96</sup> Rather, the justices noted that the statute’s attempt to create a civil union equal to but separate from marriage in an effort to preserve traditional civil marriage only for opposite-sex couples “does nothing to ‘preserve’ the civil marriage law, only its constitutional infirmity.”<sup>97</sup> Since same-sex couples can marry in Massachusetts, they are legal spouses and therefore afforded all of the same benefits, rights, and responsibilities as opposite-sex married couples in that state, including all rights and protections provided by inheritance law.

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<sup>92</sup> CONN. GEN. STAT. §46b-3800 (2006).

<sup>93</sup> *Id.* For example, CONN GEN STAT. §45a-727a (2006) dealing with the state public policy of opposite-sex marriage is specifically exempted.

<sup>94</sup> H.B. 742, 2005-2006 LEG SESS. (Vt. 2005).

<sup>95</sup> 798 N.E.2d 941 (Mass. 2003).

<sup>96</sup> In re Opinions of the Justices to the Senate, 802 N.E.2d 565 (Mass. 2004). (The legislature requested this opinion to resolve the question of whether a statutory system separate from marriage that would provide the same civil rights and responsibilities as marriage would comply with the court’s interpretation of the state constitution.)

<sup>97</sup> *Id.* at 569.

E. Other Approaches: American Law Institute and Proposed Model Statute

In *Inheritance Rights for Domestic Partners*, Professor Gallanis gives an overview of the current ALI approach to inheritance rights for domestic partners based on a reading of current and proposed ALI publications.<sup>98</sup> The article grew out of Professor Gallanis's role as reporter for the Joint Editorial Board for Uniform Trusts and Estates Acts which revised a model statute that had been proposed by Professor Wagonner but was not ultimately adopted by the Board.<sup>99</sup> The Board, however, agreed to allow publication of the model statute, which serves as the centerpiece the Gallanis article and the basis of much of the discussion in the following sections of this paper.<sup>100</sup>

The *Principles of the Law of Family Dissolution* (PLFD), approved in 2000 by the American Law Institute, provides some rights to domestic partners, both same-sex and opposite-sex.<sup>101</sup> The PLFD provides a definition of domestic partner as “two persons of the same or opposite sex, not married to one another, who for a significant period of time share a primary residence and a life together as a couple.”<sup>102</sup> The PLFD calls for a presumption of domestic partnership when two people have “maintained a common household with their common child” that exceeds a certain cohabitation parenting period designated by the statute.<sup>103</sup> It also calls for a similar presumption in other circumstances such as when two people not related by blood or adoption have maintained a common household that exceeds a statutorily defined cohabitation period<sup>104</sup> or when they have a child in common.<sup>105</sup>

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<sup>98</sup> Gallanis, T.P. *Inheritance Rights for Domestic Partners*. 79 TUL. L. REV. 55, 56 (2004).

<sup>99</sup> *Id.*

<sup>100</sup> *Id.*

<sup>101</sup> *Id.* at 80.

<sup>102</sup> AM. LAW. INST., PRINCIPLES OF THE LAW OF FAMILY DISSOLUTION: ANALYSIS AND RECOMMENDATIONS §6.03(1) (2002).

<sup>103</sup> *Id.* at §6.03(2).

<sup>104</sup> *Id.* at §6.03(3).

<sup>105</sup> *Id.* at §6.03(5).

Though the PLFD does not specifically call upon governments to recognize domestic partnerships for purposes other than family dissolution, when read together with the *Restatement (Third) of Property*<sup>106</sup> the direction seems clear. At the time the Restatement was published, the PLFD had not yet been approved by ALI; however, the Restatement addressed the issue by stating in a comment that to the extent that the PLFD may treat a domestic partner as “having the status of a spouse, conferring rights on such a partner on the dissolution of the relationship, the domestic partner who remains in that relationship with the decedent until the decedent’s death should be treated as a legal spouse for the purposes of intestacy.”<sup>107</sup>

Further indication that academic circles may be moving to provide for domestic partners in uniform statutes can be found in a proposed change to the UPC originating in the Joint Editorial Board for Uniform Trust and Estate Acts (JEB).<sup>108</sup> Though the model statute has not been officially endorsed by the board, the board encouraged its publication for use by states as a resource in developing their statutory systems.<sup>109</sup> This model statute, put simply, provides all of the same probate rights to domestic partners as state law provides to spouses.<sup>110</sup>

The detail provided by the model statute lies in its eligibility requirements for domestic partnerships. A couple may qualify as domestic partners under the model statute in one of two ways: by registration with the state<sup>111</sup> or by meeting several qualifications.<sup>112</sup> To qualify under the second route, a person must not be married, must not have been prohibited from marrying the

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<sup>106</sup> RESTATEMENT (THIRD) OF PROPERTY §2.2 cmt. g (1999).

<sup>107</sup> *Id.*; See also Gallanis, *supra* note 98 at 80-82.

<sup>108</sup> See also Gallanis, *supra* note 98 at 56. In December, 2002, the JEB appointed Gallanis special reporter to study and prepare a model statute addressing how inheritance rights may be extended to domestic partners. The model statute was discussed by the JEB, but the JEB questioned whether it had the authority to approve a model statute. The JEB encouraged Gallanis to publish the study in a law review so that states may use it as a resource. Even so, Gallanis emphasizes that he is acting “purely in [his] individual capacity and not as a special reporter to the JEB.”

<sup>109</sup> *Id.*

<sup>110</sup> *Id.* at 90. “Throughout the state’s probate code, ‘spouse’ is to be replaced by ‘spouse or domestic partner.’ In the relevant sections of the state’s probate code, ‘marriage’ is to be replaced with ‘marriage or domestic partnership period.’”

<sup>111</sup> *Id.* at 87.

<sup>112</sup> *Id.*

decedent by state law because of blood relationship, and must have been sharing a common household with the decedent in a “qualified relationship.”<sup>113</sup> The statute goes on to define and elaborate on the terms “common household”<sup>114</sup> and “qualified relationship,”<sup>115</sup> with most of the focus going to what constitutes a qualified relationship.

The model statute defines a qualified relationship as one “in which two individuals have chosen to share one another’s lives in an intimate and committed relationship of mutual caring.”<sup>116</sup> This approach follows California’s definition of domestic partners.<sup>117</sup> The model statute goes on to specify factors to be considered in determining whether a relationship qualifies as a domestic partnership<sup>118</sup> and then to detail a list of conditions that will create a presumption of a qualified relationship.<sup>119</sup> A presumption arising under only one of the factors can be

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<sup>113</sup> *Id.*

<sup>114</sup> *Id.*

<sup>115</sup> *Id.*

<sup>116</sup> *Id.*

<sup>117</sup> CAL. FAM. CODE §297(a) (West 2006). “Domestic partners are two adults who have chosen to share one another’s lives in an intimate and committed relationship of mutual caring.”

<sup>118</sup> See Gallanis, *supra* note 101 at 88-89. Factors include the written statements or promises made to one another, or oral or written representations jointly made to third parties, regarding their relationship; whether one party gave to the other, or the parties exchanged, an observable symbol of their relationship, such as a ring or other jewelry; the extent to which the parties intermingled their finances; the extent to which the parties made joint gifts; the extent to which the parties formally acknowledged responsibilities to each other, as by one or both naming the other as primary beneficiary of a life insurance policy or an employee benefit plan, or as agent to make health care or property decisions; the extent to which the parties’ relationship was treated by the parties as qualitatively distinct from the relationship either party had with any other person; the parties’ community relationship as a couple; the parties’ participation in a commitment ceremony. . . ; the parties’ participation in a void or voidable marriage that, under the law of this state, does not give rise to the economic incidents of marriage; and the parties’ procreation of, adoption of, or joint assumption of parental functions toward a child.

<sup>119</sup> *Id.* at 89. “An individual’s relationship with the decedent is presumed to have been a qualified relationship . . . if at least one of the following conditions is met . . . (1) the decedent named the individual as his [or her] “domestic partner” or language of similar import, in a governing instrument in effect at the decedent’s death; (2) during the [six] year period preceding the decedent’s death, the decedent and the individual shared a common household for periods totaling at least [five] years; (3) the decedent or the individual registered or designated the other as his [or her] “domestic partner” or language of similar import, with any private or public organization and neither partner executed a document terminating or purporting to terminate the registration or designation; (4) the decedent and the individual joined in a marriage or commitment ceremony conducted an certified in writing by any private or public organization; or, (5) the individual is the parent of a child of the decedent, or is or was a party to a written co-parenting agreement with the decedent regarding a child, and if, in either case, the child lived before the age of 18 in the common household of the decedent and the individual.”

rebutted by a preponderance of the evidence, and a presumption arising under more than one of the factors can be rebutted only by clear and convincing evidence.<sup>120</sup>

The model statute differs from any of the current state approaches by creating an avenue for inheritance rights to be extended to domestic partners in the absence of registration with the state. This is a distinct policy choice that appears to further both of the main goals of inheritance law discussed above: effectuating the intent of the decedent and protecting survivors. Much like traditional inheritance law, it does this by using certain life situations to identify people whose relationships are such that they would want their partner treated as a spouse for the purposes of inheritance. The use of factors to create presumptions seems appropriate for a population of people to whom an official avenue of registration has heretofore been unavailable. However, implementation of the model statute would represent a significant change in policy for states that currently only provide for inheritance rights to extend to unrelated couples who specifically “opt in” via marriage.

### **III. MICHIGAN’S CURRENT APPROACH**

Michigan law currently provides no inheritance rights for same-sex couples. Michigan’s Estates and Protected Individuals Code<sup>121</sup> is based on the UPC, which does not provide such rights, and Michigan provisions for intestacy,<sup>122</sup> elective share,<sup>123</sup> pretermitted spouse protections,<sup>124</sup> and automatic revocation of testamentary gifts to a former spouse<sup>125</sup> all operate only with regard to married couples.

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<sup>120</sup> *Id.* at 90.

<sup>121</sup> MICH. COMP. LAWS §700.1101 – .8102 (2006)

<sup>122</sup> MICH. COMP. LAWS §700.2102 (2006).

<sup>123</sup> MICH. COMP. LAWS §700.2202 (2006).

<sup>124</sup> MICH. COMP. LAWS §700.2301 (2006).

<sup>125</sup> MICH. COMP. LAWS §700.2807 (2006).

In 2004, Michigan voters passed Proposal 2, which amended the Michigan Constitution to prohibit same-sex marriage,<sup>126</sup> thus foreclosing marriage as a possible route through which same-sex couples could access inheritance rights. To be precise, this amendment provides that “to secure and preserve the benefits of marriage for our society and for future generations of children, the union of one man and one woman in marriage shall be the only agreement recognized as a marriage or similar union for any purpose.”<sup>127</sup> This provision plainly provides that marriage in the State of Michigan is currently only available to opposite-sex couples, as it was before the amendment.<sup>128</sup> However, the words “or similar union for any purpose” provide a vague notion that the law could be read broadly to prohibit other kinds of unions.<sup>129</sup>

#### **IV. PROPOSAL TO REALIGN MICHIGAN INHERITANCE LAW TO BETTER IMPLEMENT ITS MAIN PURPOSES**

##### **A. Michigan Constitutional Considerations**

Before outlining a proposal, the reality of Michigan’s constitutional provision banning same-sex marriage must be considered. The constitutional amendment is too new and the case law too scarce for definitive analysis; however, based on the language of the amendment and what case law exists to this point, the constitutional landscape should be taken into account when considering how to comply with the Michigan Constitution and, at the same time, recognize that inheritance law should be structured to serve the families of today.

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<sup>126</sup> MI Const. of 1963, art. I, §25 (2004).

<sup>127</sup> *Id.*

<sup>128</sup> MICH. COMP. LAWS §551.1 (2006); MICH. COMP. LAWS §551.272 (2006).

<sup>129</sup> MI Const. of 1963, art. I, §25 (2004). Case law interpreting this section is scant and an in-depth discussion of the interpretation of this constitutional provision too large a task for this paper. However, any proposed solution to the inheritance law problems discussed herein must be designed with an awareness of possible challenge under this provision. Litigation over the meaning of this amendment is ongoing.

Currently, only one Michigan court opinion has been issued laying out an interpretation of this provision.<sup>130</sup> This trial court opinion held that public employers may continue to offer health care benefits to same-sex domestic partners in the face of a challenge under the Michigan constitution. A discussion of this opinion bears on a proposal for inheritance law reform because any proposed statutory scheme that allows same-sex partners access to any kind of legal protection or benefit is likely to face a challenge that it violates the Michigan Constitution.

First, the trial court noted that the stated purpose of the constitutional provision is to “secure and preserve the benefits of marriage.”<sup>131</sup> Since “health care benefits are not among ‘the statutory rights or benefits of marriage,’” the court reasoned that health care benefits are benefits of employment and not benefits of marriage. Second, the court notes that the criteria<sup>132</sup> used by the public employers to determine eligibility for health care benefits do not create any recognition of a “union” from which the benefits flow.<sup>133</sup> The court noted that the relationship between the parties may continue after the employment and health care benefits end. Third, the court notes that the eligibility criteria for health care benefits used by the employers “pale in comparison to the myriad of legal rights and responsibilities accorded to those with marital status”.<sup>134</sup> The court references that courts in other states have focused on the vast differences in rights and obligations between domestic partnership and marriage in holding that the two are dissimilar. Fourth, the court notes that the benefits offered by employers require no state approval of eligibility similar to a marriage license, thereby further debunking an argument that

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<sup>130</sup> National Pride at Work, Inc. v. Granholm, No. 05-368-CZ, 2005 WL 3048040 (Mich. Cir. Ct. 2005).

<sup>131</sup> *Id.* at \*3.

<sup>132</sup> *Id.* at \*2. Eligibility criteria included being at least 18 years of age, sharing a common residence for a particular period of time, being unmarried and not related by blood such that they are prohibited from marrying, are in a relationship of mutual support and caring, and are of the same gender.

<sup>133</sup> *Id.* at \*4.

<sup>134</sup> *Id.* at \*5.

the policy of providing the benefits amounts to recognition of a union similar to marriage.<sup>135</sup> Finally, the court notes that the final phrase of the constitutional provision “for any purpose” applies only if a union similar to marriage exists and is therefore inapplicable here.<sup>136</sup> It is worthy of note, however, that the court makes a passing reference that the Michigan Constitution prohibits civil unions.<sup>137</sup>

The case is currently on appeal to the Michigan Court of Appeals, where oral argument was heard on April 11, 2006.<sup>138</sup> Though it is a trial court opinion and therefore of little precedential value, it provides a glimpse of one possible interpretation of a state constitutional provision that would bear on any attempt to include same-sex couples in Michigan inheritance law.

#### B. The Proposal

Two key issues must be decided when formulating a proposal for inheritance law reform that provides inheritance rights for same-sex couples: how to determine who is eligible and which rights to grant to those who are. Gallanis suggests considering these two issues within the framework of four fundamental questions.<sup>139</sup> The first two questions focus on how the law will determine which relationships qualify for inclusion by asking whether the proposal should include opposite-sex couples as well as same-sex couples and what other criteria should be used to determine eligibility.<sup>140</sup> The second two questions address what inheritance rights should be extended to eligible relationships by focusing first on the intestate share extended to the survivor

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<sup>135</sup> *Id.*

<sup>136</sup> *Id.* at \*6.

<sup>137</sup> *Id.* at \*5. “There is nothing in the amendment that evidences the intent of the people to go beyond disallowing same sex marriage and civil unions.” (presuming that the amendment does, in fact, evidence the intent of the people to disallow civil unions.)

<sup>138</sup> *National Pride at Work v. Granholm*, Docket No. 265870 (Mich. Ct. App.).

<sup>139</sup> *See Gallanis*, *supra* note 101 at 83.

<sup>140</sup> *Id.* at 83-84

and then on any other inheritance rights that may be extended to eligible relationships.<sup>141</sup>

Each of these fundamental questions is considered in turn, with reference to existing Michigan law on the subject.

1. Should the Proposal also Include Opposite-sex Couples?

Of the jurisdictions that provide inheritance rights for same-sex couples, Vermont, Connecticut, and California limit the arrangements to same-sex couples. The question of whether reform should include both same-sex couples and opposite-sex couples raises two primary issues. First, we must consider whether including both same-sex and opposite-sex unmarried couples, rather than same-sex unmarried couples alone, in the proposed statutory structure would better implement donor intent and family protection purposes of the inheritance law. Second, we must consider whether one option or the other would be constitutionally fatal to the proposal.

Allowing both same-sex and opposite-sex unmarried couples to benefit from inheritance law would better effectuate the purposes of that law than providing only for same-sex unmarried partners. A 1998 study indicated that the general public preferred that same-sex and opposite-sex unmarried couples be treated the same under inheritance laws.<sup>142</sup> Donor intent would be satisfied for a greater number of people because the law would recognize the actual family structures that exist today. A greater portion of those who are currently dependent on these family structures for financial security would benefit from the protective functions of the inheritance law that recognizes their primary family relationships.

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<sup>141</sup> *Id.*

<sup>142</sup> Mary L. Fellows et al., *Committed Partners and Inheritance: An Empirical Study*. 16 LAW & INEQ. 1, 89 (1998).

Including opposite-sex unmarried couples in inheritance statutes also serves the benefit of possibly increasing the likelihood that the program would withstand scrutiny under the same-sex marriage ban of the Michigan Constitution. By providing benefits to opposite sex couples as well as same sex couples, the purpose of the statute will be clear: to provide legal benefits to committed partners that are in line with what people in these relationships would want to see happen with their assets upon death. The purpose of the statute would clearly not be to provide a parallel avenue of providing marriage-like benefits exclusively to same-sex couples. Based on the single court opinion to date, the government recognition and provision of legal benefits that had only been previously provided as incidents of marriage would factor into a court's analysis of whether the union recognized by the statute would be "similar to marriage."<sup>143</sup>

2. What Criteria Should be Used to Determine Eligibility Inclusion in this Statutory Scheme?

Several issues are involved in determining what makes an eligible domestic partnership. Ideally, these decisions should be driven by the purposes of inheritance law. The first issue to address is whether the designation of domestic partnership should be triggered automatically upon the satisfaction of certain criteria (as in the model statute), such as sharing a common residence for certain period of time, sharing finances, or exhibiting other manifestations of a committed relationship. Alternatively, eligibility may hinge upon satisfaction of certain minimum criteria and registration with the state. The clear answer to this question is that some kind of registration should be required. To do otherwise would invite court challenges in every situation where satisfaction of the criteria is the least bit vague. Moreover, a simple registration

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<sup>143</sup> National Pride at Work, Inc. v. Granholm, No. 05-368-CZ, 2005 WL 3048040 (Mich. Cir. Ct. 2005) at \*6.

process made accessible to a wide range of people would allow people to opt in to the benefits of the system for a far lesser cost than what they might currently incur to hire an attorney to draft an estate plan.

This proposal recommends using the same set of criteria used by the Hawaii Reciprocal Beneficiary Act.<sup>144</sup> In Hawaii, same-sex and opposite-sex couples can register as reciprocal beneficiaries even if related by blood. Use of such criteria would clearly differentiate this relationship designation from that of marriage. It would also provide an opportunity for an even wider range of people to opt in to the benefits and protections of default rules more applicable to their individual situations. By widening the scope of inheritance law to allow relationships between brothers and sisters, grandparents and grandchildren, and unmarried same-sex and opposite-sex couples, the law places its purposes at the center. It supports the intent of the decedent by allowing more people to choose how state inheritance law will apply to them, and by potentially extending its reach to more relationships, the protective function of the law is necessarily extended to more survivors.

### 3. What Intestate Share Should the Partner Receive?

In this area, more research is needed to determine how most same-sex and opposite-sex unmarried partners distribute their assets when they draft wills and/or research to determine what most people in these relationships say they would want to see happen with their assets upon death. In the absence of such research, I propose following the PLFD and *Restatement (Third) of Property* in providing the same share to a domestic partner as to a spouse.<sup>145</sup> Like situations should be treated alike by the law, and since the characteristics of same-sex couple households

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<sup>144</sup> See *infra* notes 48-49.

<sup>145</sup> Gallanis *supra* note 101 at 85.

are similar<sup>146</sup> to those of married couple households, the law should provide similar financial protection. Despite the logic of this position, it increases the danger of the proposed statute violating Michigan's constitution by tracking the way that married couples are treated.

#### 4. To What Other Probate Rights should the Partner be Entitled?

Finally, Gallanis suggests a query as to what other rights, if any, committed partners should receive in a statutory scheme in addition to intestate succession.<sup>147</sup> If the provisions of inheritance law are to be truly driven by implementing the intent of the decedent and protecting surviving family members, then families with like financial and emotional ties should be treated the same under inheritance law. Therefore, a Vermont-like application of any partnership designation to existing law seems most appropriate. This blanket application would provide all protections inherent in state law, thereby treating like situations in like ways. However, it may cause the designation to be seen by a reviewing court as creating a union similar to marriage.

## **CONCLUSION**

The gap between the traditional family model on which most state inheritance laws are based and the reality of today's family structure widens by the day. As this gap widens, the number of families left vulnerable to intentional or unintentional disinheritance grows, and the likelihood that assets may be distributed in ways bearing no relation to the probable wishes of decedents increases as well. Passionate debates rage across the country about the propriety of government recognition of same-sex couples, with some of the most vigorous opposition to such recognition coming from people who say that they are morally opposed to such recognition. Inheritance law does not strive to pronounce morality or make political statements; it is a

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<sup>146</sup> See *infra* note 3.

<sup>147</sup> *Id.*

workhorse that labors to protect families by directing assets where they are most likely to be needed and paying heed to the likely wishes of the decedent. Perhaps keeping the simple purposes of the law at the forefront can help guide legislative reform in this political minefield.

Simply stated, “. . . the reasons for giving probate rights to spouses apply with equal force to domestic partners. Decedents with surviving partners want to provide for them; the surviving families need support; and unmarried couples are an economic unit in the same way as spouses.”<sup>148</sup>

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<sup>148</sup> Gallanis *supra* note 101 at 68. Internal footnotes omitted.